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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	ON APPEAL
	:	NO.
MERCHANT MARINER DOCUMENT	:	2708
Issued to: SIMONE JOYCE SOLOMON	:	

APPEARANCES

For the Government:
CWO Dan Sammons, USCG
LT John D. Nee, USCG
Senior Investigating Officer Mark Gibbs

For Respondent:
Graham W. Syfert, Esq.

Administrative Law Judge: Dean C. Metry

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated May 15, 2013, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard suspended the Merchant Mariner Document of Ms. Simone Joyce Solomon (hereinafter "Respondent") for fourteen months upon finding proved one charge of *misconduct*. The specification found proved alleges that on July 2, 2012, Respondent, while serving as a crewmember aboard the vessel ALLIANCE CHARLESTON, refused a chemical test, in violation of 49 C.F.R. § 40.191(b), by submitting what according to 49 C.F.R. § 40.93(b) was a substituted specimen.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner Document issued to her by the United States Coast Guard. [D&O at 4; Transcript (hereinafter "Tr.") Volume (hereinafter "Vol.") I at 13][1] On July 2, 2012, Respondent was ordered by her employer to take a random chemical test. [D&O at 4; Tr. Vol. I at 13, 80; Coast Guard Exhibit (hereinafter "CG Ex.") 19] Respondent's urine specimen was collected in accordance with procedures in 49 C.F.R. Part 40. [D&O at 4-5; Tr. Vol. I at 30-31; CG Ex. 3, CG Ex.7] The collection took place onboard the vessel ALLIANCE CHARLESTON, in the port of Jebel Ali, United Arab Emirates. [D&O at 4; Tr. Vol. I at 89; CG Ex. 19] On that date, in Jebel Ali, United Arab Emirates, the outside temperature was extremely hot. [D&O at 5; Tr. Vol. I at 43, Tr. Vol. III at 10-11] The collector, Mr. Hualde, was employed by Anderson-Kelly Associates' service provider in the United Arab Emirates, Plastic Powder Coating Company. [Tr. Vol. I at 97] Respondent's employer relies on Anderson-Kelly Associates to meet substance testing requirements. [Tr. Vol. I at 69, 87-88]

Mr. Hualde boxed all of the urine specimens collected on the ALLIANCE CHARLESTON, stored them in an air-conditioned room overnight, and shipped them by courier the next day, July 3, 2012, to Plastic Powder Coating Company. [D&O at 9-10;[2] Tr. Vol. I at 57-58; CG Ex. 20] The record does not establish exactly when the box was received by Plastic Powder Coating Company, but it was received no later than July 7, 2012, when Plastic Powder Coating Company shipped the box by Federal Express from the United Arab Emirates to Anderson-Kelly Associates in Mount Olive, New Jersey. [Tr. Vol. I at 92-93; CG Ex. 21] Ms. Erin Beller of Anderson-Kelly Associates received the box of urine specimens on July 10, 2012. [Tr. Vol. I at 96-97; CG Ex. 21] She stored the specimens in her office until they were released to the courier. [Tr. Vol. I at 95]

Ms. Beller shipped the box of urine specimens to MEDTOX, a laboratory in St. Paul,

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[1] The transcript of the part of the hearing held on January 15, 2013, is broken into two volumes, but is numbered consecutively from page 1 to page 328. The transcript of the part of the hearing held on January 16, 2013, is in one volume, numbered from page 1 to page 209.

