U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. MERCHANT MARINER'S LICENSE NO. 648313 AND MERCHANT MARINER'S DOCUMENT NO. [redacted] (OLD Z 58942) Issued to: William E. Wright, Appellant	DECISION OF THE COMMANDANT ON APPEAL NO. 2583

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated April 10, 1995, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's merchant mariner's license, upon finding a charge of *use of a dangerous drug* proved. The single specification supporting the charge alleged that appellant was, as shown by a positive drug test, a user of a dangerous drug, to wit; Marijuana.

Hearings were held in New York, New York on October 24, 1994, and January 10, 1995. Appellant was represented by counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and three exhibits. Appellant's counsel introduced into evidence the testimony of three witnesses and eleven exhibits. The Administrative Law Judge introduced six exhibits into evidence on his own motion.

The Administrative Law Judge's Decision was served on Appellant on March 9, 1995. His Order

of Revocation was served on Appellant on April 10, 1995. Appellant filed a timely notice of appeal on May 9, 1995 and perfected it on August 18, 1995.

APPEARANCE: Donald E. Klein, Sipser, Weinstock, Harper & Dorn, 380 Madison Avenue, New York, New York, 10017

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license and document issued by the U.S. Coast Guard. Appellant's merchant mariner's license authorized him to serve as Third Mate On Oceans on Steam or Motor Vessels of any Gross Tons. Appellant's merchant mariner's document was endorsed as Able Seaman, Any Waters, Unlimited and was initially issued in 1989.

On April 16, 1993, Appellant visited the Physician's Diagnostic Office in Jersey City, New Jersey, to provide a periodic urine sample, as required by Coast Guard regulations, to receive a drug free certificate permitting him to sail. [Transcript of January 10, 1995, (Jan TR) at 360]. The testing was done under the arrangement of the Masters, Mates and Pilots Union. The Appellant gave the sample to a laboratory technician, Ms. C. Feliciano, and certified on the Drug Testing Custody and Control Form (DTCC) that the sample belonged to him. [Transcript of October 24, 1994, (Oct TR) at 77]. A copy of the DTCC was entered into evidence as Investigating Officer's Exhibit 1, Jan TR at 3-5. The bottle with the sample was sealed in the presence of the Appellant and packaged for shipment in a sealed tamper-proof envelope. *Id*. The envelope and a copy of the DTCC were then sealed inside a shipping kit and picked up by courier for delivery to the Nichols Institute, the laboratory where the sample was tested. *Id*.

The sample was received at the Nichols Institute on April 20, 1993. The receipt of the kit as well as the handling and testing of the sample are documented on the lab's internal chain of custody. (Attachment 4 to I.O. Exhibit 3).

The internal handling and testing procedures of the laboratory were described during the hearing by the Laboratory's Scientific Director, Mr. J. Callies. [Jan TR at 269-276]. He described the process as having several steps. Upon receipt of the package, an internal chain of custody and numbering system are established. The seals on each package and bottle are examined to ensure they are intact. Then, an initial drug screen is conducted. If a positive result for one or more of five illicit drugs (marijuana metabolite, cocaine metabolite, opiates—codeine and morphine, phencyclidine, and amphetamine—amphetamines and methamphetamine) is registered, a second confirmatory test using gas chromatography/mass spectrometry (GC/MS) is conducted.

The Appellant's sample was tested on April 21, 1993, and a positive initial test result for

marijuana was received. A second confirmatory test was also conducted, with a positive test result as well. [I.O. Exhibit 1] The laboratory's Final Report was issued on April 21, 1993, and sent on to Greystone, the company which provided the Medical Review Officer for the Nichols Institute under an arrangement with the Masters, Mates and Pilots Union.

At Greystone, the Medical Review Officer, Dr. David M. Katsuyama, interviewed the Appellant by telephone on April 23, 1993. [Oct TR at 220]. The Medical Review Officer concluded that despite the Appellant's denial of use, there was no other reasonable medical explanation for the presence of the illicit substance in the Appellant's person on the date of the collection of the sample. The Medical Review Officer also found no problems with the chain of custody. Accordingly, he completed the Drug Testing Custody and Control Form, finding that the test result was positive. [I.O. Exhib. 1; Oct TR at 225] At the request of Greystone, a separate re-test was done by Nichols on the same sample, also with a positive result. [I.O. Exhib. 2; Oct TR at 160]

BASES OF APPEAL

This appeal has been taken from the Administrative Law Judge's revocation of Appellant's license and merchant mariner's document. Appellant's brief on appeal denies the charge and the specification and sets forth four bases for appeal:

I. The specification was not proven because the presumption that Appellant was a "user" of a dangerous drug was misapplied and the Administrative Law Judge's decision was against the clear weight of the evidence.

