UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD,

Complainant,

vs.

DEIONDRE CHARLES LEWIS,

Respondent.

Docket Number 2020-0301
Enforcement Activity No. 5783202

DECISION AND ORDER

Issued: June 14, 2021

By Administrative Law Judge: Honorable Brian J. Curley

Appearances:

Lineka N. Quijano, Esq.
S&R National Center of Expertise
and
Mr. Paul F. Lonardo
Sector Houston/Galveston

For the Coast Guard

Deiondre Charles Lewis, *pro se*

For Respondent

I. BACKGROUND or PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated this administrative action by filing a Complaint against Deiondre Charles Lewis (Respondent), seeking to revoke his Merchant Mariner Credential (MMC). 46 U.S.C. § 7703. The Complaint alleges Respondent committed misconduct while acting under the authority of his MMC by leaving a drug testing facility before completing a pre-employment chemical drug test. 49 C.F.R. § 40.65; 49 C.F.R. § 40.191(a)(2-3).

Respondent filed an Answer on September 28, 2020, admitting all the facts in the Complaint, except Paragraph 6 and 7. (Answer at 1-2). Respondent also checked the box indicating he would raise an affirmative defense, but did not specify the defenses in the Answer. Id. Thereafter, the parties conducted discovery and motion practice consistent with my scheduling orders.

Pursuant to the parties' agreement, this matter proceeded to a hearing via Zoom for Government on February 2, 2021. During the hearing, Lineka N. Quijano, Esq., and Mr. Paul F. Lonardo appeared on behalf of the Coast Guard. Respondent appeared pro se. As part of its case-in-chief, the Coast Guard called four (4) witnesses, and offered thirteen (13) exhibits, all of which were admitted. Respondent called three (3) witnesses, including himself, but offered no exhibits.[1]

After the presentation of evidence and witnesses, Respondent asked to file a post-hearing brief on the merits. Pursuant to the court's briefing order, the Coast Guard timely filed its brief by April 1, 2021. As of the date of this Decision and Order, Respondent has not filed a post-hearing brief.

[1] Pursuant to my scheduling order, Respondent filed a Witness and Exhibit List on November 20, 2020. Respondent included an attachment showing a medical appointment of his grandmother.

This matter is now ripe for decision. For the reasons stated below and after considering the record as a whole, I find the Coast Guard **PROVED** Respondent committed misconduct and, therefore, am **SUSPENDING** Respondent's MMC for 12 months.

II. FINDINGS OF FACT

The undersigned finds the following facts proved by preponderant evidence in the record.

1. At all times relevant, Respondent held MMC #000495527. (Coast Guard Exhibit CGX-1).

2. On or about September 9, 2019, while employed as a tankerman at Genesis Marine, Respondent applied to be a tankerman with Atlas Marine Services, LLC. (Atlas). (CGX-2).

3. As part of the application process, Atlas required Respondent to undergo pre-employment drug screening at Texas Alcohol and Drug Testing Services (Testing Facility), in Houston, Texas. (Transcript (Tr.) 20-22; CGX-3).

4. Atlas memorialized Respondent's testing order in a document referred to as an ePassport—a pre-employment drug test order. (Tr. at 20-22).

5. On September 24, 2019, Abel Garza, a certified-DOT urine specimen collector, prepared the room where Respondent would provide a urine sample by placing a clean towel next to the sink, putting blue dye in the toilet water, making sure all the cabinets and water faucets were taped, and removing all other items that were in the room. (Tr. at 50).

6. On September 24, 2019, sometime before 10:29 a.m., Respondent arrived at the Testing Facility for pre-employment drug testing, and presented his ePassport and identification to the facility's employees.[2] (Tr. 51-52, 88, 101; CGX 3, 12).

7. Thereafter, Mr. Garza called Respondent from the waiting room and confirmed Respondent's identification and directed him to verify his information. (Tr. at 51-53).

8. Mr. Garza then led Respondent to the collection room where he explained the DOT drug collection process, directed Respondent to empty his pockets and place all his belongings in a locker. Tr. at 54-56; 171.

9. Respondent washed his hands and selected a wrapped, new collection container which Mr. Garza opened in front of Respondent. Id.

10. Mr. Garza instructed Respondent to void in the cup advising Respondent he must provide a sample within three minutes. Tr. at 54-55.