[2] The ALJ's D&O conflates the actions of the courier and Plastic Powder Coating Company. The record shows that Mr. Hualde transferred the box of samples to the courier on July 3, 2012, and the box was received by Plastic Powder Coating Company in the United Arab Emirates, which then shipped the box to Anderson-Kelly Associates in the United States. [CG Ex. 20 and CG Ex. 21]

Minnesota, later in the same day that she received it. [D&O at 5; Tr. Vol. I at 110-11] MEDTOX conducted the chemical testing of Respondent's urine specimen. [D&O at 5; Tr. Vol. I at 124-35; CG Ex. 8, CG Ex. 10, CG Ex. 19] MEDTOX received the box of urine specimens on July 11, 2012. [CG Ex. 19] There was no evidence presented that the box of urine specimens was exposed to extreme or even unusual heat while it was in the custody of Mr. Hualde, the courier in the United Arab Emirates, Plastic Powder Coating Company, Federal Express, Anderson-Kelly Associates, the shipper used by Anderson-Kelly Associates, or MEDTOX laboratory. From the time the box of urine specimens left the custody of Mr. Hualde on July 3, 2012, until it was delivered to Ms. Beller on July 10, 2012, the evidence merely shows that the box was in transit within the United Arab Emirates and from the United Arab Emirates to the United States.

At the MEDTOX laboratory the initial specimen validity testing of Respondent's urine specimen showed a creatinine concentration of 1.4 mg/dL. [D&O at 6; Tr. Vol. I at 143-45, 147; CG Ex. 19] Subsequent confirmatory testing showed a specific gravity of 1.0223 on one aliquot, and a specific gravity of 1.0223 and a creatinine concentration of 1.3 mg/dL on another aliquot. [D&O at 6; Tr. Vol. I at 144-145; CG Ex. 19] In accordance with 49 C.F.R. § 40.93(b), the laboratory was required to consider the specimen to be substituted, because the creatinine concentration was below 2 mg/dL and the specific gravity was greater than 1.0200. [D&O at 6; Tr. Vol. II at 219]

These results were reported to a Medical Review Officer, Dr. Hani Khella, who spoke to Respondent by telephone, determined there was no legitimate medical reason for the abnormal results, and verified that the urine specimen was substituted. [D&O at 6-7, 10; Tr. Vol. II at 219-23, 225; CG Ex. 13, CG Ex. 14, CG Ex. 15, CG Ex. 17] Submission of a substituted urine specimen is considered a refusal to test. 49 C.F.R. § 40.191(b).

PROCEDURAL HISTORY

The Coast Guard issued its Complaint against Respondent's Merchant Mariner Document on August 10, 2012. On the same date, Respondent filed her Answer to the Complaint, wherein she admitted the jurisdictional allegations, denied seven of the nine factual allegations, and requested a hearing.

The hearing was held on January 15-16, 2013, at Jacksonville, Florida. Respondent was represented by counsel. At the hearing, the Coast Guard presented the testimony of five witnesses and offered eighteen exhibits, all of which were admitted into the record. Respondent presented the testimony of three witnesses and offered seven exhibits, all of which were admitted into the record. Two exhibits related to discovery were admitted as ALJ exhibits.

Both Respondent and the Coast Guard made oral closing arguments and waived the opportunity to submit closing briefs. The ALJ issued his D&O on May 15, 2013.

Both Respondent and the Coast Guard filed their Notices of Appeal on June 6, 2013. Respondent perfected her appeal by filing her Appeal Brief on June 8, 2013. The Coast Guard perfected its appeal by filing its Appeal Brief on July 15, 2013. Both appeals are properly before me.

BASES OF APPEAL

Both Respondent and the Coast Guard appeal from the ALJ's D&O. Respondent raises the following bases of appeal:

I. *Discovery Violations;*

II. *Urinary creatinine degrades at temperatures below 300 degrees Centigrade; and*

III. *The charging document was insufficient.*

The Coast Guard simultaneously appeals and raises the following bases of appeal:

I. *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; and*

II. *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.*

OPINION

RESPONDENT'S APPEAL

I.

Discovery Violations.

