UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

DEREK RAFAEL GOMEZ,

Respondent

Docket Number 2011-0412
Enforcement Activity No. 4106267

DECISION AND ORDER

Issued: April 18, 2012

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

For Complainant
LT Jonathan D. Shumate
CWO Thomas J. Davan
United States Coast Guard Sector New York
212 Coast Guard Drive
Staten Island, New York 10305

For Respondent
Mr. Derek Rafael Gomez, *pro se*
405 East 92nd Street, Apt. 20C
New York, New York 10128

SUMMARY

The United States Coast Guard (Coast Guard) initiated this administrative action under 46 U.S.C. § 7703(1)(B), 33 C.F.R. Part 20, and 46 C.F.R. Part 5 seeking a twenty four (24) month outright suspension of Respondent Derek Rafael Gomez's (Respondent) Merchant Mariner's Credential. In its Complaint, the Coast Guard alleged Mr. Gomez wrongfully refused to provide a second specimen by means of a directly observed collection for a Department of Transportation [DOT] drug test, thereby committing an act of misconduct. The specimen collector's testimony revealed she failed to act in accordance with the regulations in that she did not direct or conduct the immediate collection of a new urine specimen under direct observation procedures. The undersigned therefore finds that the Coast Guard **DID NOT PROVE** the allegations in the Complaint by a preponderance of reliable, probative and credible evidence. The Complaint against Respondent, Derek Rafael Gomez, is thus dismissed with prejudice.

STATEMENT OF THE CASE

The Coast Guard charged Respondent with one count of Misconduct in violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27. *Complaint* (September 9, 2011). The Coast Guard alleged the following:

> 1. On or about 12 July 2011, at approximately 1425 Respondent submitted to a pre-employment DOT drug test in accordance with 46 CFR 16.210.
>
> 2. Respondent provided an initial urine specimen, which failed the requisite standards for temperature and odor as required by 49 CFR 40.65.
>
> 3. Respondent was informed by the DOT urine collector that he was required to provide a second urine specimen in accordance with 49 CFR 40.65(b)(5), 40.65(c)(1); and 49 CFR 40.67(c).
>
> 4. On or about 12 July 2011, at approximately 1425, Respondent wrongfully refused to provide a second urine specimen by means of a directly observed collection and left the testing site after the testing process commenced, acts which constitute misconduct under 46 CFR 5.27; 49 CFR 40.67(m); & 49 CFR 40.191(a)(2) & (3).
>
> See *Coast Guard Complaint* at 2.

In his Answer, Respondent denied most of the allegations and requested a hearing which took place in New York on October 26, 2011. The undersigned conducted the hearing in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 as well as the substantive and procedural regulations at 46 C.F.R. Part 5, and 33 C.F.R. Part 20. Respondent produced his credential at the opening of the hearing in accordance with 46 C.F.R. § 5.521.

In its Complaint, the Coast Guard alleged Respondent submitted to a pre-employment drug test. Although he admitted this allegation in his Answer, at hearing Respondent claimed it was not a pre-employment drug test, but rather, he was attempting to raise his grade from seaman to able body seaman. See Tr. at 67:20 – 24, 71:16 – 23. In its letter to the Coast Guard advising of Respondent's "Refusal to Test," the Seafarer's Health and Benefits Plan referred to the drug test as a "pre-employment/periodic urine drug test." See CG Ex. 02. The test, therefore, would more appropriately be categorized as a periodic test. At the hearing, Respondent did not dispute that he was acting under the authority of his credential and that there was a legitimate purpose for the drug test. Tr. at 17:11 – 12, 67:11 – 24, and 71:6 – 23. Because the undersigned dismissed the Complaint on other grounds, it is unnecessary to develop the record on this issue.

The Coast Guard presented the testimony of the DOT certified specimen collector, Leya Sandoval [the collector or Ms. Sandoval] and introduced five (5) exhibits, all of which were admitted without objection. Mr. Gomez did not introduce any exhibits; however, he testified under oath on his own behalf. The witness and exhibit list is contained in **Attachment A**.

Following the hearing, the undersigned issued a Scheduling Order for post hearing briefs, including proposed findings of fact and conclusions of law, to be filed no later than December 9, 2011 and reply briefs to be filed no later than December 27, 2011. See *Post Hearing Brief Scheduling Order*. Respondent submitted a post hearing brief but it contained no enumerated, proposed findings of fact and conclusions of law. The Coast Guard did not submit a post hearing

brief; instead, it submitted a reply brief containing proposed findings of fact and conclusions of law. Proposed findings and conclusions are ordinarily contained in a post hearing brief, not a reply brief. Under the terms of the Scheduling Order, the Coast Guard precluded Respondent from replying to its initial arguments and proposed findings by placing its proposed findings and conclusions in its reply brief. However, there is no resulting prejudice to Respondent because the undersigned finds the allegations in the Complaint not proved. The Coast Guard's proposed findings of fact and rulings thereon are contained in **Attachment B**.

In his post hearing brief, Mr. Gomez argues the case should be dismissed because "the USCG did not prove beyond a preponderance of the evidence that: (A) Ms. Sandoval unequivocally articulated to me that I was required to submit a second directly observed urine specimen immediately and (B) that I subsequently refused to submit said specimen, behavior thus amounting to misconduct." *Respondent's Post-Hearing Brief* at 10.

