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

UNITED STATES COAST GUARD

Complainant

vs.

SIMONE JOYCE SOLOMON

Respondent

Docket Number: 2012-0351
Enforcement Activity Number: 4405978

COMPLAINANT'S APPELLATE BRIEF

July 15, 2013

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I. Bases of Appeal[1]

1. The ALJ abused his discretion and issued a decision not in accord with the law and Commandant precedent, when he failed to revoke the credential of a mariner who fraudulently substituted her urine specimen in a Coast Guard required drug test.

2. The ALJ's decision to merely suspend the credential of a mariner who attempted to defraud the Coast Guard drug-testing program does not promote safety at sea and violates public policy.

II. Facts

Respondent was working aboard the vessel *Alliance Charleston*. On July 2, 2012, while in port in Jebel Ali, United Arab Emirates, Respondent was ordered by her marine employer to submit to a random drug test in accordance with the testing requirements in 46 C.F.R. Part 16.[2] Respondent reported to the testing facility and provided a specimen to the collector. The collector followed the procedures outlined in 49 C.F.R. Part 40 during the collection process. The Respondent's specimen was sealed and the Custody and Control Form was signed by the Respondent.

MEDTOX, a SAMSHA certified laboratory, conducted chemical testing on Respondent's specimen. MEDTOX created three aliquots from the specimen. The initial test yielded a creatinine value of 1.4 mb/dL. The confirmatory test yielded a creatinine value of 1.3 mb/dL and a specific gravity measurement of 1.0223. A third test yielded a specific gravity measurement of 1.0223. Based on those measurements, MEDTOX concluded the specimen was substituted as required by 49 C.F.R. Part 40.93(b).[3]

Dr. Hani Khella, the Medical Review Officer, verified the Respondent's specimen as substituted. When the MRO contacted the Respondent, the Respondent explained that she took blood pressure medication, diuretic pills, and vitamins. After considering the Respondent's explanation, the MRO concluded that it is not

[1] The issues presented in this appeal are identical to the issues presented in USCG v. Carroll (Docket Number 2010-0575), filed on March 15, 2012. As of the time of this writing, that appeal has not been decided.

[2] ALJ Decision and Order dated May 15, 2013 (D&O) at p. 4- ALJ Finding of Fact ("FOF") No. 3; D&O at p. 18- Ultimate FOF and Conclusions of Law No. 3. (For the purposes of this appeal, the facts are based upon the ALJ's findings of fact contained within the Decision and Order below).

[3] 49 C.F.R. 40.93(b) reads: "As a laboratory, you must consider the specimen to be substituted when the creatinine concentration is less than 2 mb/dL and the specific gravity is less than or equal to 1.0010 or greater than or equal to 1.0200 on both the initial and confirmatory creatinine tests and on both the initial and confirmatory specific gravity tests on two separate aliquots.

physiologically possible to produce the creatinine and specific gravity values present in the Respondent's specimen. Consequently, the test result was reported substituted.

Sanction Imposed by the ALJ

The Coast Guard charged the Respondent with one count of misconduct and requested a sanction of revocation. A hearing was convened with both parties providing evidence and argument. Ultimately, the ALJ found the charge proved and suspended Respondent's credential for a period of fourteen months – the lower end of the applicable range in the sanction table. Under the current suspension Respondent will have her valid Coast Guard credential returned to her without having to undergo any drug treatment and without requiring Respondent to submit to a single drug test. She will also not be required to take the test the ALJ found she substituted. There is no remedial component to this Coast Guard action—other than the passage of time.

III. Discussion

A. The ALJ's Order of a fourteen month suspension does not promote safety at sea and violates Commandant policy and guidance regarding sanction for drug-test refusals.

