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

UNITED STATES COAST GUARD
Complainant

vs.

KIMBERLY ANN WION
Respondent

Docket Number 2017-0275
Enforcement Activity No. 5740978

DECISION AND ORDER
Issued: August 09, 2018

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Mr. Paul T. Tramm
Sector Puget Sound
For the Coast Guard

ROBERT M. KRAFT, Esq.
For the Respondent

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials and endorsements. See 46 C.F.R. § 5.19(b). The Coast Guard brought this proceeding under 46 U.S.C. § 7703 and its implementing regulations found at 33 C.F.R. Part 20, 46 C.F.R. Part 5, and 46 C.F.R. Part 16, seeking to revoke Respondent Kimberly Ann Wion's Merchant Mariner Credential (MMC). Specifically, the Coast Guard alleges Respondent committed an act of misconduct when she violated 40 C.F.R. § 40.191(a)(10) by utilizing a device to deliver a substituted sample of urine constituting a refusal to take an employer directed drug test. Respondent filed a timely Answer denying the factual allegations and requesting a hearing.

I held the hearing in Seattle, Washington on January 30, 2018. Andrew J. Norris, Esq. represented the Coast Guard and Robert Kraft, Esq. represented Respondent. After the hearing, I gave the parties the opportunity to submit proposed findings of fact, conclusions of law, and argument in support of their positions. Both parties filed these documents. The matter is now ripe for decision. After applying the relevant statutes, regulations, and case law to the evidence in the record, I find the allegations PROVED.

I. FINDINGS OF FACT

1. Respondent is the holder of a Coast Guard-issued Merchant Mariner Credential (MMC). [Ex. CG-01].
2. As a Washington State Ferries (WSF) employee since 1999, Respondent was a covered employee subject to the WSF Substance Abuse Policy. [Ex. CG-05; Tr. at 16].
3. In 2014, Respondent entered into a settlement agreement with the Coast Guard after testing positive for methamphetamines in a random drug test. [Ex. CG-02, CG-02, CG-03, and CG-04; Tr. at 153-54].
4. On March 1, 2016, Respondent successfully completed the requirements of the settlement agreement and the Coast Guard subsequently returned her MMC. [Ex. R-B].
5. Before WSF allowed Respondent to return to work in a safety-sensitive position, WSF required her to sign a "last chance" agreement, which incorporated the increased testing regimen prescribed by the Substance Abuse Professional (SAP) as part of the regulatory return-to-work process. [Ex. CG-04, CG-06; Tr. at 24].

6. WSF's third-party manager notified the Designated Employer Representative (DER), Mary Beth Neesan, that Respondent was required to test that month. [Tr. at 12, 20, 27].
7. Ms. Neesan reviewed Respondent's work schedule, determined that July 18, 2017 was an appropriate day for Respondent to test, and contacted her that morning to direct the test. [Tr. at 31].
8. Respondent selected DISA Anacortes from WSF's list of approved collection facilities, as she had for her previous drug tests. [Ex. CG-09; Tr. at 28, 32, 44-46, 158-59, 163].
9. Ms. Neesan faxed an order form to DISA Anacortes for Respondent's July 2017 test, indicating it was a follow-up test. [Tr. at 29].
10. Follow-up tests must be directly observed by a person of the same gender as the donor. [Tr. at 44, 46; see also 49 C.F.R. § 40.67].
11. As the only female collector and observer employed at DISA Anacortes, Marie Monyak was the only person who could observe Respondent's July 2017 test. [Tr. at 44, 46].
12. Ms. Monyak is properly trained to conduct DOT drug testing, including serving as an observer for direct observed tests. [Ex. CG-08; Tr. at 42].
13. Respondent reported to the collection facility as directed on July 18, 2017, but Ms. Monyak was unavailable at that time. [Tr. at 32, 163-165].
14. Respondent informed Ms. Neeson of Ms. Monyak's unavailability and received permission to test the following day, July 19, 2017. [Tr. at 34].
15. On July 19, 2017, Respondent reported to DISA Anacortes at or around 1:42 PM. [Ex. CG-12; Tr. at 75].
16. Ms. Monyak initiated the test using the Federal Drug Testing Custody and Control Form (CCF) for WSF. [Tr. at 67].
17. Ms. Monyak met Respondent in the lobby and led her back to the drug room, locking both access doors. [Ex. CG-13; Tr. at 66-67].
18. The "drug room" at DISA Anacortes contains workstations and a double kitchen sink with running water just outside the attached "dry room," which contains only a toilet. [Ex. CG-10 at 1, 3 and 4; Tr. at 48, 53, 55].
19. After Respondent selected a sealed specimen cup from the appropriate stack in the drug room, Ms. Monyak broke the seal and dumped the contents onto the workstation desk. [Ex. CG-11, CG-13; Tr. at 67-68].
20. Ms. Monyak and Respondent moved to the dry room, where Respondent properly positioned her clothing and turned in a full circle in front of Ms. Monyak, as required by DOT regulations. [Ex. CG-13; Tr. at 68; see also 49 C.F.R. § 40.67(b) and (i)].
21. The toilet seat in the dry room at DISA is routinely left in the full upright position between donors, since a significant majority of donors are men [Ex. CG-13; Tr. at 68].
22. The toilet seat was either partially or fully upright when Respondent entered the dry room. [Ex. CG-13; Tr. at 68].
23. Respondent used a few squares of toilet paper to cover her hand while she lowered the toilet seat to the full down position [Ex. CG-13; Tr. at 68-69].