In its reply, the Coast Guard argues Respondent's first sample showed signs of tampering; that the collector informed Respondent that it did not meet the temperature requirements; that the collector asked Respondent to submit to a second test; and, that the Respondent verbally refused and left the testing facility.

This case is now ripe for decision.

ISSUE

The parties raise a single issue: Did the collector meet her burden under the regulations by clearly informing the Respondent that he was immediately required to submit an additional urine specimen under direct observation procedures?

BURDEN OF PROOF

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges (ALJs). See 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the

entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. See 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. See 33 C.F.R. §§ 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also, Steadman v. SEC, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade [the judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (*citing*, In re Winship, 397 U.S. 358, 371-2 (1970) (Harlan J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by reliable, probative, and credible evidence that Respondent more likely than not committed the violation charged.

PRINCIPLES OF LAW

"The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea." 46 U.S.C. § 7701(a). Under 46 C.F.R. § 5.19 (b), the Commandant of the Coast Guard "has delegated to ALJs the authority to admonish, suspend with or without probation or revoke a license, certificate or document issued to a person by the Coast Guard under any navigation or shipping law."[1] Title 46 U.S.C. § 7703(1)(B) provides that "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder - - when acting under the authority of that license, certificate, or document - - has committed an act of misconduct or negligence." Title 49 C.F.R. § 5.27 defines misconduct as "human behavior

[1] The Coast Guard now refers to licenses, certificates of registry, and documents as credentials. 74 Fed. Reg. 11,216, 11,196 (March 16, 2009).

which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required."

Title 46 C.F.R. § 16.201(a) prescribes "[c]hemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40."

Employee's Responsibilities

The allegation in Paragraph 4 of the Coast Guard's Complaint states "Respondent wrongfully refused to provide a second urine specimen by means of a directly observed collection and left the testing site after the testing process commenced, acts which constitute misconduct under 46 CFR 5.27; 49 CFR 40.67(m); & 49 CFR 40.191(a)(2) & (3)." *Complaint* at 2.

The regulations at 49 C.F.R. Part 40 put the employee on notice of conduct that constitutes a refusal to test. Title 49 C.F.R § 40.67(m) provides "[a]s the employee, if you decline to allow a directly observed collection required or permitted under this section to occur, this is a refusal to test." Further, 49 C.F.R. § 40.191(a)(2) provides "[a]s an employee, you have refused to take a drug test if you: Fail to remain at the testing site until the testing process is complete . . .." Subsection (a)(3) of 49 C.F.R. § 40.191 prescribes, "[a]s an employee, you have refused to take a drug test if you: Fail to provide a urine specimen for any drug test required by this part or DOT agency regulation . . .."

Specimen Collector's Duties

In addition to the above regulations that put the employee (Respondent) on notice of conduct that constitutes a refusal to test, there are numerous, specific regulations the specimen collector must follow. To determine whether Respondent refused to test, it is necessary to

determine whether the specimen collector substantially complied with the following relevant regulations.

49 C.F.R. § 40.61

> As the collector, you must take the following steps before actually beginning a collection: * * * (c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (e.g. a driver's license). 49 C.F.R. § 40.61(c).
>
> As the collector, you must…"[e]xplain the basic collection procedure to the employee, including showing the employee the instructions on the back of the CCF. 49 C.F.R. § 40.61(e).
>
> As the collector, you must . . . [d]irect the employee to remove outer clothing (e.g. coveralls, jacket, coat, hat) that could be used to conceal items or substances that could be used to tamper with a specimen. You must also direct the employee to leave these garments and any briefcase, purse, or other personal belongings with you or in a mutually agreeable location. You must advise the employee that failure to comply with your directions constitutes a refusal to test. 49 C.F.R. § 40.61(f).
>
> You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee you must allow the collector to make this observation. 49 C.F.R. § 40.61(f)(4).

49 C.F.R. § 40.63

> As the collector, you must take the following steps before the employee provides the urine specimen: * * * (b) Instruct the employee to wash and dry his or her hands at this time. You must tell the employee not to wash his or her hands again until after delivering the specimen to you. You must not give the employee any further access to water or other materials that could be used to adulterate or dilute a specimen." 49 C.F.R. § 40.63(b).

49 C.F.R. § 40.65

> As a collector, you must check the following when the employee gives the collection container to you: * * * (b) *Temperature*. You must check the temperature of the specimen no later than four minutes after the employee has given you the specimen. 49 C.F.R. § 40.65(b).
>
> The acceptable temperature range is 32-38C/90-100F. 49 C.F.R. § 40.65 (b)(1).
>
> You must determine the temperature of the specimen by reading the temperature

strip attached to the collection container. 49 C.F.R. § 40.65(b)(2).

If the specimen temperature is within the acceptable range, you must mark the "Yes" box on the CCF (Step 2). 49 C.F.R. § 40.65(b)(3).

If the specimen temperature is outside the acceptable range, you must mark the "No" box and enter in the "Remarks" line (Step 2) your findings about the temperature. 49 C.F.R. § 40.65(b)(4).