1. Coast Guard Policy before the NTSB "Moore" Decision

"The purpose of suspension and revocation proceedings is to promote safety at sea." 46 USC § 7701. The service of mariners who attempt to subvert the drug testing process is not compatible with safety at sea. See Appeal Decision 2694 (LANGLEY) (2011). Prior to 2005, the Coast Guard had "a policy of automatically supporting revocation in every case when a mariner refused to submit to a random drug test." See Commandant v. Moore, NTSB Order No. EM-201 (2005). In promulgating this policy the Vice Commandant observed that "if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested." Appeal Decision 2578 (CALLAHAN) (1996). In the Coast Guard Appeal Decision in MOORE, the Vice Commandant noted that if a sanction less than revocation were imposed in a refusal case "the intent of the Coast Guard's drug testing regulations would undoubtedly be thwarted." Appeal Decision 2652 (MOORE (2005), modified by Commandant v. Moore, NTSB Order No. EM-201 (2005). While the Commandant dealt with refusals in those cases, the same logic should be applied to substitution cases. A mariner that subverts the testing process by substituting their own urine for a synthetic substance is refusing to participate in the drug testing process.

2. The MOORE Decision

In 2005, the NTSB issued a decision in a case involving a mariner found to have refused to submit to a required drug test. Commandant v. Moore, NTSB Order No. EM-201 (2005). In that case, the Coast Guard ALJ revoked the mariner's license without articulating any aggravating factors related to the refusal. The Vice Commandant upheld the revocation. On appeal from the Vice Commandant's decision, the NTSB wrestled with the sanction issue. On the one hand the Coast Guard policy of supporting revocation in all refusal cases was sensible. It was also a policy the NTSB itself had previously enforced. See Administrator v. Krumpter, NTSB Order EA-4724 (1998) (noting that revocation should be the "predictable consequence" of a refusal to test). On the other hand, the Coast Guard's sanction guidance set the appropriate sanction for refusal, absent aggravation or mitigation, as a suspension of between twelve and twenty-four months. 5 C.F.R. Table 5.569. In Moore, the NTSB ultimately held that the sanction of revocation was improper because the ALJ had not articulated aggravating factors. The NTSB upheld the Commandant's overall decision, but because of the absence of aggravating factors, modified the sanction to a twenty-four-month suspension. If the ALJ had articulated an aggravating factor, the revocation sanction would have been upheld by the NTSB.

3. Moore's Impact on Coast Guard Policy and This Case

Before the NTSB decision in Moore, the Commandant considered revocation to be the appropriate sanction in refusal cases. See Appeal Decisions 2652 (MOORE) (2005), 2624 (DOWNS) (1999), 2578 (CALLAHAN) (1996). The NTSB decision in Moore curtailed that policy thus making revocation the appropriate sanction only in cases where aggravating factors were present. The question here is: how much of the Coast Guard's pre-Moore revocation policy survives the NTSB decision in Moore? The answer appears to depend on whether there are aggravating factors present. In cases where there are no aggravating factors, the NTSB decision in Moore clearly controls and revocation is inappropriate. In cases where there is one or more aggravating factor, the NTSB's restriction on the revocation policy of the Coast Guard would be inapplicable and the Commandant's view on this issue pre-Moore would control.

Substitution of a urine sample is a *per se* aggravating factor. When a mariner attempts to thwart the drug test by substituting their urine sample, they are consciously acting to deceive the marine employer and the Coast

Guard. In this case, the ALJ should have recognized that deception and clearly articulated it as an aggravating factor. The failure to do so is an abuse of discretion.

Because of this clear aggravating factor, the NTSB's holding in Moore restricting the Coast Guard's revocation policy in refusal cases does not apply. And because the NTSB only modified the Coast Guard's pre-Moore revocation policy, the elements of the policy unmodified by the NTSB remain intact. The Vice Commandant's guidance in Moore-- that a sanction less than revocation would thwart the intent of the Coast Guard's drug testing regulations-- is unaffected by the NTSB's Moore decision. The NTSB merely modified the Vice Commandant's decision on sanction and held that the Coast Guard could not enforce a revocation policy in cases where there were no aggravating factors. When a Commandant decision is modified, the principles and policies not modified remain binding. See Appeal Decision 2639 (HAUCK) (2003) citing to Appeal Decision 2272 (PITTS), modified by Commandant v. Pitts, NTSB Order EM-98 (1983); Appeal Decision 2514 (NILSEN) (1990) citing to Appeal Decision 2181 (BURKE), modified by Commandant v. Burke, NTSB Order EM-83 (1980); see also Appeal Decisions 2110 (HARRIS) and 2181 (GILBERT) (citing to Appeal Decisions 1858 and 2021, respectively- both "modified" by the NTSB). Therefore, the "principles and policies enunciated" by the Vice Commandant in MOORE remain binding on Administrative Law Judges under 46 C.F.R. § 5.65, except in cases where there are no aggravating factors.