Respondent asserts in her Appeal Brief that the Coast Guard committed a discovery violation when it failed to notify her counsel before trial that Dr. Khella, the Medical Review Officer, had additional telephone conversations concerning Respondent's substituted urine specimen test result, which Dr. Khella recorded, after his initial unrecorded telephone conversation with Respondent. [Respondent's Appeal Brief at 3-5] Respondent asserts that following the initial telephone conversation between Dr. Khella and Respondent, there were two additional telephone conversations that were recorded, one between Dr. Khella and a union doctor and one between Dr. Khella and Respondent. [*Id.*] Respondent asserts that the ALJ committed error by denying discovery of the recording of the telephone conversation with the union doctor, and by relying on the Coast Guard's denial of the existence of a third telephone conversation or the Coast Guard's failure to address the third phone conversation. [*Id.*] Respondent argues that the telephone recordings would have supported her claim that Dr. Khella never advised her of the opportunity to have her specimen retested. [*Id.* at 3]

Respondent does not assert that the Coast Guard failed to comply with the requirements of 33 C.F.R. § 20.601(a)(1) to name Dr. Khella as a witness at the hearing, and to provide a summary of his expected testimony. Respondent admits that she also received Coast Guard Exhibit 15, which was a script that Dr. Khella testified he used in his initial telephone conversation with her. Respondent's Appeal Brief at 3. The ALJ rejected Respondent's allegation that Dr. Khella did not offer her the opportunity to have her specimen re-tested, concluding that ". . . Dr. Khella credibly testified that when he calls donors he reads from a standard MRO interview script, informing each donor he or she has up to seventy-two (72) hours to request the split specimen be tested at another laboratory. (Tr. Vol. II at 220)(CG Ex.15)." [D&O at 11 n. 3]

I see no basis to find that the Coast Guard violated applicable discovery requirements or that the ALJ erred in failing to order further discovery regarding Dr. Khella and his telephone

conversations concerning Respondent's substituted urine specimen test results. The record does not support Respondent's assertion that there were three telephone conversations. Rather, the evidence shows that there were only two telephone conversations concerning Respondent's substituted urine specimen test results. In the first, Dr. Khella spoke with Respondent, following his MRO interview script. [D&O at 7, 11 n.3; Tr. Vol. II at 220-23; CG Ex. 15] That telephone call was not recorded. [Tr. Vol. II at 242] In the second telephone call, Dr Khella spoke to Respondent and a doctor who was representing her, at the same time. [Tr. Vol. II at 267-68, 271] That telephone call was recorded.[3] [Tr. Vol. II at 243, 268, 270-71]

Shortly before her hearing, Respondent submitted a request for further discovery. Among other things she requested the audio recording of Dr. Khella's telephone conversation with her. The request was made in connection with Respondent's assertion that she was not given notice of her opportunity to have the specimen re-tested, and the Coast Guard's position that Dr. Khella used a script to provide the notice about re-testing. The ALJ found that the motion for further discovery was deficient and denied it. At the hearing, on January 16, 2013, following the testimony of Dr. Khella and Respondent, the ALJ initiated another discussion of Respondent's request for the audio recording. [Tr. Vol. III at 58-60] The discussion makes it clear that the ALJ and the Coast Guard understood that Respondent was requesting a recording of the initial telephone conversation between Dr. Khella and Respondent. [*Id.*] The ALJ considered the issue moot, because Dr. Khella and the Coast Guard maintained that there was no audio recording of the initial telephone conversation. [*Id.*] Although that discussion included references to the second telephone conversation, which was recorded, Respondent and her counsel did not raise any objection to the ALJ's treating the discovery request as limited to the initial telephone conversation. [*Id.*]

Accordingly, I find that there was no error in the ALJ's finding that there was no audio recording of the initial telephone conversation, I find that the ALJ properly treated Respondent's request as being limited to the initial telephone conversation, and I find that Respondent waived any argument that her request included the audio recording of the other telephone conversation,

[3] The record shows that this second telephone conversation was unlikely to be relevant to the issue of whether Respondent was notified of her opportunity to have her urine sample re-tested. Dr. Khella testified that he did not address the opportunity to re-test in the second telephone conversation because the seventy-two hours during which that opportunity was available had passed. [Tr. Vol. II at 271]

when she did not address that during the discussion of the request at the hearing. Substantial evidence supports the ALJ's finding that the initial telephone conversation was not recorded. Any suggestion in Respondent's Appeal Brief that her request for the audio recording should have been treated as including the recording of the second telephone conversation is not supported by the record.