If the specimen temperature is outside the acceptable range, you must immediately conduct a new collection using direct observation procedures (see § 40.67). 49 C.F.R. § 40.65(b)(5).

In a case where a specimen is collected under direct observation because of the temperature being out of range, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but the temperature is out of range. You must also, as soon as possible, inform the DER [Designated Employer Representative] and collection site supervisor that a collection took place under direct observation and the reason for doing so. 49 C.F.R. § 40.65(b)(6). (Brackets added).

In a case where the employee refuses to provide another specimen (see §40.191(a)(3)) or refuses to provide another specimen under direct observation (see § 40.191(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure. 49 C.F.R. § 40.65(b)(7).

You must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering (e.g., if you notice any unusual odor). 49 C.F.R. § 40.65(c).

If it is apparent from this inspection that the employee has tampered with the specimen (e.g. blue dye in the specimen, excessive foaming when shaken, smell of bleach), you must immediately conduct a new collection using direct observation procedures (see § 40.67). 49 C.F.R. § 40.65(c)(1).

In a case where a specimen is collected under direct observation because of showing signs of tampering, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but it shows signs of tampering. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so. 49 C.F.R. § 40.65(c)(2).

In a case where the employee refuses to provide a specimen under direct observation (see § 40.191(a)(4)), you must discard any specimen the employee provided previously during the collection procedure. Then you must notify the

DER as soon as practicable. 49 C.F.R. § 40.45(c)(3).

49 C.F.R. § 40.67

As a collector, you must immediately conduct a collection under direct observation if: * * * (3) The temperature on the original specimen was out of range (see § 40.65(b)(5)); or (4) The original sample specimen appeared to have been tampered with (see § 40.65(c)(1)). 49 C.F.R. §§ 40.67(c)(3) and (4).

As the collector, you must explain to the employee the reason, if known, for a directly observed collection under paragraphs (c)(1) through (3) of this section. 49 C.F.R. § 40.67(d)(2).

As the collector, you must complete a new CCF for the directly observed collection. 49 C.F.R. § 40.67(e). You must mark the "reason for test" block (Step 1) the same as for the first collection. You must check the "Observed, (Enter Remark)" box and enter the reason (see § 40.67(b)) in the "Remarks" line (Step 2). 49 C.F.R. §§ 40.67(e)(1) and (2).

As the collector, you must ensure that the observer is the same gender as the employee. You must never permit an opposite gender person to act as the observer. The observer can be a different person from the collector and need not be a qualified collector. 49 C.F.R. § 40.67(g).

As the collector, if someone else is to observe the collection (e.g. in order to ensure a same gender observer) you must verbally instruct that person to follow procedures at paragraphs (i) and (j) of this section. If you, the collector, are the observer, you too must follow these procedures. 46 C.F.R. § 40.67 (h).

As the collector, when you learn that a directly observed collection should have been collected but was not, you must inform the employer that it must direct the employee to have an immediate recollection under direct observation. 49 C.F.R. § 40.67(n).

49 C.F.R. § 40.191

As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g. telephone or secure fax machine) that ensures that the refusal notification is immediately received. 49 C.F.R. § 40.191(d).

As the collector, you must note the refusal in the "Remarks" line (Step 2) and sign and date the CCF. 49 C.F.R. § 49.191(d)(1).

FINDINGS OF FACT

The following Findings of Fact are based on a thorough and careful analysis of documentary evidence, testimony of witnesses, and the entire administrative record.

1. At all relevant times Respondent was a holder of a Merchant Mariner's Credential (Serial Number 000088711) issued by the United States Coast Guard. See *Coast Guard's Complaint* at 1, ¶ 1; *Respondent's Answer* at 1; and, CG Ex. 01.[2]
2. On July 12, 2011, Respondent submitted to a DOT required drug test under 46 C.F.R. Part 16. See Tr. at 17, 71, and 82 – 84.
3. Ms. Leya Sandoval is a certified Department of Transportation Specimen Collector. See CG Ex. 05; Tr. at 22:10 – 24:5.
4. Ms. Sandoval had taken approximately 1,000 samples over a period of approximately three (3) years but has had only one other situation in which she was required to secure a second sample. See Tr. at 24:20 – 25:5, 59:16 – 25.
5. When Mr. Gomez arrived at the collection facility he needed to use the restroom. See Tr. at 37:4 – 16.
6. Ms. Sandoval did not ask Respondent to empty his pockets because he was wearing shorts and she does not recall whether Respondent washed his hands. See Tr. at 39: 2 – 12.
7. Mr. Gomez provided an initial urine specimen. See Tr. at 39:13 – 20.
8. When Mr. Gomez handed Ms. Sandoval his urine specimen she believed it was hot so she put it down. See Tr. at 39:22 – 40:3.
9. Ms. Sandoval would have put the specimen down to check the temperature even if she had not believed it was hot. Id.

[2] Citations referencing the transcript are as follows: (Tr. at ___). Citations referring to Coast Guard Exhibits are as follows: (CG Ex. ___).