In Moore, the NTSB was faced with competing guidance. The NTSB did not take issue with the Coast Guard's assertion that a refusal thwarted the intent of the drug-testing regulations (i.e., the guidance in MOORE and other CDOAs). The NTSB only found that, the express guidance in the Coast Guard's sanction table outweighed the revocation policy previously endorsed by the Commandant. Because there is a clear aggravating factor in this case, the ALJ was unrestricted by the sanction Table at 5 C.F.R. 5.569 ("Table"). Because there was a clear aggravating factor allowing deviation from the regulatory sanction guidelines, the ALJ was required to abide by the Commandant's guidance in MOORE.[4] That guidance makes revocation the only proper sanction for this case.

[4] In the D&O the ALJ appears to fault the Coast Guard for citing to the Vice Commandant's decision in MOORE. D&O at 25, n. 15. This seems based on the ALJ's belief that the NTSB "overturned" the Vice Commandant's decision. It did not.

Revocation in this case is also called for under the Commandant's guidance in Appeal Decision 2578 (CALLAHAN) (1996). In CALLAHAN, revocation was deemed the proper sanction where the factors considered "raise a serious doubt about a mariner's ability to perform safely and competently in the future." Respondent's actions in this case go well beyond raising such "doubt." While the ALJ's suspension Order could be seen as within his discretion under the sanction guidelines, where possible, a sanction must also be consistent with the intent of the Coast Guard's drug-testing regulations. The Vice Commandant in CALLAHAN made it clear that when a mariner refuses a drug test, revocation is the sanction that carries out the intent of the Coast Guard's drug-testing regulations. The Commandant's previous, clear guidance favoring revocation for a mariner's refusal to take a drug test is a binding principle to which the ALJ was required to adhere. 46 C.F.R. § 5.65.[5] Because a revocation would have comported with both the sanction guidelines and the intent of the Coast Guard's drug testing regulations as explained in CALLAHAN, revocation was required. See Id. The ALJ does not have the latitude to disregard binding principles in Commandant Appeal Decisions in favor of his own discretion.[6] Id.

Commandant and ALJ Decisions Post-Moore

Both the regulations and Commandant policy should be interpreted and applied to "promote uniformity in orders rendered." See 46 C.F.R. § 5.569(d). Since the NTSB Decision in Moore, Coast Guard ALJs have ordered revocation in every refusal case with a clear aggravating factor and no mitigation.[7] See e.g. Appeal Decision 2694

The NTSB modified the Commandant Appeal decision on sanction. In that respect, Moore only affects cases in which there are no aggravating factors. To apply Moore to the facts of this case is to over-read Moore.

[5] The precedential binding authority of 46 C.F.R. § 5.65 is very broad. It states that the ALJ is bound by "the principles and policies enunciated" in Commandant Decisions; not merely the holdings of those decisions.

[6] The ALJ does not explain his decision to select a sanction from within the Table at 5.569 ("the undersigned finds a sanction within the Table guidelines appropriate."). D&O at 25. There is no explanation of why the ALJ believes that a sanction from the Table is appropriate, given that 5 C.F.R. § 5.569(d) states that a sanction from the Table is "considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation" (emphasis added).

[7] The D&O refers to three post-Moore ALJ decisions to support the proposition that "ALJs frequently follow the sanction guidelines for refusal cases" to impose a sanction less than revocation. D&O at 25. In each of those three cases, there were no aggravating factors found by the ALJ. Under Moore, those ALJs were required to impose sanctions within the guidelines. This case is the exact opposite of those cases. Here, the ALJ specifically found an aggravating factor involving blatant fraud upon the Coast Guard's drug-testing program. See D&O at 25. That other ALJs have complied when compelled to impose sanctions from the Table, in cases involving completely different facts, is not relevant when determining the correct sanction under these facts.