Discovery in a case such as this is governed by 33 C.F.R. Part 20, Subpart F. Nothing in 33 C.F.R. Part 20, Subpart F required the Coast Guard to notify Respondent of the second telephone conversation among Dr. Khella, Respondent, and a doctor representing her. Moreover, it appears that Respondent should have been aware of this second telephone conversation, because she was a participant in the conversation. There is no merit in Respondent's first issue on appeal. The Coast Guard committed no discovery violation, and the ALJ did not err in finding that Respondent's request for an audio recording of Dr. Khella's initial telephone conversation with her was moot.

II.

Urinary creatinine degrades at temperatures below 300 degrees Centigrade.

In her second issue on appeal, Respondent challenges the ALJ's reliance on testimony that creatinine is stable and does not degrade in heat because it has a melting point of 300 degrees Celsius. [Respondent's Appeal Brief at 6-7] She asserts that it was an abuse of discretion for the ALJ to accept the testimony of Dr. Khella as more knowledgeable and credible than the testimony of Dr. Syfert and Dr. Logan, on the subject of the effect of heat on creatinine in urine specimens. [*Id.* at 10] Respondent also requests that a scientific expert be appointed as *amicus curiae* to provide additional testimony on the subject of the effect of heat on creatinine in urine specimens. [*Id.* at 1-2]

The relevance of the effect of heat on creatinine in urine specimens arises from the fact that Respondent's urine specimen was collected when the outside temperature was extremely hot. At her hearing, Respondent attempted to establish a legitimate medical explanation for the laboratory report of a substituted specimen by asserting that her urine specimen was exposed to extreme heat

during its transport and storage, prior to being tested at the laboratory, which could have caused the abnormally low creatinine concentration in her specimen. [D&O at 11]

I agree with Respondent's argument that there is reason to doubt the testimony of Dr. Khella, to the extent that he suggested that creatinine in a urine specimen would not degrade at temperatures below 300 degrees Celsius. The 300 degrees Celsius melting temperature stated by Dr. Khella, by its terms, evidently relates to crystalline creatinine, rather than creatinine in solution, as it exists in a urine specimen. The record does not establish and it cannot be assumed that the 300 degree Celsius melting temperature has any relevance to the issue of the heat stability of creatinine in urine, and the ALJ should not have given it any weight. However, despite that, I find that there is a substantial basis for the ALJ's finding that Respondent failed to establish that possible exposure to extreme heat during the transport and storage of her urine specimen was sufficient to undermine or refute the Coast Guard's *prima facie* case of misconduct. [D&O at 11]

To begin with, there was scant evidence to support Respondent's suggestion that her urine specimen was exposed to extreme heat for any extended period of time during the transport and storage of her specimen before it was tested at the laboratory. Mr. Hualde, the collector, kept the specimens in an air-conditioned room until he released them to his courier, and Ms. Beller kept them in her office until she released them to her courier. The only substantial time during which the transport and storage conditions are uncertain is the period from July 3, 2012, when Mr. Hualde delivered the specimens to his courier for delivery to Plastic Powder Coating Company, and July 10, 2012, when Ms. Beller received the specimens in New Jersey. During that eight-day period, the specimens were in the custody of the courier or Plastic Powder Coating Company in the United Arab Emirates, and Federal Express for transport from the United Arab Emirates to the United States. Respondent speculates that her urine specimen may have been exposed to high temperatures during some or all of that eight-day period.

The regulations in 49 C.F.R. Part 40 do not address the transport and storage of urine specimens, except to require the collector to ensure that the specimens are "shipped to a laboratory as quickly as possible, but in any case within 24 hours or during the next business day." 49 C.F.R. § 40.73(b). For purposes of its *prima facie* case, the Coast Guard only had to prove that the

regulations were complied with. Therefore, the Coast Guard was not required to prove that Respondent's urine specimen was not exposed to high heat during transportation and storage prior to being tested.