10. When Ms. Sandoval attempted to read the temperature, she claimed the strip on the side of the specimen container did not show a temperature reading. See Tr. at 41:13 – 24.
11. Ms. Sandoval believed Mr. Gomez's urine specimen had a strong urine odor. See Tr. at 40:9 – 41:11.
12. In her written statement of July 15, 2011, regarding Mr. Gomez's drug test on July 12, 2011, Ms. Sandoval stated that his sample had an "unusual odor." See CG Ex. 04.
13. Ms. Sandoval probably would have asked Respondent to submit an additional sample under direct observation based solely on the odor of his initial specimen even though she did not inform Respondent of any odor or remark any odor on the Custody Control Form. See Tr. at 42:9 – 19, CG Ex. 03.
14. Ms. Sandoval claims she probably told Respondent that "because the specimen not showing [sic] the temperature, it's required for me to collect a second sample." See Tr. at 43:2 – 5.
15. In response to Ms. Sandoval stating "it's required for me to collect a second sample," Respondent stated "…that if there's any problem, if they needed him to do - - the company will call him." See Tr. at 45:10 – 13.
16. After Mr. Gomez told the collector "if they needed him to do [the second test] the company will call him" Ms. Sandoval finished the collection process for Respondent's initial sample including splitting the specimen into separate vials, sealing the vials, and finishing the CCF. See Tr. at 47:14 – 19.
17. Ms. Sandoval re-stated that it was required for her to collect a second sample but she did not further explain to Respondent that the sample was to be provided immediately under direct observation. See Tr. at 47:20 – 24.

18. Ms. Sandoval indicated in the remarks section of the CCF "specimen was too hot, patient body temperature 98.5 and, slash, refused to do second." See Tr. at 36:11 – 21; CG Ex. 03.

19. Ms. Sandoval did not clearly explain the remarks on the CCF to Respondent. See Tr. at 49:6 – 20.

20. Ms. Sandoval understood that the second directly observed specimen was required immediately but did not communicate this to Respondent. See Tr. at 57:9 – 22.

21. Based solely on Respondent's statement that someone would call him if he had to provide a second test, Ms. Sandoval determined that Respondent was refusing to provide a second specimen. See Tr. at 50:9 – 18, 88:25 – 89:5.

22. Ms. Sandoval did not explain to Respondent that the additional collection would be done under direct observation procedures. See Tr. at 50:9 – 18.

23. There were males available to be a same sex observer for a direct observation collection but Ms. Sandoval made no attempt to contact anyone. See Tr. at 60:21 – 61:2, 93:25 – 94:24.

24. After finishing the initial collection, Respondent and the collector walked out of the testing area to the front reception area where Respondent remained for several minutes talking to the other receptionist. See Tr. at 48:8 – 22, 68:13 – 20, 79:18 – 23.

25. Ms. Sandoval believed that while Respondent was "hanging out" in the reception area he still might provide a second sample even though she had previously determined he had refused. See Tr. at 90:1 – 6, 97:19 – 98:4, and 98:19 – 24.

26. Ms. Sandoval made no attempt to discuss or further explain the regulations' requirements while Respondent was "hanging out" for several minutes in the reception area. See Tr. at 88:25 – 89:5.

27. Respondent left the collection facility without providing a second specimen. See Tr. at 49:21 – 50:8, 76:11 – 13.

ANALYSIS AND CREDIBILITY DETERMINATIONS

"Great deference is given to the ALJ in evaluating and weighing the evidence." Appeal Decision 2695 (AILSWORTH) (2011). "The ALJ is the arbiter of facts" and it is "his duty to evaluate the testimony and evidence presented at the hearing." Id. "The ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Id. Further, "the findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." Id.

A collector need only substantially comply with the regulations for the testing process to be valid. Technical violations are insufficient to show that the chain of custody is broken or that the integrity of a sample is compromised. Appeal Decision 2688 (HENSLEY) (2010). As the Coast Guard correctly states in its reply brief, "this is a refusal case, wherein the focus of the inquiry is not the integrity of the specimen or the chain of custody, but rather on the testimony of the individuals involved." *Complainant's Post-Hearing Brief* at 23.

1. The Collection

When the Coast Guard asked "[d]id you explain the procedures to him . . . all the procedures for the collection" Ms. Sandoval responded "[w]hat do you mean 'all the procedures?'" Tr. at 38:20-25. There is no evidence the collector required Respondent to present valid identification before beginning the testing process. 49 C.F.R. § 40.61(c). Further, Ms. Sandoval provided no testimony that she "explained the basic collection procedures" to Respondent or showed him "the instructions on the back of the CCF." 49 C.F.R. § 40.61(e). Moreover, there is no evidence the collector advised Respondent "that failure to comply with your [the collector's] directions constitutes a refusal to test." 49 C.F.R. § 40.61(f).

When the Coast Guard asked "[d]id you have him wash his hands" Ms. Sandoval responded "I always make sure that everything was clean and safe there for him to have that. I don't remember or recall him actually washing his hands." Tr. at 39:2-7; see also, 49 C.F.R. § 40.63(b). When asked if she told him to empty his pockets, Ms. Sandoval said, "He didn't seem to have any - - he didn't have no [sic] outerwear. It was the summertime. He had short sleeves and probably shorts I believe." Tr. at 39:8 – 12; 49 C.F.R. § 40.61(f)(4). Early on in the process, Ms. Sandoval substituted her own judgment instead of doing as the regulations direct. While these violations may be technical individually, when looked under the totality of the circumstances, a pattern of the collector's failure to comply with the regulations starts to emerge.