[2] All time references indicate Central Time throughout this order.

11. After Respondent voided in the cup, he gave the sample to Mr. Garza within three minutes. Tr. at 56.

12. Mr. Garza then immediately checked the initial sample and determined it was out of the acceptable temperature range. (Answer to Complaint at page 1, paragraph 2; Tr. at 61, 65, 66).

13. Mr. Garza explained to Respondent he would have to provide a second sample, this time under direct observation. (Tr. at 56, 59, 62).

14. Respondent then voided in a second cup a second time while Mr. Garza observed, but Respondent was only able to provide 5 ml. of urine. (Tr. 57; 67).

15. Because Respondent could not produce at least 45 ml. of urine, Mr. Garza began the shy bladder collection process, and logged Respondent's inability to produce the requisite amount of urine at 10:34 a.m. (Tr. at 58, 64-68; CGX-6, 9).

16. Mr. Garza informed Respondent he could drink up to 40 oz. of water, and had three hours to produce a sample. (Tr. at 68).

17. Mr. Garza then led Respondent to the waiting room, provided a glass of water, and explained to Respondent he was not permitted to leave the collection Testing Facility because if he did it would be considered a refusal to test. (Tr. at 67-68, 79).

18. Mr. Garza then documented Respondent's last attempt to provide a sample was at 10:38 a.m. and, noted under the shy bladder rules, Respondent had until 1:38 p.m. to provide a sufficient sample under direct observation. (Tr. at 64, 66-68; CGX-9).

19. While in the waiting room, Respondent checked his phone and noticed multiple missed calls from his brother and girlfriend concerning his grandmother. (Tr. at 175, 181, 202).

20. Although the calls to Respondent were not specific, Respondent determined he had to leave the Testing Facility because his grandmother was "85 years old and ha[d] health issues." (Tr. at 175, 181, 202).

21. Respondent advised the collector of the situation and the collector told Respondent if he left the facility it would constitute a refusal, but was unsure of the effect on Respondent's MMC. (Tr. at 97, 202).

22. Sometime at or before 11:10 a.m., but after 10:39 a.m., Respondent left the Testing Facility before supplying a sufficient sample under the shy bladder procedures. (Tr. at 70).

III. DISCUSSION

A. Jurisdiction

Under Coast Guard case law, jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 COX (2001). Like federal courts, the undersigned has an "independent obligation to ensure" it does not exceed the scope of its jurisdiction and therefore "[M]ust raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011); see also Appeal Decision 2656 (JORDAN) (2006).

When the Coast Guard charges misconduct under 46 U.S.C. § 7703(1)(B), the misconduct must have occurred while the mariner was acting under the authority of his merchant mariner credential. As explained in Appeal Decision 2656 (Jordan) (2006), a mariner acts under the authority of his credentials when he applies for a position requiring an MMC and when participating in a pre-employment drug test as a condition for employment. 46 C.F.R. § 5.57.

Here, the record shows Respondent applied to be a tankerman with Atlas who required Respondent to undergo pre-employment drug screening. (Tr. at 15-18). The record further shows Respondent appeared at the Testing Facility on September 24, 2019, and began the testing procedures. (CGX-12). Accordingly, I conclude Respondent was acting under the authority of his license on September 24, 2019, when he appeared at the Testing Facility to undergo drug screening. Appeal Decision 2656 (Jordan) (2006); (Answer at 2 (admitting all jurisdictional allegations)). Having established jurisdiction I now turn to burden of proof.

B. Burden of Proof

Pursuant to 46 U.S.C. § 7702(a), title 5 U.S.C. §§ 551-559 of the Administrative Procedure Act (APA) applies to Coast Guard suspension and revocation (S&R) proceedings. The APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. 5 U.S.C. § 556(d). In an S&R proceeding, the Coast Guard bears the initial

burden of proof, however, Respondent bears the burden to prove any affirmative defenses. 33 C.F.R. § 20.702.

Under the APA, the fact-finder 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. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party must prove that "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Here, the Coast Guard must prove by preponderant evidence that Respondent committed misconduct by failing to complete a pre-employment drug test, as alleged in the Complaint. 33 C.F.R. § 20.702; 46 U.S.C. § 7703(b).