(LANGLEY) (2011); Appeal Decision 2690 (THOMAS) (2010)[8]; USCG v. Johnson, CG S&R 07-0250 (ALJ D&Os available at http://www.uscg.mil/alj/decisions/).

In LANGLEY, the Vice Commandant upheld the ALJ's sanction of revocation in a refusal case. The ALJ found that the mariner substituted his urine sample in an attempt to cheat the drug test. Because this act involved deception, the ALJ found revocation to be the proper sanction. The ALJ in Langley noted:

> After considering all of the evidence in the record including the fact that a mariner provided a substitute sample in connection with a company ordered random drug test, I find that the aggravating evidence in this case is substantial and outweighs the mitigating evidence by a significant degree. Substitution of a specimen is an intentional act and constitutes a refusal to test. Such interference with the integrity of the testing process creates a risk of an impaired mariner continuing to serve in a safety sensitive position. The drug-testing regulations are designed to minimize use of intoxicants by merchant mariners and to promote a drug free and safe work environment. This goal would be undermined if merchant mariners could either substitute a specimen or refuse to participate in a chemical test and receive a lesser sanction than if they tested positive for a controlled substance. Appeal Decision 2578 (Callahan) (1996); Appeal Decision 2625 (Robertson) (2002). The purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. Based on the evidence of record as a whole, I find that the Coast Guard has provided sufficient evidence of aggravating factors to support exceeding the suggested range contained in the table. Therefore, I find that revocation is the appropriate sanction in this case.

USCG v. Langley, CG S&R 2009-0397, D&O at 8-9.

The ALJ in Langley revoked the mariner's credential after finding one instance of deception and despite the existence of facts in mitigation. Id. at 7-8. In Langley, the mariner's deception "was regarded as a significant aggravating factor in determining [the] sanction of revocation." Id. at 8. In this case, by substituting her urine sample, the Respondent committed a deceptive act. Furthermore, there were no mitigating factors. D&O at 16, Ultimate Findings of Fact 4, 5, & 7; D&O at 25. Additionally, the refusal in Langley was for a non-DOT, company-ordered drug test- not a Coast Guard required test.

The ALJ in Langley is not the only ALJ since the NTSB's Moore decision to determine that a mariner's deceptive acts related to a refusal case warrants revocation. In USCG v. Johnson, the ALJ found Respondent's "mendacity" in failing to appear at the hearing enough of an aggravating factor to warrant revocation. CG S&R

[8] In Thomas, the ALJ revoked the mariner's credential for refusing a drug test and specifically noted the "Respondent's duplicitous behavior relative to the required drug testing." The ALJ also recognized that Appeal Decision 2624 (MOORE) (2005), though "modified" by the NTSB, is still precedent under 5 C.F.R. § 5.65 and appropriately cited to the binding principles and policies therein. See USCG v. Thomas, CG S&R 2008-0554, D&O at 36.

07-0250, D&O at 8. That decision to revoke, even given a relatively benign aggravating factor, is consistent with the Commandant's guidance outlined above. The ALJ's decision to revoke in Johnson is consistent with our assertion that the NTSB Moore decision did not materially alter the Commandant's position on sanction when aggravating factors are found. See USCG v. Johnson, CG S&R 07-0250, citing Appeal Decisions 2624 (DOWNS) (2001) and 2578 (CALLAHAN) (1996).

The ALJ in Johnson found that the "goal [of the Coast Guard's mandated drug-testing regulations] would be severely undermined if merchant mariners could refuse a chemical test and face a lesser sanction than if they tested positive." Johnson D&O at 9. As a consequence, the ALJ in Johnson concluded that revocation was "the appropriate remedy to ensure maritime safety, to guarantee the effectiveness of the drug-testing program, and to prevent potential abuse by [the mariner] in the future." Id. The ALJ in Johnson determined that application of the regulations led to a sanction of revocation-- even in a default case where the only aggravation was the respondent's own mendacity in not appearing at the hearing. If the goal of the regulations is to "promote uniformity in orders rendered," does it make sense to have a sanction scheme in which procedural "mendacity" warrants revocation, but blatant fraud and obstruction does not? Revocation was the appropriate sanction for most refusals before Moore and, for those cases involving aggravating factors-- it still is.