2. The Collector Failed to Communicate Clearly

a. The Collector Failed to Communicate to the Respondent

When Ms. Sandoval was unable to read the temperature strip on the collection container, the regulations require her to "immediately conduct a new collection using direct observation procedures." 49 C.F.R. §§ 40.65(b)(5) and 40.67(c)(3). Inherent in this requirement is the necessity for the collector to clearly explain to the employee what is required in such a way that the employee understands. See 49 C.F.R. §§ 40.61(e) and (f). The regulations do not prescribe Respondent's conduct except that he or she must abide by the collector's instructions. See 49 C.F.R. §§ 40.61(e) and (f); §§40.191(a)(2) and (3); and §§ 40.67(m). The collector has the duty to "conduct" the specimen collection under direct observation procedures. See 49 C.F.R. §§ 40.65(b)(5) and 40.67(c)(3).

The term "conduct" is not defined in the regulations; therefore, its plain meaning is used to define the term. Webster's Collegiate Dictionary defines "conduct" to mean "1: to bring by or as if by leading; 2a: to lead from a position of command; b: to direct or take part in the operation or management of; c: to direct the performance of… ." *Merriam-Webster's Collegiate Dictionary* 240 (10th ed. 2002). Clearly, when the regulations place the duty to "conduct" on the

collector, she is in the position of leadership and control in the situation. Put another way, Respondent does not have a duty to guess or decipher the meaning of the collector's statements. The collector is required to clearly and unambiguously direct Respondent's actions.

Ms. Sandoval testified "I immediately **suggested** when he was in the collection area that he needed to provide a second one [specimen]." Tr. at 91:8-10 [Emphasis and brackets added]. To "suggest" is not the same as to "conduct" under the regulations. As noted above, "conduct" means much more than merely suggesting. Merely "suggesting" does not meet the requirements of the regulations to "immediately conduct a new collection using direct observation procedures" as required by 49 C.F.R. §§ 40.65(b)(5) and 40.67(c)(3).

When Ms. Sandoval determined she was required to collect a "second sample," she told Respondent "because the specimen not showing [sic] the temperature, it's required for me to collect a second sample." Tr. at 43:2 – 5. The regulations require "[i]f the specimen temperature is outside the acceptable range, you must immediately conduct a new collection using direct observation procedures (see § 40.67)." 49 C.F.R. § 40.65(b)(5). Title 49 C.F.R. § 40.67(c)(3) provides, "[a]s a collector, you must immediately conduct a collection under direct observation if: * * * (3) The temperature on the original specimen was out of range (see § 40.65(b)(5))."

Ms. Sandoval's statement does not explain to the Respondent that she must collect a second sample immediately, nor does it explain that the collection must be done under direct observation. She informed the Respondent that the sample did not show a temperature, but did not further explain that this required an immediate collection under direct observation. The regulations do not require an employee to know what it means that his specimen did not register a temperature on the collection cup. See 49 C.F.R. § 40.67(d)(2). The onus is on the collector to not only explain what that means to him but also to make sure he understands so that he can comply with her instructions. Ms. Sandoval's statement that "it's required for me to collect a second sample" implicitly required Respondent to infer that he must provide a second sample

under direct observation.

Respondent claims the collector did not clearly articulate he was required to immediately provide a new collection under direct observation and that a failure to do so was a refusal to test. See Tr. at 68:13 – 24, 73:24 – 74:3, and 76:18 – 20; see also Respondent's Post Hearing Brief at 10-16. In light of Ms. Sandoval's testimony and the totality of the circumstances, I find Respondent's claim to be credible.

b. The Collector Failed to Testify Clearly

The undersigned has no reason to believe Ms. Sandoval's testimony is untruthful; however, her testimony is inconsistent, incoherent, nonresponsive, and vague. As a result, the undersigned is unable to accord sufficient weight to her statements to find the allegations in the Complaint proved by the preponderance of reliable, probative, and credible evidence.

Ms. Sandoval testified on one occasion that "in my belief, I remember that I told him, again, it's the second specimen required. You need to provide it while I was finishing the paperwork." Tr. at 57:3 – 8. Not only is this statement inconsistent with all her previous statements of what she told Respondent, but it also does not make sense in light of her obligations under the regulations. Her purported statement "he needed to provide it while I was finishing paperwork" gives the semblance that she informed him of the immediacy requirement. The Respondent, however, cannot just provide another sample; the new collection must be done under direct observation. See 49 C.F.R. §§ 40.65(b)(5), 40.65(c)(1), and 40.67(c)(3) and (4). The collector, therefore, is required by the regulations to fill out a new CCF and to ensure that the observer is the same sex as the employee. See 49 C.F.R. §§ 40.67(e) and (g). For the Respondent to provide a directly observed sample the collector had to take certain specific steps. There is no evidence that Ms. Sandoval started to fill out a new CCF, open a new collection kit, or contact a male observer.