24. Respondent then sat on the toilet and Ms. Monyak handed her the collection cup. [Ex. CG-13; Tr. at 68].

25. Respondent held the cup between her legs with one hand. [Tr. at 94-95, 98-99].

26. Respondent made facial gestures and appeared to be straining to provide a sample, as she often did during drug testing. [Ex. CG-13; Tr. at 69].

27. Respondent asked Ms. Monyak to turn on the faucet outside the dry room, claiming the sound of running water would help her produce a sample. [Ex. CG-13; Tr. at 69-70].

28. Within a minute or so of Ms. Monyak turning on the faucet, Respondent produced a specimen in the collection cup. [Ex. CG-13; Tr. at 70].

29. Ms. Monyak took the sample to the work station, which is approximately 3-4 steps away from the dry room, while Respondent cleaned up. [Ex. CG-13; Tr. at 70-71].

30. Ms. Monyak turned to face Respondent just as she was standing up from the toilet, and saw something white drop from her body, which she thought was toilet paper. [Ex. CG-13; Tr. at 71].

31. After Respondent finished in the dry room, she walked to the work station and observed Ms. Monyak checking the temperature on the specimen, pouring it into the vials, and sealing the vials. [Ex. CG-13; Tr. at 71].

32. Ms. Monyak directed her to begin completing Step 5, Respondent's portion of the CCF. [Ex. CG-13; Tr. at 71].

33. Ms. Monyak took the excess urine in the collection cup to the dry room to discard it and flush the toilet. [Ex. CG-13; Tr. at 71].

34. Ms. Monyak observed what appeared to be a white pill bottle floating in the toilet. [Ex. CG-13, CG-14; Tr. at 71].

35. Ms. Monyak called Respondent over to show her what she had discovered in the toilet. [Ex. CG-13; Tr. at 72].

36. Respondent said she did not know what the item was or how it got there. [Ex. CG-13; Tr. at 72-73].

37. Respondent became shaky and teary upon seeing the item. [Ex. CG-13; Tr. at 73-74].

38. Ms. Monyak retrieved the item from the toilet and placed it on paper towels at the workstation. [Ex. CG-13; Tr. at 80].

39. The item was a small white bottle, similar those containing over-the-counter painkillers, with aluminum foil over the opening, held in place by black tape and pierced through the center. [Ex. CG-12, CG-13, CG-14; Tr. at 74, 80, 81].

40. Ms. Monyak annotated the "remarks" section of the CCF with a description of the item and how it was found, and read her remarks out loud to Respondent. [Ex. CG-12, CG-13; Tr. at 74].

41. Respondent initially refused to finish filling out Step 5 of the CCF, but eventually completed it. [Tr. at 74-75, 204].

42. Respondent erroneously wrote her birthdate in the block meant for the testing date, and her printed name was virtually illegible. [Ex. CG-12, CG-13, CG-15; Tr. at 75].

43. Ms. Monyak provided Respondent with the donor copy of the CCF. [Tr. at 77].

44. After Respondent departed the collection site, Ms. Monyak took pictures of the pill bottle she had retrieved from the toiled and then disposed of it. [CG Ex. 14; Tr. at 80-81].

45. On July 20, 2017, Respondent attempted to take a directly observed, self-pay drug test at Island Hospital. [Ex. R-D CG-17; Tr. at 129].

46. Christine Childs was the collector on duty at Island Hospital. [Ex. CG-17; Tr. at 129].

47. Respondent followed the DOT procedures for directly observed tests but was unable to provide a sample on July 20, 2017. [Ex. CG-17; Tr. at 129-30].

48. On July 21, 2017, Respondent again appeared at Island Hospital to take a drug test, Ms. Childs was again assigned as the collector/observer. [Ex. CG-17, CG-18; Tr. at 132].

49. On July 21, 2017, Respondent informed Ms. Childs that she did not want the test to be observed. [Ex. CG-17, CG-18; Tr. at 132-33].

50. The sample Respondent provided on July 21, which was not directly observed but which was otherwise collected and analyzed in accordance with DOT 49 CFR Part 40 procedures, subsequently tested negative for dangerous drugs. [Ex. CG-17, CG-18; R-E; Tr. at 133-34].

51. The Coast Guard obtained via a Google search instructions showing females how to pass an observed urine drug test using a pill bottle to deliver a substitute sample. [Ex. CG-19; Tr. at 139, 144].

II. ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proof

Title 46 U.S.C. § 7702(a) provides that Coast Guard suspension and revocation proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. Here, because the Coast Guard brought this action, it bears the burden of proof. 33 C.F.R. § 20.702(a). The standard of proof in administrative proceedings is "preponderance of the evidence," meaning a party must prove that a "fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993). The ALJ, as the finder of fact, must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence" before assessing a sanction. See 5 U.S.C. § 556(d).

Evidentiary rules under the APA are less strict than in jury trials, and a judge must only exclude irrelevant, immaterial, or unduly repetitious evidence. See 5 U.S.C. § 556(d); Gallagher v. Nat'l. Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. Nat'l. Transp. Safety Bd., 684 F.2d 683, 688 (10th Cir. 1982). Moreover, evidence "need not be authenticated with the precision demanded by the Federal Rules of Evidence" in order to be admissible in an administrative proceeding. Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007).

B. Misconduct

In this case, the Coast Guard alleges that Respondent committed misconduct by refusing to take an employer-directed drug test. Specifically, the Coast Guard alleges Respondent utilized a device containing a substitute sample of urine. Title 46 U.S.C. § 7703 states: "A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder—(1) when acting under the authority of that license, certificate, or document—(B) has committed an act of incompetence, misconduct, or negligence." Misconduct is defined in 46 C.F.R. § 5.27 as "human behavior 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." Thus, the Coast Guard has the burden of proving this allegation by reliable, credible, and probative evidence showing that Respondent more likely than not engaged in this prohibited conduct.

C. Jurisdiction

Jurisdiction in misconduct cases is established only if the misconduct occurred while the mariner was acting under the authority of his MMC. 46 U.S.C. § 7703; see also Appeal Decision 2615 (DALE) (2000). A mariner acts under the authority of a Coast Guard-issued credential or endorsement when the holding of such credential or endorsement is required either by law or

regulation or by an employer as a condition of employment. 46 C.F.R. § 5.57(a). A mariner does not cease to act under the authority of his or her credential while on shore leave.

Here, Respondent has admitted to the jurisdictional allegations, but the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (2006) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established). The record shows that Respondent's employer, WSF, required her to hold an MMC as a condition of her employment. Additionally, Respondent had separately signed a continuation of employment agreement agreeing to these drug tests as a condition of continued employment. [Ex. CG-06]. The drug test in question was also required by law or regulation. See 46 C.F.R. § 16.201(f). Thus, Respondent was acting under the authority of her license when she underwent drug testing on July 17, 2017 and I find jurisdiction established.

D. Analysis

1. Coast Guard's Argument

The Coast Guard argues that, if the pill bottle device came from Respondent, the only plausible explanation is that she intended to interfere with the testing process. [CG Brief at 13]. Specifically, the Coast Guard contends there is substantial evidence in the record to show that the pill bottle did, in fact, come from inside Respondent's body, and she therefore interfered with the testing process. Relying primarily on Ms. Monyak's testimony, the Coast Guard asserts that the toilet was empty prior to Respondent beginning the collection process, the facial expressions and sounds Ms. Monyak observed were due to Respondent exerting effort to hold the pill bottle inside herself and puncture the foil, and that white object Ms. Monyak observed falling from Respondent's body was the pill bottle in question. [Id. at 13-14].

Furthermore, the Coast Guard maintains that even if I believed Respondent's testimony that the toilet seat was only partially raised and there was toilet paper in the bowl when she

began the collection process, the chances the pill bottle could be concealed under the seat or in the toilet paper are extremely slim. [Id. at 14]. The Coast Guard describes the implausibility of either another female leaving the device at the collection site or the collector herself placing it there. [Id. at 17-19]. Finally, the Coast Guard asks me to disregard the negative test Respondent took two days later at Island Hospital as irrelevant. [Id. at 20].

2. Respondent's Argument

Respondent argues that a number of technical flaws prevent the test from being used as evidence against her. She points to the collector's testimony to support this claim. Specifically, Respondent claims Ms. Monyak's inability to see the urine flowing directly from Respondent's body into the collection cup from where she was standing during the collection violated Section 9 of the DOT Guidelines. [Resp. Brief at 6]. She argues that Ms. Monyak did not properly document the refusal to test or timely notify the DER, in contravention of 49 C.F.R. 40.191(d). [Id. at 10]. She also contends that an immediate retest should have been done, pursuant to 49 C.F.R. 40.63(e) and/or 40.65(c)(1). [Id. at 11].

3. The Test Was Conducted in Accordance with DOT Protocols

a. Reason for Testing

There is no dispute that Respondent tested positive for methamphetamines in 2014 and subsequently entered into a settlement agreement with the Coast Guard in lieu of requesting a hearing before an ALJ. Respondent successfully completed the requirements of the agreement and the Coast Guard returned her MMC. She was, however, subject to increased drug testing upon her return to work, as required by the SAP. The parties agree that the drug test in question here was a follow-up test administered as part of Respondent's "last chance" agreement with WSF, but I note that it was also required as part of the DOT-regulated return-to-work process, which incorporated the SAP recommendations. [Ex. CG-03].