C. Misconduct

When the Coast Guard alleges a mariner refused to submit to a chemical drug test, the Coast Guard must first show the test was both properly ordered in accordance with 46 C.F.R. Part 16 and properly conducted in accordance with 49 C.F.R. Part 40. Appeal Decision 2732 (CAMP) (2020). Once the Coast Guard establishes the test was both properly ordered in accordance with 46 C.F.R. Part 16 and properly conducted in accordance with 49 C.F.R. Part 40, the Coast Guard must then prove Respondent refused the test as defined by 49 C.F.R. § 40.191. I address each issue in turn.

1. The Chemical Testing Was Properly Ordered under 46 C.F.R. Part 16

Title 46 C.F.R. § 16.210-250 sets forth several types of drug tests a marine employer must order when employing mariner employees. One of those tests requires marine employers to conduct pre-employment tests and provides "[n]o marine employer shall engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous

drugs." 46 C.F.R. § 16.210. Here, the record shows Respondent applied to be a tankerman, a type of crewmember, for Atlas. (CGX-2). In response to his application, Atlas directed Respondent to undergo drug screening consistent with 46 C.F.R. § 16.210. Accordingly, I conclude Atlas properly directed Respondent to undergo drug screening in accordance with 46 C.F.R. Part 16.

Having determined the Coast Guard properly ordered the test, I now turn to whether the test was conducted in accordance with 49 C.F.R. Part 40. Appeal Decision 2732 (CAMP) (2020).

2. The Collector Complied with the Requirements of 49 C.F.R. Part 40 when Collecting Respondent's Specimen

Upon review of the record, I agree the collector complied with the testing procedures in 49 C.F.R. Part 40. Here, the record shows when conducting the pre-employment test, the collector complied with the following procedures in this case:

1. checked Respondent's identification;
2. explained the collection procedures to Respondent;
3. directed Respondent to remove his outer clothing;
4. directed Respondent to deposit his personal belongings in a locker;
5. directed Respondent to empty his pockets;
6. instructed Respondent to wash his hands;
7. placed strips over the water accesses of the restroom and put blue dye in the toilet;
8. chose a new collection container in Respondent's presence;
9. informed Respondent he must provide a sufficient amount of urine.

See 49 C.F.R. §§ 40.61, 40.63; Tr. at 50-55. Based on these facts, I conclude the collector substantially complied with the collection procedures in 49 C.F.R. Part 40.

Having concluded the collection was properly ordered under 49 C.F.R. Part 16 and conducted pursuant to 49 C.F.R. Part 40, I now turn to the Coast Guard's allegation that Respondent refused the pre-employment test.

3. Allegation that Respondent Refused the Pre-Employment Test

The Coast Guard's single-count misconduct allegation asserts Respondent failed to complete a pre-employment drug test. Specifically, the Coast Guard asserts Respondent violated 49 C.F.R. § 40.67 and 49 C.F.R. § 40.191 by leaving the Testing Facility before the collector completed the testing procedures. As set forth below, I agree the Coast Guard proved the allegations in the Complaint.

Under pertinent Commandant Decisions on Appeals (CDOAs), when the Coast Guard alleges a respondent refused to submit to a drug test, the Coast Guard must first prove Respondent "refused" within the meaning of 49 C.F.R. § 40.191. Appeal Decision 2732 (CAMP) (2020). Section 40.191 describes several scenarios identifying conduct that constitutes refusal, one of which includes the "failure to remain at the testing site until the testing process is complete." 49 C.F.R. § 40.191(a)(2).

Section 40.191(a)(2) does, however, carve out an exception, and excludes those who leave the testing site before the testing process commences. 49 C.F.R. § 40.191(a)(2). In other words, section 40.191(a)(2) permits a mariner that arrives to take a pre-employment drug test to leave the facility at any time before the test "commences." A test "commences" under Coast Guard law when "the employee—or the collector, in the employee's presence—breaks the seal on the collection container." Appeal Decision 2685 (MATT) (2010). If the employee leaves at any time thereafter before completing the testing procedures, he will be deemed to have refused to take the drug test. Id.