On direct examination the Coast Guard asked her as follows: "Did he mention that he had

to go or didn't have time for that [a second test]?" Ms. Sandoval's replied: "I can't recall at the moment." Tr. at 47:7 – 9. In rebuttal testimony, Ms. Sandoval stated, "[a]s I remember, he say [sic] that something like he has to go or if anything, they'll let him know or they'll call him back." Tr. at 89:10-15. "He stated that he didn't have time and if there was any reason or any problem, they would call him." Tr. at 97:13-15.

When Ms. Sandoval explained to Respondent the remarks she wrote on the CCF, she stated that "[e]xplained why I was doing it, means when I wrote that there was no temperature on there, means [sic] show him that the cup didn't show any temperature. When I took his body temperature, I explained to him that it's just because the specimen didn't show no [sic] temperature. And I wrote that he refused to do a second because he say [sic] that if they needed to do it, they'll call him." Tr. at 49:6 – 20. Ms. Sandoval's statement is nonresponsive and incoherent.

When the undersigned asked Ms. Sandoval if she told Respondent, at the time of the test, that a second specimen was required now, she simply repeated the word "now." Tr. at 57:3 – 15. When subsequently asked by the undersigned if she had any doubt that the new collection was required now she answered "[t]hat's why I gave him the requirement. It has to be immediately." Tr. at 57:16 – 22. Her repetition of the word "now" does not answer the question if she told Respondent that he was required to submit a second directly observed specimen immediately. Further, her answers show she understood a new collection had to be done immediately but she did not clearly communicate this to Respondent.

3. <u>Respondent's Statement Indicates Misunderstanding, Not Refusal</u>

a. Collector's Silence Affirmed Respondent's Misunderstanding

In response to her statement that "it's required for me to collect a second sample," Ms. Sandoval consistently testified (referring to Respondent as 'him") "if there's any problem, if they needed him to do – the company will call him . . . if they needed to do it [the second test] they'll

call him . . . if they needed, they'll let him know . . . if there's any problem, they would call obviously because his number was there . . . if there is any problem of anything [sic], they would call him back." Tr. at 45:10-13, 49:6-20, 50:9-18, 56:6-21, and 88:25-89:5. Respondent's statement clearly indicates he did not understand he was required to provide a second sample immediately. Instead of explaining or clarifying further, Ms. Sandoval remained silent.

Respondent's statement that "they would call him" is not an unequivocal expression that he is refusing to provide a specimen by means of direct observation. Rather, his statement reflects his misunderstanding about what the collector said. Without further clarification or explanation, Ms. Sandoval subjectively determined that Respondent was refusing to test. She explained this subjective belief when she testified as follows: "from my belief, he didn't have no [sic] intentions to give me a second specimen at that moment, because he say if they needed [sic], they'll let him know." Tr. at 50:9 – 18.

Although Ms. Sandoval previously determined Respondent refused the second test, she nonetheless testified she believed he might still provide a second sample when he was "hanging out" in the reception area for approximately ten minutes. However, she chose not to say anything to him. Tr. at 88:25 – 89:5, 90:1 – 6, 97:19 – 98:4, and 98:19 – 24. Ms. Sandoval had several opportunities to fully, clearly, and unambiguously explain what is required under the regulations. She did not do so.

b. Collector's Actions Affirmed Respondent's Misunderstanding

Ms. Sandoval's actions were insufficient to put the Respondent on notice that something was wrong. She testified that after Mr. Gomez told her "they will call him," she "finished with the collection which make sure [sic] the container was temper sealed and the forms that were placed [sic] where they need to be and there was also a plastic bag that we used that is sealed and I finished all that and gave him a copy of the document." Tr. at 47:14 – 19. The regulations require "[a]s a collector or an MRO [Medical Review Officer] when an employee refuses to

participate in the part of the testing process in which you are involved, **you must terminate the portion of the testing process in which you are involved,** document the refusal on the CCF [Federal Drug Custody and Control Form] (including, in the case of the collector printing the employee's name on Copy 2 of the CCF), immediately notify the DER [Designated Employer Representative] by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received." [Brackets and emphasis added]. 49 C.F.R. § 40.191(d); see also 49 C.F.R. § 40.65(b)(7). Further, the regulations required Ms. Sandoval to discard Respondent's sample. 49 C.F.R. § 40.65(b)(7).

Instead of terminating the portion of the testing process in which she was involved, Ms. Sandoval completed it in violation of 49 C.F.R. § 40.191(d). She also failed to discard Respondent's specimen in accordance with 49 C.F.R. § 40.65(b)(7). Her actions not only violated these regulations but also failed to put Respondent on notice that something was wrong. For example, if she had followed the above regulations, Respondent might have been curious as to why she terminated the test and discarded his first specimen. Instead, Respondent observed the collector finishing the process and giving him a copy of the CCF. Given Ms. Sandoval's lack of verbal explanation and her failure to act as the regulations prescribe, Mr. Gomez's belief that the testing process was complete and that he was free to leave was not unreasonable.