The Coast Guard's drug testing program is administered in accordance with the DOT protocols found at 49 C.F.R. Part 40. See 46 C.F.R. Part 16. As part of the return-to-work process, the SAP prescribes in writing the number and frequency of follow-up tests an employee must take. 49 C.F.R. § 40.307. The mariner's employer must ensure that follow-up testing is conducted as directed by the SAP in order for the mariner to continue working in a safety-sensitive position. 49 C.F.R. § 40.309(a). Here, the SAP prescribed eight follow-up tests during Respondent's first year after returning to work, six tests in the second year, four tests in the third year, and two tests in the fourth year. [Ex. CG-03].

The DOT regulations also require follow-up tests to be directly observed by a person of the same gender as the donor; either the collector or another person may act as the observer. 49 C.F.R. § 40.67(b) and (g). During a directly observed test, the observer must request the donor to raise his or her shirt above the waist and lower pants and underpants, and then turn around. This is meant to ensure that a donor is not wearing a prosthetic device. See 49 C.F.R. § 49.69(i). The observer must then watch the donor's urine flow from his or her body into the collection cup. 49 C.F.R. § 49.69(j).

If a donor possesses or wears a prosthetic or other device that could interfere with the testing process, it is considered to be a refusal to take a drug test. 49 C.F.R. § 40.191(a)(10). When a donor refuses a drug test, the collector must terminate the test, document the refusal in on the CCF, and immediately notify the employer's DER of the refusal. 49 C.F.R. § 40.191(d). The collector must ensure that the donor's name is printed on Copy 2 of the CCF, note the refusal in the "Remarks" line, and sign and date the CCF. Id.

b. Observed Collection

The parties agree that Ms. Monyak acted as both collector and observer for Respondent's July 19, 2017 drug test. They also agree that Respondent cooperated with Ms. Monyak's directions to raise her shirt, lower her pants and underpants, and turn around slowly. However,

Respondent contends that Ms. Monyak failed to watch the urine pass from her body into the collection cup in violation of 49 C.F.R. § 49.69(j). I note that the regulations specify that failure to directly observe a collection that is required to be directly observed is a procedural problem. See 49 C.F.R. § 40.209(b)(6). The failure does not result in the cancellation of a test, nor does it require correction because it does not adversely affect an employee's right to a fair test. Id.

Here, the evidence shows that it would have been difficult for Ms. Monyak to see urine passing directly from Respondent's body into the collection cup, both because Respondent's body partially obscured Ms. Monyak's view and Ms. Monyak was not standing directly in front of Respondent. However, Ms. Monyak was present as an observer and testified she paid close attention during the testing process. Even though Ms. Monyak's positioning in the dry room was not optimal and her sightline was partially blocked, the regulations are clear that this does not constitute a reason to invalidate the test. See 49 C.F.R. § 40.209(b)(6). Ms. Monyak substantially complied with the direct observation procedures and, accordingly, I find that the collection as a whole was performed in accordance with DOT protocol.

c. Retest

Respondent contends Ms. Monyak should have conducted a second collection after discovering the pill bottle in the toilet. She points to 49 C.F.R. § 40.65(c)(1), which requires an immediate new collection under direct observation procedures when a collector discovers signs of tampering with a specimen after a normal drug test. However, 49 C.F.R. § 40.65 covers situations where a collector discovers problems with the sample itself indicating it has been tampered with, such as unusual color or odor, foaming when shaken, or the presence of foreign objects in the sample (as opposed to in the toilet or elsewhere in the collection space). Here, Ms. Monyak did not detect any signs of tampering in the specimen Respondent provided, but rather found evidence that Respondent refused to test by utilizing a prosthetic or other device. I find that, where a test was initially conducted under direct observation and the donor refuses to test,

49 C.F.R. § 40.65(c)(1) does not apply and there is no requirement to immediately retest that donor.

d. CCF Compliance

Respondent attacks the validity of the CCF because the certification printed on the form states the specimen was collected, labeled, sealed, and released to FedEx when it was actually discarded. Respondent asks me to find Ms. Monyak's testimony less credible because she signed this certification as required by 49 C.F.R. § 40.45. Respondent's argument concerning credibility is misguided, since the propriety of Ms. Monyak's signature on the certification is an issue of regulatory compliance rather than credibility. The certification is part of the form itself, and collectors are prohibited from altering it. 49 C.F.R. § 40.45(c). However, in situations such as this one, where the sample is not released to the laboratory for testing, the collector is still required to document the refusal and sign and date the form. 49 C.F.R. § 40.191(d).