Here, Respondent admits he submitted to a pre-employment drug test on September 24, 2019. (CGX-2; Answer). The record further shows after arriving at the Testing Facility,

Respondent presented his ePassport (his prospective employer's instructions to test), had his identification verified by the collector, and complied with various instructions, including emptying his pockets and washing his hands. (Tr. at 54). The collector's testimony further proves Respondent followed instructions by selecting a "brand new cup" and handing it to the collector, who then opened the cup in Respondent's presence. (Tr. at 54). Based on this evidence, I conclude Respondent submitted to a pre-employment drug test on September 24, 2019, and the testing process "commenced" as contemplated by Matt, supra.

Having determined the testing procedures commenced, I now must determine if Respondent left the Testing Facility before the testing procedures were complete. I agree he did.

The record shows after opening the new cup for the urine sample, Respondent voided and provided a specimen. (Tr. at 56). Immediately after Respondent voided, the collector determined it was out of temperature range as required by 49 C.F.R. § 40.65(b), i.e., the sample was not between 90° and 100° Fahrenheit (F). (Tr. at 61). Specifically, the collector testified the test strip indicator on Respondent's specimen cup measured the temperature of the urine sample and indicated the sample was not between 90° and 100°. (Tr. at 56). After noticing the temperature gauge on the cup, Mr. Garza then determined Respondent's urine was greater than 100° based on feeling the outside of the container. (Tr. at 59-61). Having conducted hundreds of previous tests, Mr. Garza was able to determine when the temperature was too high or too low. (Tr. at 55-56, 61, 79-82).[3]

Because the collector determined the sample was out of range, he instructed Respondent to provide a second sample, but this time under direct observation as required by 49 C.F.R. § 40.65(b)(5). (Tr. at 56-57). Again, before collecting the specimen, the collector instructed respondent to rinse and dry his hands and select a new cup. (Tr. at 57). Respondent complied

with the instructions, but was unable to provide at least 45 milliliters of urine, as required by 49 C.F.R. § 40.193. (Tr. at 57, 63). Because Respondent could not provide a sufficient specimen, the collector initiated shy bladder procedures. 49 C.F.R. § 40.193.

In accordance with 49 C.F.R. § 40.193, the collector informed Respondent he had three hours to produce a sufficient sample—45 milliliters—and could drink 5 cups of water. (Tr. at 68). Respondent, while waiting in the lobby, noticed he had missed calls from his girlfriend and brother and determined it concerned his grandmother. (Tr. at 171). Based on these calls, Respondent decided he had to leave, advised the collector of the situation, and asked for guidance. (Tr. at 197). The collector told Respondent leaving the facility would constitute a refusal, but did not know if it would have an impact on his license. (Tr. at 197, 202). Respondent then left the facility before providing a sample.

Upon review of these facts, I conclude the Coast Guard **PROVED** Respondent refused a pre-employment drug test by leaving the Testing Facility after the commencement of the test but before the test was complete. 49 C.F.R. § 40.191(a)(2). As made clear by Appeal Decision 2656 (JORDAN) (2006), refusal of a pre-employment drug test is misconduct under 46 U.S.C. § 7701(1)(B) and 46 C.F.R. § 5.27. Having found the Coast Guard proved a prima facia case of refusal to take a pre-employment drug test, I now turn to Respondent's defenses.

D. Respondent's Defenses

As noted above, Respondent did not file a post-hearing brief. Respondent did, however, raise two arguments in his defense at the hearing: 1) Respondent did not think he would lose his license and that he thought he could leave before the Testing Facility completed the testing; and 2) he left the facility because his grandmother is "85 years old and has health issues. That's my

[3] To be clear, Mr. Garza did not testify that he could tell the exact temperature of a urine specimen. However, he did testify that once the test strip indicated the sample was out of range, he could tell if that sample was too high or too low by touching the container.

reason that I got up, that's the reason I left." (Tr. at 197; Tr. at 202). I briefly address both arguments.

1. Respondent's Assertion He Did Not Know Leaving the Facility Before Completing the Test Would Affect his License

Respondent first argues he did not know he could lose his license if he left the testing facility on September 24, 2019. Respondent further implied he thought leaving the facility would only affect his success at getting a job with Atlas. I find this defense meritless.

