

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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
	:	NO. 2685
	:	
	:	
<u>Issued to: WILLIAM S. MATT</u>	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated May 13, 2008, Coast Guard Administrative Law Judge (hereinafter “ALJ”) Bruce T. Smith dismissed the Coast Guard’s Amended Complaint alleging *violation of law or regulation* (for refusal to submit to pre-employment drug testing) against William S. Matt (hereinafter “Respondent”). The ALJ dismissed the Coast Guard’s allegation upon finding that the Coast Guard did not prove, “by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole” that Respondent failed to submit to Coast Guard mandated drug testing. [D&O at 16] The Coast Guard appeals.

PROCEDURAL HISTORY

The Coast Guard filed its original Complaint against Respondent with the Coast Guard ALJ Docketing Center on July 5, 2007. [D&O at 2] Respondent filed an Answer to the Complaint, denying all jurisdictional and factual allegations, on July 24, 2007. A hearing was scheduled to be held in the matter on January 23, 2008. [*Id.*]

The hearing in the matter began on January 23, 2008, at New Orleans, Louisiana but was continued to allow Respondent to confer with newly obtained counsel from Tulane Law School<sup>1</sup>. [D&O at 2-3; Order Granting Respondent's Motion for Continuance]

The hearing in the matter reconvened on April 3, 2008, at New Orleans, Louisiana. [D&O at 3] The Coast Guard introduced the testimony of three witnesses and entered six exhibits into the record during the hearing. [*Id.*; Transcript (hereinafter "Tr.") at 4-5] In addition to testifying on his behalf, Respondent introduced the testimony of one witness and entered five exhibits into the record. [*Id.*]

On June 3, 2008, the Coast Guard filed its Notice of Appeal in the matter. The Coast Guard perfected its appeal by filing an Appellate Brief on July 14, 2008. Respondent filed a timely Reply Brief on August 18, 2008<sup>2</sup>. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented by counsel from the Tulane Law Clinic, Ms. Andrea Wilkes and Ms. Stacy Seicshnaydre Associate Professors, Mr. Greg Euteneir, Mr. Armand Perry, Mr. Jason Kafoury and Mr. Jason Kuczek, Student

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<sup>1</sup> Prior to the scheduled hearing, Respondent expressed a desire to be represented by counsel but informed the ALJ that he was financially unable to secure representation. The ALJ informed Respondent that he might be able to obtain free representation from law students involved with Tulane Law School's legal representation clinic. Subsequently thereafter, students and faculty from the law clinic graciously offered Respondent *pro bono* representation and entered their appearance, on behalf of Respondent, at the start of the previously scheduled hearing.

<sup>2</sup> In his Reply Brief, Respondent contends that this appeal should not be entertained because the Appeal Brief filed by the Coast Guard was untimely. The record shows that the Coast Guard's Appeal Brief was due by close of business on July 14, 2008. The signed Certificate of Service attached to the Coast Guard's Appeal Brief is dated July 14, 2008. The record shows that although the Appeal Brief was faxed to the ALJ Docketing Center at 5:47 p.m., on July 14, 2008, it was not stamped as received by Docketing Center personnel until the following day. Given this evidence, I accept the Coast Guard's Appeal Brief as timely.

Attorneys. The Coast Guard Investigating Officers were LCDR Melissa J. Harper and PO1 Cynthia Dubach of U.S. Coast Guard Sector New Orleans, Louisiana.