Ms. Monyak testified that the box identifying the delivery service used to transmit the sample to the laboratory was filled out in advance of the test, and she did not fill it in during Respondent's test. [Tr. at 76]. Ms. Monyak adequately explained the situation in the remarks section and in a subsequent signed statement. While Respondent's argument highlights issues of inconsistency between the CCF form and the regulations, and internal inconsistencies on the CCF form itself, the standard for completing the CCF form is substantial compliance rather than absolute compliance. I find the notation of "FedEx" in the box indicating the name of the delivery service to be harmless, particularly as it is at most a minor administrative error that the regulations do not require to be corrected. See 49 C.F.R. § 40.209(b)(1).

e. DER Notification

Respondent also argues that Ms. Monyak failed to timely notify the DER of the refusal. Ms. Monyak testified that after Respondent left the testing facility, she photographed the bottle and then attempted to call the DER, Mary Beth Neesan. She was unable to reach Ms. Neesan, so

she tried calling the back-up DER, Jenny White, also unsuccessfully. She then called the third-party administrator to let them know what had happened and ask them to contact the DER. [Tr. at 82]. I find that Ms. Monyak attempted to notify the DER in a timely fashion and is not responsible for the fact that both the primary and back-up DER were unavailable. Her decision to call the third-party administrator, while not required by regulation, was nevertheless an appropriate action in light of her inability to reach a WSF DER.

f. Disposal of the Pill Bottle

Respondent argues that she has been prejudiced because Ms. Monyak disposed of the pill bottle after she took the photographs which are Ex. CG-14. [Tr. p. 81.] "Her disposal of the pill bottle precluded [Respondent] and her counsel from inspecting the bottle to determine the size of the bottle, which would be relevant to an allegation that [Respondent] had inserted the bottle in her vagina, and further precluded any opportunity for fingerprint or DNA testing which could exonerate [Respondent] from the allegations which the Coast Guard is making in this revocation hearing." Resp. Brief at 14. Respondent has requested I find that "Monyak's disposal of this pill bottle constitutes a spoliation of evidence, which has prejudiced [Respondent] in her defense of these allegations." Id.

Spoliation is defined as the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation" once the duty to preserve such evidence has been triggered. Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009) (internal quotation and citation omitted). A party seeking sanctions for spoliation first bears the burden of establishing that the opposing party destroyed relevant evidence. Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 766 (9th Cir. 2015). Most courts apply some variation of a three-part test when considering whether spoliation occurred: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind;' and (3) that the

evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012); see also Ghorbanian v. Guardian Life Ins. Co. of Am., No. C14-1396RSM, 2017 WL 1543140, at *2 (W.D. Wash. Apr. 28, 2017).

Here, it is clear that the collector, Ms. Monyak, disposed of the pill bottle, which would have been relevant, tangible evidence. However, I do not find that the disposal constituted spoliation for the following reasons. First, the collector was a witness rather than a party to this matter. Second, I do not find she disposed of the bottle with a culpable state of mind. When a collector in a DOT drug test discovers any device designed to thwart collection, the collector's duty is to document the event. 49 CFR 40.191(d). The only requirement to retain anything during an abnormal drug test arises when a donor presents a suspect sample and a second observed sample is collected pursuant to 49 C.F.R. § 40.65. Even then, if the donor refuses to provide a second sample, the rules require the collector to discard the original sample. Id.; see also DOT Urine Specimen Collection Guidelines, available at https://www.transportation.gov/sites/dot.gov/files/docs/resources/partners/drug-and-alcohol-testing/2567/urine-specimen-collection-guidelines-january-2018.pdf. I already determined above that 49 C.F.R. § 40.65 did not apply to the collection in question here. Accordingly, while it would have been preferable for Ms. Monyak to preserve the pill bottle, she was under no obligation to do so.

The Coast Guard, as a party to this litigation, bears no responsibility for spoliation because Ms. Monyak disposed of the bottle immediately after taking photographs; it was therefore gone before the Coast Guard was aware of the issue. [Tr. p. 81]. The testimony and photographs in the record constitute sufficient evidence to meet the Coast Guard's burden.

5. Credibility Determinations

Respondent and Ms. Monyak have offered contradictory testimony on a number of issues, including the condition of the dry room and the sequence of events leading up to the

discovery of the pill bottle. Therefore, I must make credibility determinations to reach a conclusion about whether it is more likely than not Respondent attempted to use the pill bottle found in the dry room toilet to deliver a substitute urine sample. I must also evaluate the credibility of Respondent's testimony about her ability to use such a device.

When evaluating the evidence in the record, an ALJ must make determinations as to its credibility and reliability. The ALJ "is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeal Decision 2519 (JEPSON) (1991). This is because, as the presiding official, the ALJ "can fully observe the response, character and demeanor of the witnesses in issue." Id. Some factors traditionally involved in a credibility determination include:

> (1) the demeanor of the witness, (2) the inherent plausibility of the witness's testimony, (3) the consistency of the testimony of the witness with prior statements of the witness, (4) the internal consistency of the witness's statements, (5) the consistency of the testimony with other evidence, (6) the accuracy of the witness's testimony, and (7) the interest of the witness in the outcome of the proceeding. Other factors may also apply but a credibility assessment is commonly made based on the totality of the circumstances after considering any relevant fact that may impact the witnesses [sic] credibility.