The regulations also do not address transport and storage of urine specimens as a basis for finding that there was a legitimate medical explanation for the report of a substituted specimen. They place the burden on the employee to "demonstrate that he or she did produce or could have produced urine through physiological means" that meets the criteria for a substituted specimen. 49 C.F.R. § 40.145(e). Assuming the phrase "produced urine through physiological means" allows a legitimate medical explanation to be based on the transport and storage of the urine specimen, Respondent had the burden to demonstrate that her specimen was exposed to sufficient heat for a sufficient time to cause it to be reported as substituted even though it was produced through physiological means.

Respondent's Exhibit 5 contains the most specific evidence on the issue of the heat stability of creatinine. Respondent's Exhibit 5 is a paper entitled *Urine pH: the Effects of Time and Temperature after Collection*, 31 Journal of Analytic Toxicology 486 (2007). Although primarily concerned with urine pH, the paper also incidentally addresses the heat stability of creatinine. The paper reports that creatinine in a urine specimen was stable at -20, 4, and 25 degrees Celsius. *Id.* at 490. When exposed to temperatures above 25 degrees Celsius for fourteen days, the creatinine concentration in a urine specimen would degrade. *Id.* at 488. Ultimately, however, the paper concludes: "At none of the investigated temperatures were results for urine creatinine concentration or specific gravity obtained that met the reporting criteria of a substituted or dilute specimen." *Id.* at 493. The "investigated temperatures" included up to 93 degrees Celsius. *Id.* That is nearly 200 degrees Fahrenheit. Accordingly, this paper does not support Respondent's argument that her urine specimen may have been reported as substituted because of exposure to heat during transportation and storage before testing. Respondent's Exhibit 5 suggests that if her urine specimen had been produced through physiological means, even exposure to extreme heat

for fourteen days would not cause it to be reported as dilute or substituted.[4]

The evidence shows that Respondent's urine specimen was kept at room temperature, where creatinine is stable, except for a period of eight days when the temperatures to which the urine specimen was exposed are unknown. If exposure for fourteen days at temperatures up to 93 degrees Celsius would not produce a urine specimen that met the reporting criteria for a substituted specimen, or even a dilute specimen, then there is no basis for finding that Respondent's urine specimen was reported as substituted only because it may have been exposed to heat during the eight days it was in the United Arab Emirates or in transit from there to the United States.

The testimony of Respondent's two witnesses, Dr. Syfert and Dr. Logan, which conflicted with that of the Coast Guard's witness, Dr. Khella, on the subject of the heat stability of creatinine, is not so credible or reliable that it could refute or add materially to the results reported in Respondent's Exhibit 5. As discussed above, there is reason to doubt the opinion of Dr. Khella regarding the heat stability of creatinine. Yet Dr. Logan was ultimately uncertain about the effects of heat on the concentration of creatinine in a urine specimen. [D&O at 15-16; Tr. Vol. III at 127-28] Finally, Dr. Syfert was of the opinion that creatinine in an unrefrigerated urine specimen would degrade. [D&O at 15; Tr. Vol. III at 100] However, he was not specific as to the rate at which creatinine would degrade, in relation to any particular temperature or time period. Nor did he explain the basis for his opinion. While it appears true, primarily based on Respondent's Exhibit 5, that the concentration of creatinine in a urine specimen will degrade over time when exposed to temperatures above 25 degrees Celsius, Respondent did not establish that, during the eight days her specimen was in transit and storage, it was exposed to temperatures that would cause the specimen to be reported by the laboratory as substituted. The ALJ correctly found that the Coast Guard proved its case that the urine specimen was properly determined to be substituted, and Respondent's rebuttal evidence concerning the heat stability of creatinine was insufficient to refute the Coast Guard's evidence. [D&O at 11]

Regarding Respondent's request for *amicus curiae,* I find that the request is untimely.