### FACTS

This appeal ultimately turns on the factual sufficiency of the ALJ's determination. Therefore, the following summary of facts is based on a review of the entire record before the ALJ. At all times relevant to this proceedings, Respondent was the holder of a Coast Guard issued Merchant Mariner License that authorized him to serve as a master of steam or motor vessel of not more than 100 gross registered tons. [D&O at 4; Coast Guard Exhibit 1, at 6]

On April 13, 2007, Respondent drove approximately five hours from his home in Ferriday, Louisiana, to Phil Guilbeau Offshore, in Galliano, Louisiana, in an attempt to seek employment as a vessel Captain. [D&O at 4; Tr. at 26, 143-45; Coast Guard Exhibit 1] Phil Guilbeau Offshore had employment opportunities, requiring a Coast Guard license, and Respondent filled out an application for such a position with the company. [D&O at 4; Tr. at 26, 147; Coast Guard Exhibit 1] As a condition of employment with Phil Guilbeau Offshore, Respondent was required to submit to and pass a pre-employment drug test that was to be administered at Complete Occupational Health Services, a short distance from Phil Guilbeau Offshore's offices. [D&O at 4; Tr. at 29-30, 35-37, 51, 147]

Respondent arrived at Complete Occupational Health Services at approximately 11:00 a.m. on April 13, 2007. [D&O at 4; Tr. at 149-50] Respondent signed in at Complete Occupational Health Services and waited to take the drug test. [D&O at 4; Tr. at 151]



Ms. Hailey Angelette, who was certified to work as a collector at Complete Occupational Health Services on April 4, 2007, was the person responsible for administering the pre-employment drug test to Respondent. [D&O at 5; Tr. at 60, 62, 110; Coast Guard Exhibit 2] On April 13, 2007, Ms. Angelette filled out a Federal Drug Testing Custody and Control Form (hereinafter "DTCCF") for Respondent. [D&O at 5; Tr. at 63; Coast Guard Exhibits 3, 4a] At the hearing, Ms. Angelette testified that she had no independent recollection of the Respondent's actions on April 13, 2007. [Tr. at 76-77] As a result, Ms. Angelette's testimony was entirely derived from information contained on the DTCCF. [D&O at 5-6; Tr. at 76-77]

To complete the administrative portions of the DTCCF, Ms. Angelette obtained Respondent's social security number and other pertinent information from files that were maintained at Complete Occupational Health Services. [D&O at 5; Tr. at 76-77] Ms. Angelette indicated on the DTCCF that the first urine sample provided by Respondent had no temperature and, subsequently wrote "Donor refused 2<sup>nd</sup> collection/Donor discarded 1<sup>st</sup> sample" on the DTCCF. [D&O at 5; Tr. at 66-68; Coast Guard Exhibits 3, 4a] The DTCCF further indicates that although Respondent discarded his urine sample, that sample was delivered to the testing laboratory by DHL courier. [D&O at 5; Tr. at 106, 114-15; Coast Guard Exhibits 3, 4a]

Complete Occupational Health Services subsequently completed a final report stating that Respondent refused a pre-employment drug test. [D&O at 6; Tr. at 101-02, 107; Respondent's Exhibit A, at 1] Although the final report contained the signature stamp of a Medical Review Officer (hereinafter "MRO"), Ms. Angelette admitted that she completed the form and acknowledged that a MRO did not review it prior to completion.

[D&O at 6; Tr. at 101-02, 107] Complete Occupational Health Services had no documents from April 13, 2007, containing Respondent's signature or indicating that Respondent attempted, in any way, to fake a drug test on that date. [D&O at 6; Tr. at 105, 109] The Coast Guard received Phil Guilbeau Offshore's letter reporting Respondent's alleged refusal to submit to a pre-employment drug test sometime between May 14, 2007, and May 23, 2007. [D&O at 6; Tr. at 134; Respondent's Exhibit C]

### BASES OF APPEAL

This appeal is taken from the ALJ's D&O which dismissed the Coast Guard's Complaint upon finding that the record contained insufficient evidence to support a conclusion that Respondent committed a *violation of law or regulation*. The Coast Guard raises the following bases of appeal:

- I. *The ALJ erred in finding that Respondent left the testing facility prior to commencement of his scheduled pre-employment drug test in violation of 46 U.S.C. § 7703, 46 C.F.R. § 5.33 and 49 C.F.R. § 40.191<sup>3</sup>; and*
- II. *The ALJ erred in finding the DTCCF unreliable in showing that Respondent commenced the test because of insignificant documentation errors in light of a wealth of case law to the contrary.*