St. Claire Marine Salvage, Inc. v. Bulgarelli, No. 13-10316, 2014 WL 3827213, at *6 (E.D. Mich. Aug. 4, 2014), aff'd (6th Cir. 14-2135) (July 22, 2015). The essence of credibility is whether the testimony in the record is well-supported and believable; "[t]he presence of evidence which conflicts with the testimony of a witness is not, in itself, enough to conclusively show a lack of credibility of that witness when there is substantial evidence that supports his account." Appeal Decision 2017 (TROCHE) (1975).

a. Respondent's Contention that She Was Not Capable of Utilizing the Pill Bottle is Not Credible

The Coast Guard entered evidence that using a pill bottle to deliver a substitute urine specimen is a known method for females to defeat the drug testing process. The substitute urine

is held inside the pill bottle by an easily pierced cover, such as aluminum foil, and the pill bottle is secreted in the donor's vagina prior to the test. [Ex. CG-19]. When Mr. Tramm, a Coast Guard Investigating Officer, performed a simple internet search, it brought up instructions for female donors on how to use this technique. [Tr. at 140]. Although the Coast Guard did not show that Respondent accessed any specific website with instructions on this technique, Mr. Tramm's testimony sufficiently established that a female looking for a way to substitute urine during an observed drug test could easily find out how to do it.

Respondent advanced a number of reasons why she could not have utilized the pill bottle technique to deliver a substitute specimen during the drug test. First, she argues that the manner in which she held the collection cup would have prevented her from puncturing the bottle's aluminum foil cover without Ms. Monyak noticing. Furthermore, if she had punctured the foil when Ms. Monyak left briefly to turn on the water faucet, the contents would have flowed into the cup immediately and not approximately a minute later, as Ms. Monyak testified. She also argues that as a post-menopausal woman, she would not have been able to insert the bottle into her vagina without lubrication, and the photographs entered into evidence do not show any signs of lubrication on the bottle.

After reviewing the record as a whole, and particularly the testimony of Ms. Monyak and Respondent, I find Respondent could have held the collection cup in such a fashion as to briefly obscure Ms. Monayk's view while she punctured the foil on the pill bottle. Thus, it is of little consequence that Respondent did not provide her sample while Ms. Monyak was outside the dry room turning on the faucet. Although Respondent testified she always held the collection cup from the bottom and thus could not have reached the foil with her finger, I find this testimony less than credible. Respondent explained that holding the cup that way was easier for her as a larger woman, but her demonstration during the hearing made it appear significantly more difficult than holding the cup from the side. [Tr. at 160-161]. Moreover, Ms. Monyak also

testified that she had a specific recollection of how Respondent held the cup, and that it was from the side rather than the bottom. [Tr. at 98].

I also find it possible for Respondent to conceal the bottle in her vagina. Respondent stated she would not be able to insert such a bottle without lubrication because she is post-menopausal, but did not present any medical evidence to support her argument. She also argued that the photographs do not show any visible signs of lubrication on the pill bottle. However, this could be explained either by the fact that no lubricant was used; lubricant was used but rubbed off before the bottle fell into the toiled; or a water-based lubricant was used and washed off the bottle while it was in the toilet.

In short, none of Respondent's arguments establish that she was physically incapable of using the pill bottle to deliver a substituted sample of urine. While the process of concealing the bottle and using it to deliver a sample may not have been comfortable or easy, if Respondent feared testing positive for drug use, she had a powerful motivation to endure the discomfort.

b. The Collector's Testimony is More Credible than Respondent's

Having discounted Respondent's arguments that the pill bottle could not possibly been hers, I find the evidence in the record also establishes it is more likely than not she used it as a means to interfere with the drug test. The evidence indisputably establishes that the pill bottle was in the toilet after Respondent tested, but before the toilet was flushed. Respondent advanced two alternative theories: the bottle was either left by a previous donor, or planted in the toilet by Ms. Monyak. For the reasons below, neither theory is credible.

Respondent's version of events during the drug test contrasts in several important ways with Ms. Monyak's recollection. Ms. Monyak testified she remembered the toilet seat being in the upright position and Respondent using some toilet tissue to hold it while she lowered it. [Tr. at 68-69]. Respondent disputes this, stating that the toilet seat was hanging between the upright and down positions. [Tr. at 166-67]. However, both Ms. Monayk and Respondent agree that

Respondent used several sheets of toilet paper to cover her hand while she lowered the seat to the down position. [Tr. at 68, 167]. Respondent contends that, when she dropped the toilet paper into the toilet bowl, there was already a wad of toilet paper in the bowl blocking the outflow hole. [Tr. at 167]. She testified she told Ms. Monyak about it, but Ms. Monyak simply said it was fine and to get going. [Tr. at 168].