4. Specimen Order

The undersigned notes that in addition to her testimony that Respondent's urine specimen was "too hot," Ms. Sandoval also testified that the sample "had a little odor…a bit of a strong odor," and "strong odor" but that odor was consistent with urine. See Tr. at 40:9 – 41:1. In her written statement of July 15, 2011, Ms. Sandoval inconsistently stated that the specimen had an "unusual odor." See CG Ex. 04. Ms. Sandoval did not indicate anything about the specimen's odor on the CCF. There is no evidence she said anything to Respondent regarding the specimen's odor. Although Ms. Sandoval testified she "probably" would have determined a

second sample was required based solely on the odor, the record shows that at the time of the collection she based her actions on the temperature, not on the odor. Even if Ms. Sandoval determined the odor required a new collection, her subsequent statements and actions were still insufficient to put Respondent on notice that he must immediately provide a new specimen under direct observation.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Derek Rafael Gomez and the subject matter of this hearing are properly within the jurisdiction of the U.S. Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7703; 46 C.F.R. Part 5; and 33 C.F.R. Part 20.

2. At all relevant times, Respondent was acting under the authority of his MMC. 46 C.F.R. § 5.57(b).

3. The collector, Ms. Leya Sandoval, did not substantially comply with 49 C.F.R. Part 40.

4. Ms. Sandoval did not meet her burden under the regulations by clearly informing the Respondent that he was immediately required to submit an additional urine specimen under direct observation procedures.

5. Respondent's statement was not a refusal to test.

6. Respondent Derek Rafael Gomez did not commit an act of misconduct by wrongfully refusing to provide a second urine specimen by means of a directly observed collection and leaving the testing site after the testing process commenced in violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27.

DECISION

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations, and case law, I find the Coast Guard **DID NOT PROVE** by a preponderance of reliable, probative, and credible evidence that Respondent Derek Rafael Gomez, committed an act of misconduct in violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that in accordance with 46 C.F.R. § 5.567(a), the Complaint issued against Respondent Derek Rafael Gomez (Docket No. 2011-0412, Enforcement Activity No. 4106267) is hereby **DISMISSED WITH PREJUDICE**.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, attached hereto as **Attachment C**.

_____

Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: April 18, 2012

ATTACHMENT A

WITNESSES AND EXHIBITS:

Witnesses:

For the Coast Guard: Ms. Leya Sandoval, certified collector.
For Respondent: Mr. Derek Gomez testified on his own behalf.

Coast Guard Exhibits:

CG 01 – Merchant Mariner Profile of Mr. Derek Rafael Gomez from the Coast Guard merchant mariner licensing and documentation system database (1 page).

CG 02 – Letter from Seafarers Health and Benefits Plan Medical Department to the Coast Guard regarding the July 12, 2011 drug test of Mr. Derek Gomez (1 page).

CG 03 – Two copies of the Federal Drug Testing Custody and Control Form (CCF) (2 pages).

CG 04 – Handwritten statement of Ms. Leya Sandoval dated July 15, 2011 (2 pages).

CG 05 – DOT Specimen Collector certificate for Leya Sandoval (1 page).

Respondent Exhibits:

Respondent did not offer any exhibits into evidence.

ATTACHMENT B

Respondent did not submit proposed findings of fact. Respondent provided further argument in his post-hearing brief.

COAST GUARD'S PROPOSED FINDINGS OF FACT

1. At all relevant times mentioned herein and specifically on or about July 12, 2011, the above named Respondent was the holder of MMC#000088711 issued by the United States Coast Guard. (Tr. 8, 19, Gov't Ex. CG-1).[3]
ACCEPTED AND INCORPORATED

2. On or about July 12, 2011, Respondent submitted to a DOT required drug test under 46 CFR Part 16 for the purpose of obtaining a raise of grade of his MMC from his status as a "Specially Trained Ordinary Seaman" to first endorsement as "Able Seaman" at the direction of the Paul Hall Center Maritime School. (Tr. 17, 71, 82-84; Resp. PHB at 1, 7-8).
ACCEPTED AND INCORPORATED

3. The first urine specimen submitted by the respondent was extremely hot to the touch, so hot that the Collector had to put it down. (Tr. 36, 39-40, 55, 75, 78; Gov't Exs. CG-3 & CG-4).
ACCEPTED AND INCORPORATED only to the extent that it was Ms. Sandoval's testimony which formed the basis of her opinion that "a second test is required." The undersigned does not accept that statement for the truth of the matter asserted therein.

4. The first urine specimen submitted by the respondent had an unusual, strong odor. (Tr. 41, 42; Gov't Ex. CG-4).
ACCEPTED TO THE EXTENT THAT THIS WAS MS. SANDOVAL'S TESTMONY. HER SUBJECTIVE OPINION, HOWEVER, IS INSUFFICIENT TO FIND AS A FACT THAT THE SAMPLE HAD A STRONG OR UNUSUAL ODOR.

5. The first urine specimen submitted by the Respondent was outside of the acceptable temperature range. (Tr. 32, 36, 39-45; Gov't Exs. CG-3 & CG-4; *see also* Resp PHB at 3, 14).
REJECTED. The undersigned cannot find as a fact that the temperature was outside of the acceptable range based solely on Ms. Sandoval's testimony. Her statement that the specimen was too hot and her inability to get a reading on the specimen cup is insufficient to find as a fact that the specimen's temperature was out of range.

6. The first urine specimen submitted by the Respondent registered at 100 degrees Fahrenheit only *after* the collection cup was entirely emptied into the split samples and the four minute allowable time period for obtaining a temperature reading had expired. (Tr. 41-43; Gov't Ex. CG-4; 49 CFR § 40.67(b)).