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<sup>3</sup> The issue as presented by the Coast Guard in their brief is misleading. The ALJ did not find that Respondent violated 46 U.S.C. § 7703, 46 C.F.R. § 5.33 and 49 C.F.R. § 40.191; indeed, the ALJ found no violation occurred. [D&O at 15-16] The body of the Coast Guard's appeal brief reveals that the issue is more accurately framed as: *The ALJ erred in finding that Respondent left the testing facility prior to commencement of his scheduled pre-employment drug test, thus the Coast Guard met its burden of proof in proving violations of 46 U.S.C. § 7703, 46 C.F.R. § 5.33 and 49 C.F.R. § 40.191*. I will frame the issue in this manner hereinafter in this decision.

Opinion

## I.

*The ALJ erred in finding that Respondent left the testing facility prior to commencement of his scheduled pre-employment drug test, thus the Coast Guard met its burden of proof in proving violations of 46 U.S.C. § 7703, 46 C.F.R. § 5.33 and 49 C.F.R. § 40.191.*

On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. *See* 46 C.F.R. § 5.701 and 33 C.F.R. § 20.1001. Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence. The ALJ's findings of fact and determinations in this regard will not be disturbed and will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence. Appeal Decisions 2541 (RAYMOND) (citing Appeal Decisions 2522 (JENKINS), 2492 (RATH), and 2333 (ALAYA)). *See also* 2628 (VILAS) ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious."). The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. Appeal Decisions 2395 (LAMBERT) and 2282 (LITTLEFIELD).

The requirements and procedures for pre-employment drug testing are set forth in 49 C.F.R. § 40.1 *et seq.* While it is true, as the Coast Guard contends, that 49 C.F.R.



§ 40.191(a)(2) mandates that the employee remain at the testing facility until the testing process is complete, the regulation makes clear that “an employee who leaves the testing site before the testing process commences (see § 40.63(c)) for a pre-employment test is not deemed to have refused to test.” The drug testing process begins when the employee—or the collector, in the employee’s presence—breaks the seal on the collection container. See 49 C.F.R. § 40.63(c). If the employee leaves at any time thereafter, he will be deemed to have refused to take the drug test.

The Coast Guard contends, contrary to the ALJ’s determination, that the record contains “substantial evidence” to support a conclusion that Respondent left the testing facility after the testing process began—after the seal was broken—and, insists that the ALJ should have found the *violation of law or regulation* charge proved. [Appeal Brief at 6]

A careful review of the ALJ’s D&O shows that he did not find the Coast Guard’s evidence persuasive. In that regard, the ALJ stated as follows:

In these proceedings, the Coast Guard bears the burden of proof and must prove any violation by a preponderance of the evidence. In this case, in order to prove failure to test, the Coast Guard needed to prove Respondent left Complete Occupational Health Services after the commencement of the drug testing process. The Coast Guard’s case rested primarily on the collector’s testimony. The collector, who had only nine...days of experience prior to testing Respondent on April 13, 2007, had no recollection of Respondent. Her testimony was based entirely from a custody and control form. This form contains significant errors, to include indicating Respondent’s urine was both discarded and sent to the testing laboratory. When questioned on these errors, the collector testified she just automatically fills out the form. The form also indicated Respondent was going to have a five-panel test, while the final report indicated Respondent was going to have a two-panel test. The collector also testified that the medical review officer never reviewed this form. The reliability of this form is seriously in doubt.