Both Respondent and Ms. Monyak agreed that Respondent then properly raised her shirt, lowered her pants and underwear, and turned in a circle. [Tr. at 169]. Respondent attempted to provide a sample, making faces and visibly straining, before asking Ms. Monyak to turn on the water.[1] Shortly thereafter, within about a minute, Respondent provided a sample. Both Ms. Monyak and Respondent testified that Respondent routinely had urine on the hand she used to hold the collection cup, and Respondent stated she had gotten urine on her hand that day. [Tr. at 114, 161, 177]. She handed the specimen to Ms. Monyak, who took it to the desk in the dry room to wait while Respondent finished in the rest room. Ms. Monyak testified she had a clear view from the desk to the toilet. While Respondent stood up from the toilet, Ms. Monyak "caught a flash of something white falling from her body" but assumed it was toilet paper and did not say anything about it. [Tr. at 71]. When Respondent was ready, she came to the desk and observed Ms. Monyak checking the temperature of the specimen, decanting it into the vials, sealing the vials, and labeling them. While Respondent completed Step Five of the CCF, Ms. Monyak took the excess specimen to the toilet to dispose of it.

At that point, Ms. Monyak noticed something floating in the toilet, which appeared to be a pill bottle. She called Respondent over to look at it, and Respondent expressed disbelief and then stated it must have come from under the toilet seat. [Tr. at 72-73]. Respondent contends that the bottle could not have fallen into the toilet without a sound, and Ms. Monyak testified she did

[1] I note that the screenshots from the website describing the pill bottle technique recommend talking to the collector in an attempt to distract her while piercing the foil covering the pill bottle. [Ex. CG-19]. While the evidence does not establish with certainty that Respondent was attempting to distract Ms. Monyak, it is plausible.

not hear anything. Respondent says that if the bottle had fallen as Ms. Monyak described, it "would have either hit the floor, the front edge of the toilet seat, or the toilet bowl in a location where there was not water in the bowl." She also says that, if she had utilized such a device, she logically would have tried to retrieve it rather than leaving it in the toilet for the collector to find.

I do not find the position of the toilet seat to be significant. The starting position of the toilet seat is not prescribed by regulation, but it was generally kept in the full upright position at DISA Anacortes because most of the donors were male. Even if the seat was partway down at the start of her test, as Respondent alleges, there is no logical explanation for how the seat could have concealed the pill bottle without the two women noticing it before Respondent began testing. In particular, if the bottle somehow remained concealed under the seat, it would have stopped the seat from going fully into the down position; otherwise, the women would have seen or heard it dropping into the toilet bowl while Respondent finished lowering the seat.

I also find it unlikely that there was a toilet paper wad in the bowl prior to Respondent starting the test. Ms. Monyak testified that the water in the toilet had to be treated with blue ink so it could not be used to tamper with a sample. [Tr. at 50]. In verifying that the water was properly treated, Ms. Monyak would likely have seen and removed any debris left over from a previous test. She testified that she did not see the bottle in the toilet prior to the collection and could not have begun the test with anything in the toilet. [Tr. at 72]. I find Ms. Monyak's testimony that the toilet was in its usual condition prior to Respondent's test more credible than Respondent's testimony that the toilet was unusual in two respects—the seat being partway down and toilet paper being in the bowl.

The fact that Respondent had urine on her hand after giving her sample is significant because it lends credence to the Coast Guard's assertion that she punctured the foil covering the pill bottle's opening with her finger to deliver the substitute urine. If Respondent held the cup from the bottom and pressed it to her body, as she said she did, it is unlikely that her urine would

have bypassed the cup and gotten onto her hands. If, on the other hand, she used her finger to pierce the foil, she would necessarily end up with urine on her hand. Thus, I consider this an important factor in the likelihood that the bottle was Respondent's.

Ms. Monyak testified that nearly all the donors tested at DISA are male. [Tr. at 50, 68]. For anatomical reasons, a male donor would have been unable to use a pill bottle to provide a substitute sample. The record does not establish whether any other female donors had recently tested at DISA, but the fact that the toilet seat was not in the fully-down position prior to Respondent's test indicates that the previous donor, at least, had been male. Given the demographics of the donors at DISA, I find it improbable that the pill bottle was left over from a previous female donor.

As to Respondent's arguments about the location in the toilet bowl where the pill bottle would have fallen, I find they neither prove nor disprove where the bottle came from. There was no expert testimony showing the precise trajectory of a pill bottle falling from a particular spot, merely speculation on the part of Respondent and her attorney. It is also possible that the pill bottle had already fallen into the toilet during Respondent's test, and the white object Ms. Monyak saw was, in fact, toilet paper. The evidence in the record does not allow me to determine precisely where the pill bottle would have fallen when it left Respondent's body, and I therefore give this argument little weight. Respondent's claim that she would have tried to retrieve the bottle if it was hers is also unavailing, as doing so would have drawn Ms. Monyak's attention to her actions and made discovery of the pill bottle even more likely.