By opting for a sanction less than revocation in a refusal case with a clear aggravating factor, and no mitigating factors, the ALJ disregarded Commandant policy and thwarted the "intent of the Coast Guard's drug testing regulations." An ALJ has a great deal of discretion in selecting an appropriate sanction. But issuing an order that violates Commandant policy and thwarts the intent of Coast Guard regulations is an abuse of this discretion.

B. The ALJ's decision to issue a non-remedial suspension requiring the unconditional and automatic return of a credential to a mariner who fraudulently used a prosthetic device during a Coast Guard required drug test violates public policy.

While we believe that the ALJ's imposition of a sanction less than revocation fails to adhere to Commandant guidance, the ALJ's decision also violates public policy. The purpose of Suspension and Revocation (S&R) proceedings is to promote safety at sea. To accomplish this, the Coast Guard attempts to ensure only safe and suitable mariners receive and retain Coast Guard credentials. In this case Respondent attempted to pass a Coast

Guard required drug test by substituting her urine sample with some unknown substance. In short, Respondent attempted to cheat the testing process. Given this fact, should this mariner have her valid credential automatically returned to her, without taking a single follow-up drug test, after simply sitting out for a suspension period?

To fully address the "public policy" side of this decision, we have to ask ourselves why a mariner would attempt to cheat on a mandated drug test by using a hidden device. The answer here is obvious—a mariner attempts to cheat his way around a drug test because he believes he is going to fail the test. There simply is no other reasonable conclusion to draw from the actions of a mariner willing to go to such lengths to avoid being drug tested. A drug-using mariner selected to provide a sample has choices. She can provide a sample, or she can, as the Respondent did in this case, attempt to cheat the test. Public policy should require that Coast Guard regulations be interpreted in a way as to encourage mariners to take the test. We should not be inviting mariners to defraud the process. [9]

The Coast Guard requires every mariner to pass a drug test before getting or renewing a credential to ensure the mariner is drug free. Returning a Coast Guard credential to a mariner with a proven track record of intentionally trying to thwart the drug-testing process is risky even when that mariner is required to submit to pre-licensing drug testing. Returning a credential to such a mariner without any assurance the mariner is drug free is reckless and most assuredly violates public policy.

IV. Conclusion

The outcome of this case will send a clear signal to Respondent and other mariners tempted to cheat on future Coast Guard drug tests. If the Order below stands, we will be telling drug-using mariners to take their best shot at deceiving the collector or defrauding the testing process. If their subterfuge works, they keep their credential and

[9] If the mariner fails the test and is deemed a user of a dangerous drug, his credential is revoked. After revocation for drug use, the mariner can then enter into a medically-approved program involving treatment and follow-up testing to regain the use of his Coast Guard credential. This is accomplished using an ALJ-approved settlement agreement or through the "administrative clemency" process under 46 C.F.R. § 5.901-.905 These procedures allow the Coast Guard to be assured the mariner is at low risk for continued drug use before returning that mariner to maritime service. Given this Respondent's attempt to defraud the drug-testing process, the ALJ's Order returning Respondent's credential without any assurance that she is drug free is incomprehensible. If such an action is to be sanctioned by the Coast Guard it should come with the Commandant's imprimatur via this appeal decision.

keep sailing. If they get caught, they get a suspension without conditions and the automatic return of their credential. Either result is better than a positive test.

If the ALJ Order is modified to revocation, the Coast Guard will be sending a clear signal that we value the integrity of our drug-testing process and those mariners who use fraud or deceit during the test will have their credentials revoked.

This appeal decision will send a clear signal.

Based upon the foregoing, the Coast Guard respectfully requests the Commandant modify the sanction issued by the ALJ and issue an order revoking Respondent's Coast Guard issued merchant mariner credential.

RESPECTFULLY SUBMITTED by the U. S. Coast Guard, through undersigned Investigating Officer.

For the U.S. Coast Guard

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Date: July 15, 2013