[D&O at 14-15]

While Respondent does not deny that he went to Complete Occupational Health Services on April 13, 2007, he contends that he only “signed in” there and left, before the testing process began, because he received a call from Mike Guidry, an employee of Cheramie Marine, informing him that he could and should get a job with Cheramie, rather than Phil Guilbeau Offshore. [Tr. at 129, 151-54] Respondent testified that no one called his name while he was waiting at the testing facility, that he did not fill out any paperwork, and that he did not provide a urine sample. [Tr. at 154-61] Respondent’s testimony was supported by the deposition of Mike Guidry who recalled that he spoke to Respondent while he was waiting at the Doctor’s Office. [Coast Guard Exhibit 5 at 9-11, 17-19] In response to this evidence, the ALJ found as follows:

The undersigned finds the testimony of Respondent and his supporting witnesses credible. Respondent arrived at Complete Occupational Health Services on April 13, 2007, with the intent to complete a drug screening. However, while waiting to be tested, Respondent received a job offer that he perceived to be better. He therefore decided not to take the position with Phil Guilbeau Offshore and left the testing facility before testing began.

[D&O at 15]

After a thorough review of the record, I do not find that the ALJ’s determination that Respondent did not begin the drug testing process on April 13, 2007, to be arbitrary, capricious, or an abuse of his discretion. The ALJ’s finding in that regard—including his determination that the Respondent and his supporting witnesses were credible and the DTCCF upon which the collector based her testimony was seriously in doubt—was supported by evidence in the record and will not be disturbed.



## II.

*The ALJ erred in finding the DTCCF unreliable in showing that Respondent commenced the test because of insignificant documentation errors in light of a wealth of case law to the contrary.*

The Coast Guard contends that “[c]ourts and administrative agencies have repeatedly found that minor procedural errors in the recording and authentication of samples does not *per se* call the sufficiency of the evidence into question.” [Appeal Brief at 9]

A number of Coast Guard appeal decisions have held that minor technical infractions of the drug testing regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. See Appeal Decisions 2668 (MERRILL), 2575 (WILLIAMS), 2546 (SWEENEY); *aff'd sub nom* NTSB Order No. EM-176 (1994), 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994), 2537 (CHATHAM) and 2522 (JENKINS);

The issue at hand, however, is not a question of improper interpretation of case law, but rather goes to the weight the ALJ gave the DTCCF. In this case, the ALJ found the reliability of the DTCCF to be in doubt due to errors contained within the form, itself, and considerations as to the reliability of the person responsible for completing the form. In Coast Guard Suspension and Revocation cases, the trier of fact is the judge of credibility and determines the weight to be given the evidence.

*See e.g., Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS) and 2017 (TROCHE).* Indeed, Appeal Decision 2296 (SABOWSKI) stated as follows:

The ALJ is not bound by the witnesses' opinions, but must make his own determinations based on the facts and the law. It is his function to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this manner is not subject to being reversed on appeal unless it is shown that the evidence upon which he relied is inherently incredible. (*citations omitted.*)

As such, great deference will be accorded the ALJ's evaluation and weighing of the evidence, Appeal Decision 2541 (RAYMOND), because it is the ALJ who "saw and heard the witnesses" and the evidence presented. *See* Appeal Decision 2628 (VILAS).

After a thorough review, I find that the record contains competent, reliable and credible evidence to support the ALJ's conclusion that the reliability of the DTCCF at issue in this case was seriously in doubt. As a result, I find sufficient evidence in the record to support the ALJ's conclusion that the Coast Guard failed to prove, by a preponderance of reliable and credible evidence, that Respondent refused to submit to a drug test and I will not overturn the ALJ's findings in that regard.

#### CONCLUSION

The actions of the ALJ had a legally sufficient basis and, for the reasons stated above, I find that his decision was not arbitrary, capricious, or clearly erroneous. Furthermore, the record shows that competent, substantial, reliable, and probative evidence existed to support the findings and order of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

Accordingly, the Order of the Administrative Law Judge at New Orleans, Louisiana, on May 13, 2008, is hereby AFFIRMED.



D.P. PEKOSKE  
Vice Admiral, U.S. COAST GUARD

Signed at Washington, D.C. this 5th of January, 2010.