Finally, I do not find Respondent's theory that Ms. Monyak may have framed her credible. Both Respondent and Ms. Monyak testified that Respondent did not call DISA Anacortes to let them know she was coming on either July 18 or 19, 2017. Thus, Ms. Monyak could not have known in advance that Respondent would be testing that day. Ms. Monyak also has no discernible motive for attempting to frame Respondent. Although the two women may

have seen each other in the community occasionally, they did not have any relationship outside the context of drug testing. Respondent testified that Ms. Monyak was flustered, short with her, and spoke harshly to her assistant both days Respondent was at the DISA office, and I note that Ms. Monyak did display a certain amount of impatience during her testimony related to Respondent's complaints, facial gestures, and request for running water during the test. Even so, I cannot find any plausible reason why Ms. Monyak would plant the pill bottle.

Clearly, the pill bottle had to come from somewhere, and I have found it unlikely that it was either left by a prior donor or planted by Ms. Monyak. I also found Respondent could have physically utilized such a device. If Respondent feared testing positive during a drug test, she would have sufficient motivation to endure any discomfort or difficulty the device may have caused. The weight of the evidence supports a conclusion that the pill bottle belonged to Respondent.

E. Conclusion

Respondent had a great deal to lose if she tested positive for drugs. The evidence in the record supports the Coast Guard's allegation that Respondent used a known method of delivering substitute urine to interfere with a drug test. While Respondent raised numerous arguments about why the pill bottle found during her July 2017 drug test could not have belonged to her, none of those arguments were convincing. Under the applicable regulations, using a device to interfere with a drug test constitutes a refusal to take the test. Accordingly, I find the allegation of Misconduct for refusing to take a drug test PROVED.

III. SANCTION

Having found the Coast Guard's allegation proved, I must now issue an appropriate sanction and order in this matter. 33 C.F.R. § 20.902(a)(2). Coast Guard regulations detail the factors to be considered in determining an appropriate sanction. 46 C.F.R. § 5.569. However, an ALJ "has wide discretion to formulate an order adequate to deter the [a mariner's] repetition of

the violations he was found to have committed." Appeal Decision 2475 (BOURDO) (1988). "The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence." 46 C.F.R. § 5.569(a). Accordingly, I am not bound by the Coast Guard's recommendations.

The appropriate sanction for a particular offense is dependent on the type and circumstances of the offense. 46 C.F.R. § 5.569. Statutes, regulations and decisions on appeal mandate a particular sanction for certain offenses, whereas other offenses give the ALJ discretion in crafting the appropriate sanction. Id. Where the sanction is discretionary, an ALJ may consider the following factors in determining an appropriate sanction: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

The rules include a Table entitled "Suggested Range of an Appropriate Order," which "is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits." 46 C.F.R. § 5.569(d). The regulations explain how an ALJ may utilize the Table, noting that:

> The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for failure to obey a master's written instructions. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

46 C.F.R. § 5.569(d). However, the ALJ is not bound by the Table. See Appeal Decision 2628 (VILAS) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). "In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review." Appeal Decision 2628 (VILAS) (citing Appeal Decision 1937 (BISHOP)).

The sanction prescribed in 46 C.F.R. § 5.569 for a refusal to take a drug test is a 12–24 month suspension. When aggravating factors are present, this sanction may be increased up to and including revocation. See Appeal Decision 2702 (CARROLL) (2013) (interpreting Coast Guard policy in light of Commandant v. Moore, NTSB Order No. EM-201 (2005)). Here, Respondent not only refused to take a drug test, she attempted to utilize a device to deliver a substituted sample. I find this to be a significant factor in aggravation, because if she had been successful she would have continued working in a safety-sensitive position without demonstrating that she was not using dangerous drugs. I also take into consideration that Respondent had recently settled an allegation of drug use with the Coast Guard, and was still undergoing increased testing stemming from both the settlement and her "last chance" agreement with her employer.

Respondent attempted to present the results of a subsequent drug test as a mitigating factor. Two days after Respondent refused the July 19, 2017 observed drug test, she went to a different collection site and took a non-observed test which was negative for drugs. [Tr. at 133; Ex. R-E]. However, I give no weight to the results of a non-observed test because Respondent could have easily utilized the same technique to substitute a sample with even less risk of detection. Moreover, if Respondent had used drugs prior to the July 19, 2017 test, they may not have been present in her urine at detectable levels by the time she tested again. The regulations required her to take and pass an observed drug test when ordered by her employer, and a voluntary, non-observed test taken on another date does not satisfy this requirement.

After carefully considering the evidence in the record, I believe that the factors weigh in favor of an increased sanction above that prescribed in the Table. Thus, I find it appropriate to REVOKE Respondent's MMC.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED that the Coast Guard's allegations in the Complaint are found **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Merchant Mariner's Credential is **REVOKED**. Pursuant to 46 C.F.R. § 5.567(d), Respondent must surrender her Merchant Mariner Credential to the Coast Guard immediately.

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001, attached to this Decision and Order as Appendix A.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: August 09, 2018