[3] Citations referring to the Transcript are as follows: Transcript followed by the page number (Tr. ____); Citations referring to Coast Guard Exhibits are as follows: Government followed by the exhibit number (Gov't Ex. ____).

ACCEPTED AS MS. SANDOVALS TESTIMONY BUT NOT-INCORPORATED AS THIS IS IRRELEVANT ON THE ISSUE OF WHETHER RESPONDENT WAS PROVIDED WITH ADEQUATE NOTICE THAT HE WAS REQUIRED TO IMMEDIATELY PROVIDE A SECOND SAMPLE.

7. The Collector took Respondent's body temperature which registered at 98.5 degrees Fahrenheit. (Tr. 36, 44, 45, 49, 75; Gov't Ex. CG-3).
ACCEPTED BUT NOT INCORPORATED BECAUSE RESPONDENT'S BODY TEMPERATURE IS NOT RELEVANT ON THE ISSUE OF WHETHER THE COLLECTOR PROVIDED RESPONDENT WITH ADEQUATE NOTICE THAT HE WAS REQUIRED TO IMMEDIATELY SUBMIT A SECOND SAMPLE.

8. As a result of Finding of Fact 3-7, the first specimen submitted by Respondent was not unaltered urine from inside his own body given at the time of the drug test specimen collection on July 12, 2011.
REJECTED FOR THE REASONS STATED IN THE DECISION AND ORDER.

9. The Collector informed Respondent that his first specimen was outside of the acceptable temperature range. (Tr. 42, 43, 45, 75, 78, 87-88, 102; Gov't Exs. CG-3, & CG-4; *see also* Resp PHB at 3 and 14 (regarding temperature)).
ACCEPTED THAT THE COLLECTOR TOLD RESPONDENT THE SAMPLE DID NOT SHOW A TEMPERATURE.

10. The Collector asked Respondent to submit a second urine specimen as required by 49 CFR § 40.67, and conveyed that the sample needed to be given immediately. (Tr. 42, 43, 45, 47-48, 49, 53, 56-57, 75, 78, 88, 91, 102; *see also* Gov't Exs. CG-3 & CG-4).
REJECTED. THE COLLECTOR TOLD RESPONDENT "A SECOND TEST IS REQUIRED" BUT DID NOT EXPLAIN TO RESPONDENT THAT HE MUST PROVIDE THE SECOND SAMPLE BY DIRECT OBSERVATION IMMEDIATELY AS REQUIRED BY THE REGULATIONS.

11. After being asked to submit to a second specimen, the Respondent refused to submit a second urine specimen for drug testing. (Tr. 49, 89, 97, 98, 102; Gov't Exs. CG-2, CG-3, & CG-4).
REJECTED FOR THE REASONS STATED IN THE DECISION AND ORDER.

12. Respondent left the testing facility without providing an acceptable urine specimen before the testing process was complete.[4] (Tr. 49-50, 75, 76, 92-93; Gov't Ex. CG-2).
REJECTED FOR THE REASONS STATED IN THE DECISION AND ORDER.

[4] 49 CFR § 40.73 defines when the testing process is "complete."

COAST GUARD'S PROPOSED CONCLUSIONS OF LAW

1. The Respondent, Derek Gomez, and the subject matter contained in the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 USC § 7703; 46 CFR Parts 5 and 16; 49 CFR Part 40; and 33 CFR Part 20.
ACCEPTED AND INCORPORATED.

2. At all relevant times, and specifically on or about July 12, 2011, the Respondent acted under the authority of his MMC, while engaged in official matters regarding his credentials in order for him to obtain a raise of grade and first endorsement as able seaman. (Tr. 17; *see also* 46 CFR § 5.57(b); 46 CFR § 10.231 (c)(6)(ii); 46 CFR § 16.220(a)(2) & (a)(4).
ACCEPTED AND INCORPORATED.

3. Respondent's verbal responses declining to provide a second specimen, and his failure to submit a valid urine specimen on or about July 12, 2011, constitute a refusal to take a DOT drug test and, thus, an act of misconduct pursuant to 46 USC § 7703 and 46 CFR §5.27. *See* 46 CFR § 5.27; 46 CFR § 16.105 (defining "refuse to submit); 49 CFR §40.191(a)(2-3); 49 CFR §40.67(m); *see e.g.*, *Appeal Decision 2666 (SPENCE)* (2007); *Decision & Order (CALHOUN)* (December 13, 2004, ALJ Massey presiding).
REJECTED FOR THE REASONS STATED IN THE DECISION AND ORDER.

4. The Coast Guard proved by a preponderance of substantial, reliable and probative evidence that the Respondent, while acting under the authority of his license, committed an act of misconduct by refusing to complete the DOT drug test required by 46 CFR Part 16.
REJECTED FOR THE REASONS STATED IN THE DECISION AND ORDER.

ATTACHMENT C

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

§ 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:
(1) Whether each finding of fact is supported by substantial evidence.
(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
(3) Whether the ALJ abused his or her discretion.
(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
(i) Basis for the appeal;
(ii) Reasons supporting the appeal; and
(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --
(1) The party has petitioned the Commandant in writing; and
(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.