[4] The ALJ found that this study and another offered into evidence as Respondent's Exhibit 4 were not very probative "as Respondent presented minimal testimony as to the significance of the studies and/or how they relate to the instant case." [D&O at 16]

Respondent was afforded her right to a hearing before an impartial ALJ, as required by 46 U.S.C. § 7702(a) and 46 C.F.R. § 5.501. The ALJ closed the record at the conclusion of the hearing, on January 16, 2013. [Tr. Vol. III at 177] Respondent did not move to reopen the record, in accordance with 33 C.F.R. § 20.904. The request for *amicus curiae* was included in Respondent's appeal brief, which was filed on June 8, 2013, well beyond thirty days after the record was closed. Respondent has had her chance to present her case, and she has not shown that further expert testimony is likely to lead to a more favorable result for her.

Accordingly, while Respondent's challenge to Dr. Khella's testimony on the heat stability of creatinine has some merit, I do not find it provides any basis for relief.

III.

The charging document was insufficient.

Before her hearing, Respondent moved that the Complaint be dismissed with leave to amend because the allegations in the Complaint did not include the results of the confirmatory tests for creatinine and specific gravity. [Respondent's Motion for Summary Disposition and Motion to Dismiss the Complaint, dated October 30, 2012, at 5] She argued that because 49 C.F.R. § 40.93(b) requires confirmatory testing in order for a laboratory to report a specimen as substituted or dilute, the Complaint was deficient if it did not allege the results of the confirmatory tests. [*Id.* at 5-6] On November 29, 2012, the ALJ denied the motion to dismiss the Complaint, finding that "the Complaint contains all requisite information and provides Respondent with adequate notice of the actions giving rise to the alleged offense." [Order dated November 29, 2012, at 4-5] Among other things, the Complaint alleged the initial laboratory test results for creatinine and specific gravity, and that the specimen was considered to be substituted in accordance with 40 C.F.R. § 40.93(b); that the Medical Review Officer verified the refusal to test by submitting a substituted sample; and that, in accordance with 49 C.F.R. § 40.191(b), Respondent refused to test in that the Medical Review Officer reported a verified substituted test result. On appeal, Respondent asserts that the ALJ erred in denying her motion to dismiss the Complaint. [Respondent's Appeal Brief at 10-11]

The rules of practice for Coast Guard suspension and revocation proceedings address a motion to dismiss a complaint in these terms:

§ 20.311 Withdrawal or dismissal.

* * *

(d) Any respondent may move to dismiss a complaint . . . or any party may lodge a request for relief, for failure of another party to –

(1) Comply with the requirements of this part or with any order of the ALJ;

(2) Show a right to relief based upon the facts or law; or

(3) Prosecute the proceeding.

(e) A dismissal resides within the discretion of the ALJ.

33 C.F.R. § 20.311 (2012).

The rules of practice address the requirements for a complaint in these terms:

§ 20.307 Complaints.

(a) The complain must set forth --

(1) The type of case;

(2) The statute or rule allegedly violated;

(3) The pertinent facts alleged; and

(4) . . . (ii) The order of suspension or revocation proposed.

(b) The Coast Guard shall propose a place of hearing when filing the complaint.

(c) The complaint must conform to the requirements of this subpart for filing and service.

33 C.F.R. § 20.307 (2012).

Respondent argues that the Complaint did not comply with a requirement of 33 C.F.R. Part 20, because it failed to allege pertinent facts, specifically the results of the confirmatory tests for creatinine and specific gravity performed in accordance with 49 C.F.R. 40.93(b). In denying the motion, the ALJ stated:

> The purpose of a Complaint is to provide a respondent with notice of the actions giving rise to the alleged offense such that a respondent can prepare a defense. The Complaint does not require a recitation of all details surrounding the alleged charge. Appeal Decision 2585 (COULON) (1997). 'The thrust of modern pleading, especially in administrative proceedings, is toward fulfillment of the notice requirement.' Appeal Decision 2326

(MCDERMOTT) (1983).