II. Revocation of Appellant's license and document is in violation of Coast Guard regulations.

III. The Investigating Officer abused his discretion under 46 C.F.R. § 5.105 by preferring charges in this case; and

IV. The Medical Review Officer did not perform the functions required by the applicable federal regulations.

OPINION

I

Appellant's first basis of appeal is that the specification was not proven because the Administrative Law Judge's decision was against the clear weight of the evidence. I disagree.

Under Coast Guard regulations, there is a presumption that an individual who fails a chemical

test conducted under 46 C.F.R. Part 16 for a dangerous drug is a user of dangerous drugs. *See* 46 C.F.R. § 16.201(b). According to Coast Guard regulation, the Investigating Officer has the burden of proving all elements of the charge and specification. *See* 46 C.F.R. § 5.539. To meet this burden, as applied to the specification at hand, the Investigating Officer must prove three elements: 1) that the respondent was the individual that was tested for dangerous drugs; 2) that the respondent failed the test; and 3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2379 (DRUM), 2279 (LEWIS). This proof establishes a presumption of use of a dangerous drug and then shifts the burden of going forward with evidence to the respondent to rebut this presumption. *Id*. If the respondent produces no evidence in rebuttal, the Administrative Law Judge, on the basis of the presumption alone, may find the charge of use of a dangerous drug proved. *Id.*

In the instant case, Appellant attempted to rebut the presumption created by the Investigating Officer by offering the testimony of himself, his wife, and his physician, all suggesting that Appellant never used marijuana or other illegal drugs. Appellant denied ever using marijuana or any other illicit or controlled substance. [Decision and Order (D&O) at 3; Jan TR at 382]. Appellant's wife's testimony supported that of her husband. [Jan TR at 411]. Dr. De Lara, Appellant's personal physician for approximately ten years, testified that in his opinion, Appellant showed no signs of use of marijuana or another illegal drug. [D&O at 3]. The Appellant argues that his evidence of non-use, therefore, rebuts the presumption of use created by the positive test.

I have previously held that the trier of fact is the judge of credibility and determines the weight to be given evidence. Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS), 2017 (TROCHE). In Appeal Decision 2296 (SABOWSKI), I stated:

> The Administrative Law Judge 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.)*

The Administrative Law Judge did not find the testimony presented by the Appellant sufficient to overcome the presumption established by the Investigating Officer. [D&O at 10-11]. He viewed the disclaimers of drug use by both the Appellant and his wife as self-serving and decided that the statements should be viewed circumspectly. The Administrative Law Judge also indicated that Dr. De Lara had little knowledge of the Appellant's daily activities. [Order of Revocation at 2]. A decision by the Administrative Law Judge as to the credibility and weight to be given evidence

will be upheld on appeal unless the decision is clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Appeal Decision 2570 (HARRIS) *citing* Appeal Decisions 2541 (RAYMOND), 2546 (SWEENEY), 2522 (JENKINS), 2492 (RATH), 2333 (AYALA). There is nothing in the record that suggests that the Administrative Law Judge relied on any evidence that was inherently incredible in reaching his determination that the Appellant used marijuana, nor was his decision clearly erroneous, arbitrary or capricious. Thus, I find no basis to overturn that determination.

II

Appellant next contends that revocation of his license and document is in violation of Coast Guard regulations for two reasons. The first is that in deciding to revoke Appellant's documents, evidence provided in mitigation was not taken into account by the Administrative Law Judge. The second reason is that in determining that there had been no cure, the Administrative Law judge illegally relied solely on the fact that Appellant had not concluded a formal drug treatment program.

Coast Guard regulations allow evidence of mitigation to be entered for charges found proved. *See* 46 C.F.R. § 5.565(d). Appellant contends that though mitigation evidence was introduced, the Administrative Law Judge arbitrarily refused to consider or make judgment on the evidence offered. The specific testimony in question is that given by Appellant's family physician, Dr. De Lara, during which Dr. De Lara stated that in his opinion, Appellant did not use drugs. Appellant argues that by not considering this information in mitigation, the Administrative Law Judge did not follow Coast Guard regulations in determining whether Appellant was cured.