Even assuming Respondent set forth convincing evidence he was unaware leaving the facility could affect his license, this would not defeat a refusal charge under 49 C.F.R. § 40.191(a)(2). Nothing in pertinent CDOAs or the regulations places a burden on the Coast Guard to prove after a Respondent has commenced a drug test, he must also be aware that leaving the facility before completing the test could affect his license. There simply is no requirement to prove this knowledge. Cf. Appeal Decision 2675 (MILLS) (2008) (noting the Coast Guard must prove it complied with 49 C.F.R. §§ 40.193(b)(1) & (2), which include advising Respondent that he should drink water and has three hours to provide a sufficient specimen). Moreover, credible testimony shows Respondent was directly advised if he left the facility it would be considered a refusal.

Accordingly, to the extent Respondent argues his lack of knowledge somehow defeats the Coast Guard's claim, I disagree. However, as explained below, I do agree this may be a mitigating factor when considering sanction.

2. Respondent's Argument that Phone Calls Related to his Grandmother Should Somehow Have Permitted him to Leave the Facility

Respondent's next argument is equally meritless. Respondent implied during the hearing his duties as a caregiver for his grandmother, and the contacts from his girlfriend and brother required him to leave the facility. (Tr. at 175, 181, 202). First, Respondent provided no evidence that any actual emergency existed. Accordingly, to the extent Respondent argues he

should be excused from remaining at a testing facility until completion of a test because of an emergency, it is rejected. Even assuming arguendo that such a rule should be fashioned, there simply is no evidence that an emergency existed in this case.

Moreover, even if this case included facts proving a family emergency did arise, that would not defeat the Coast Guard's case of misconduct by refusal. Nothing in the regulations nor pertinent CDOAs indicate an emergency would excuse a mariner from completing a drug test. The regulations are clear when a Respondent may leave a pre-employment drug test—before the test commences. The regulations provide no other situation allowing a Respondent to leave the testing facility and it not constitute a refusal. 49 C.F.R. § 40.191(a)(2). Accordingly, even if evidence existed in this case that an emergency arose making it somehow understandable that Respondent should leave, it does not excuse Respondent's conduct. However, as set forth below, I find this information could be relevant and mitigating when considering the appropriate sanction.

IV. SANCTION

The imposition of a sanction at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. §§ 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). When the Coast Guard alleges refusal of a chemical drug test, the ALJ may impose a sanction at a maximum of 24 months, without aggravating evidence. 46 C.F.R. § 5.569. As explained by the National Transportation Safety Board (NTSB) in USCG v. MOORE, 2005 WL 2119329 (2005), revocation for misconduct is only permitted where aggravating circumstances exist.

Title 46 C.F.R. § 5.569 sets forth a table of recommended sanctions, and suggests a 12-24 months suspension for chemical test refusal when the Coast Guard alleges violation of a regulation. The table indicates when plead as misconduct, however, the appropriate sanction is 1-3 months suspension for failure to comply with U.S. law or regulations. A review of the Complaint shows the Coast Guard plead this case as misconduct, not violation of a law or

regulation. However, the Coast Guard does not ask for the correlating 1-3 months suspension, and instead asks for revocation. Regardless, I am not bound by the Coast Guard's recommendation. As noted by the Commandant, the imposition of a sanction is within the province of the ALJ. Appeal Decision 2362 (ARNOLD) (1984). 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 appropriate sanction for a particular offense is dependent on the type and circumstances of the offense. 46 C.F.R. § 5.569. Ultimately, to determine an appropriate sanction, the regulations instruct the ALJ to consider: (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. 46 C.F.R. § 5.569(b).

Here, the record shows little evidence concerning factors 1 and 2; neither party provided evidence of remedial actions nor Respondent's prior record. Conversely, the Coast Guard does make arguments concerning factor 3. Specifically, the Coast Guard asserts this case is aggravated because Respondent initially produced a "hot" urine sample, which, in their view necessarily means Respondent tampered with the sample. In support of their argument, the Coast Guard relies on testimony from the collector, Mr. Garza, who asserted the only way a urine sample could be over 100° F is through tampering of some sort by Respondent. (USCG Brief at 20-21). In Mr. Garza's opinion, the human body could not produce urine above 100° F. (Tr. at 78-82).