* * *

The undersigned finds the Complaint contains all requisite information and provides Respondent with adequate notice of the actions giving rise to the alleged offense. As such, the Complaint is not deficient on its face, and the Motion to Dismiss Complaint is **DENIED."**

[Order dated November 29, 2012, at 5]

Dismissal of a Complaint is within the discretion of the ALJ. 33 C.F.R. § 20.311(e). The Complaint provided Respondent with notice that she was charged with refusal to test, based on a verified substituted urine specimen test result. In addition, the Complaint provided details about the employer-directed, random chemical test; the collection of the specimen; and the initial laboratory test results that were verified by the Medical Review Officer as a refusal to test based on a substituted specimen. The ALJ did not abuse his discretion by finding that the Complaint adequately provided Respondent with notice of the actions giving rise to the alleged offense.

It has long been held that the case-in-chief for a suspension and revocation proceeding based on chemical test results must show that applicable regulations relating to the chain of custody and specimen integrity safeguards were followed. *See, e.g.*, Appeal Decision 2555 (LAVALLAIS) (1994). While the Coast Guard must show that applicable regulatory requirements were complied with in its case-in-chief, that does not mean that each such requirement must be alleged in the Complaint. The requirement for confirmatory testing is just one of many requirements for chemical testing included in 49 C.F.R. Part 40. The Complaint alleged that Respondent's refusal to test was with respect to a chemical test ordered by her employer, in accordance with 46 C.F.R. Part 16. The Complaint also cites 49 C.F.R. § 40.93(b) and § 40.191(b) as regulations providing standards for substituted specimens and for a refusal to test. There can be no doubt that Respondent was on notice that her actions giving rise to the alleged charge of misconduct involved chemical testing results and compliance with the chemical testing programs prescribed by 46 C.F.R. Part 16 and 49 C.F.R. Part 40. Respondent also specifically addressed the subject of confirmatory testing at the hearing. [D&O at 11; Tr. Vol. I at 199; Vol. II at 202-03] The Complaint was not deficient, and the ALJ did not abuse his discretion in denying the motion to dismiss the Complaint.

For the reasons discussed above, Respondent's third basis for appeal is rejected.

COAST GUARD'S APPEAL

The two bases for appeal asserted by the Coast Guard were previously addressed in Appeal Decision 2702 (CARROLL) (2013). With respect to the first issue, it was decided that any language in previous Commandant's Decisions on Appeal affirming an ALJ's decision to revoke a mariner's credentials for a refusal to test could not be interpreted to require revocation as a sanction in such cases. *Id.* at 5-6. Applicable regulations authorize the ALJ to decide on a sanction and, where the regulations do not require revocation as a sanction, a Commandant's Decision on Appeal cannot displace the regulation and require the ALJ to order revocation. *Id.* Accordingly, the ALJ's order of a sanction less than revocation is not by itself a basis for finding that the ALJ abused his discretion. *Id.*

With respect to the second basis for appeal, in *Carroll* it was decided that the same basis did not constitute proper grounds for an appeal of the ALJ's decision. *Id.* As in *Carroll*, the record here does not show that the ALJ failed to consider the proper factors, including public policy, that are relevant to a fair and impartial adjudication of the case on its individual facts and merits. The ALJ, among other things, specifically acknowledged that the purpose of the proceeding is "to 'promote, foster, and maintain the safety of life and property at sea.'" [D&O at 18] The ALJ also considered case law submitted by the Coast Guard showing that revocation had previously been imposed in refusal-to-test cases. [*Id.* at 19] Nothing significantly distinguishes this case or the Coast Guard's bases for appeal from Appeal Decision 2702 (CARROLL) (2013). For the reasons discussed in that decision, the Coast Guard's bases for appeal are rejected.

CONCLUSION

The ALJ's ultimate findings and sanction are neither erroneous nor an abuse of discretion. Although I agree with Respondent that testimony about the melting point of crystalline creatinine has little or no relevance to any material issue in this case, any reliance by the ALJ on that testimony did not prejudice Respondent, and no relief is warranted.

ORDER

The ALJ's Decision and Order dated May 15, 2013 is AFFIRMED.

Peter V. Neffenger
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 18 day of MAY, 2015.