I am not persuaded by the Coast Guard's argument. First, the Coast Guard did not provide sufficient, persuasive evidence supporting the conclusion the human body cannot produce urine over 100° F. I recognize that Mr. Garza testified directly on the subject, but I

conclude he is not qualified as a physician or some other expert cognizant to testify about how the human body may or may not cause urine to read above 100° F.

Second, even had the Coast Guard produced an expert that testified the human body cannot produce a sample over 100° F, the Coast Guard's argument would still fail under the regulations. As noted in 49 C.F.R. § 40.65, if a specimen is out of range, too hot or too cold, the collector must conduct a second test, but this time under direct observation. This implies there will be cases where the person's urine simply reads out of temperature range, hot or cold. It is clear the regulations draw no automatic conclusion that the testing subject has adulterated/modified the sample if it reads out of range. And when a specimen is out of range, the regulations direct the collector to ensure the reading is not the result of tampering by conducting a second test. To accept the Coast Guard's argument, and infer a hot sample automatically means tampering, would totally obviate the need for a second test under observation. Accordingly, I find the Coast Guard did not prove any aggravating circumstances in this case.

Conversely, I do find some mitigation in the record. Here, the record shows when Respondent left the facility, he did not understand the regulations concerning refusals and did not realize that it could have an effect on his MMC, though he made inquiries to the collector. In that sense, Respondent was confused about his obligation to remain at the testing site during the shy bladder procedures; again, he only thought it might affect his employment prospects with Atlas. Thus, Respondent had a mistaken belief that his leaving the facility would not affect his license.

As noted in USCG v. Boudreaux, the Commandant agrees a good faith, though mistaken, misreading of a regulation is mitigating. Appeal Decision 2723 (BOUDREAUX) (2019) (where the mariner testified he did not believe he had to subject himself to procedures he deemed were unlawful, so he refused to submit to a chemical test). Like Boudreaux, Respondent was

confused—neither mariner realized the ramification of their refusal to test. Accordingly, I find this misunderstanding somewhat mitigating. Appeal Decision 2723 (BOUDREAUX) (2019).

With regard to Respondent's excuse for leaving the Testing Facility, I agree that an emergency does not totally excuse a mariner from completing a drug test that has already commenced. However, I recognize there are cases where a mariner might face an emergency situation where no reasonable person would remain at the testing site, no matter the stage of the test, e.g., a death in the family or serious injury to a loved one. These situations, which should be considered on a case by case basis, may merit a lesser sanction, particularly where a Respondent can show the emergency was real, and the departure was necessary. That is not what we have here. In this case, Respondent simply indicated he left because he thought the calls from his girlfriend and brother related to his grandmother's health. He provided no evidence that any real emergency existed. Without this evidence, Respondent's explanation is not a mitigating factor. I reiterate, there may be cases where such an emergency may merit mitigation, but it is not this case.

As noted above, when aggravating factors are present, the ALJ may increase the sanction up to and including revocation. See Appeal Decision 2702 (Carroll) (2013). However, unlike Carroll, there is no evidence in this case showing facts such as Respondent utilized a device to deliver a substituted sample, or other aggravating facts, which would merit a high-end sanction of 24 months.

Accordingly, after considering all facts and the record as a whole, I find a 12-months suspension appropriate in this case.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, Respondent's MMC [redacted] and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent are **SUSPENDED** for 12 months.

IT IS FURTHER ORDERED, upon service of this Order, Respondent shall within 5 days surrender his credentials and all other valid licenses, documents, and endorsements issued by the Coast Guard to the United States Coast Guard, Mr. Paul Lonardo, USCG Sector Houston/Galveston 13411 Hillard Street, Houston, Texas 77034. The Coast Guard shall retain the MMC during the period of suspension. **PLEASE TAKE NOTICE**, pursuant to 33 C.F.R. § 20.904 and/or 46 C.F.R. § 5.901, Respondent may file a motion to reopen this matter. The filing of a motion to reopen the record of a proceeding does not affect any period for appeals.

PLEASE TAKE FURTHER NOTICE, service of this Decision 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.

Brian J. Curley
Administrative Law Judge
U.S. Coast Guard

Date: June 14, 2021

ATTACHMENT A
NOTICE OF APPEAL RIGHTS

33 CFR 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.

33 CFR 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.

33 CFR 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;
(j) Reasons supporting the appeal; and
(k) 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.

33 CFR 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.