Appellant does not accurately characterize the purpose of Dr. De Lara's testimony, nor recognize the effect of the relevant statutory requirements. The instant case involves a finding that Appellant was a user of dangerous drugs. Title 46 U.S.C. § 7704(c) requires that upon the showing that a holder of a merchant mariner's license has been found to be a user of a dangerous drug, the document must be revoked, "unless the holder provides satisfactory proof that the holder is cured." Therefore, absent evidence of cure, the Administrative Law Judge was required to revoke Appellant's documents. Furthermore, Dr. De Lara's testimony was relevant to the question of whether Appellant used drugs but did not demonstrate that Appellant had been cured. In that context, the evidence was expressly considered by the Administrative Law Judge. In his Order of Revocation, the Administrative Law Judge stated:

> Specifically, with regard to the disclaimer of drug use by respondent, as affirmed by his wife and *the observations of his physician*, I do not believe this evidence is sufficient to overcome the evidence of the properly conducted drug test here. . . Also, *Dr. De Lara has little knowledge of this mariner's daily activities*. (Emphasis added.)

Order of Revocation at 2.

Therefore, though this evidence did not strictly address mitigation, the Administrative Law Judge did explicitly consider this evidence in his decision finding that Appellant used a dangerous drug.

Appellant also argues that the Administrative Law Judge improperly relied on the Appellant's lack of evidence of registration in a drug abuse program as proof of lack of cure. My decision in Appeal Decision 2535 (SWEENEY) articulated a standard of cure, which if a mariner met, and absent aggravating factors, would satisfy proof of cure. The two part Sweeney standard included successful completion of a *bona fide* drug abuse rehabilitation program and demonstration of complete non-association with drugs for a minimum of one year.

Appellant did not offer any evidence to prove enrollment in any, let alone a bona fide, rehabilitation program nor demonstrate a complete non-association with drugs for any period of time. Appellant's only offer of evidence was the testimony of himself, his doctor, and his physician regarding Appellant's use, or non-use, of drugs. Arguably, this evidence goes to the issue of complete non-association with drugs. However, the evidence needed to satisfy proof of cure through complete non-association with drugs requires a higher level of monitoring then mere testimony. Additionally, in finding the Appellant a user of drugs, the Administrative Law Judge had already determined that this testimony was not sufficient to overcome the presumption created by the positive test, and thus was not sufficient to prove cure. Thus, the Appellant failed to meet his burden of showing evidence of cure. By statute, the Administrative Law Judge had no choice but to revoke Appellant's documents. *See* 46 U.S.C. 7704(c).

III

Appellant asserts that the Investigating Office abused his discretion in this case by preferring charges. Appellant claims that the decision by the Investigating Officer to prefer charges was arbitrary, capricious, and an abuse of discretion. Appellant alleges the decision was made based on improper criteria, specifically Appellant's race, type of license, and background. Appellant raised this issue generally for the first time after the hearing was completed (Post Hearing Memorandum of Respondent p. 5) and asserts that there was an abuse of discretion for the first time on appeal. It is well established that absent clear error, Appellant was required to raise an objection at the hearing. 46 C.F.R. 5.701(b)(1); Appeal Decisions 2546 (SWEENEY),2458 (GERMAN); 2376 (FRANK),2400 (WIDMAN),2384 (WILLIAMS),2463 (DAVIS), 2504 (GRACE), 2524 (TAYLOR). As there is no clear error, Appellant, therefore, has waived this issue and can not assert it for the first time on appeal. Although waived, I will state there is absolutely no evidence to indicate any improper motives on the part of the Investigating Officer.

IV

Appellant contends that the Medical Review Officer did not perform the functions required by the applicable federal regulations, 49 C.F.R. § 40.33. I disagree. Appellant's assertion is based on the argument that though the Medical Review Officer determined that there was no legitimate verifiable medical explanation, the Medical Review Officer did not determine whether there was a credible alternative explanation for Appellant's positive drug test.

There is no affirmative obligation for the Medical Review Officer to determine whether there was a credible alternative explanation for a positive test. Instead, the Medical Review Officer is merely required to examine alternate medical explanations for any positive test result. *See* 49 CFR 40.33. The role of the Medical Review Officer was explained in the proposed guidelines for federal drug testing programs promulgated by the Department of Health and Human Services (HHS) (52 FR 30638, August 14, 1987) as directed in the Presidential Executive Order No. 12564, dated September 15, 1986. These proposed guidelines served as a basis for the final guidelines on federal drug testing programs published by HHS on April 11, 1988 (53 FR 11970). The final HHS guidelines, in turn, served as the basis for the Department of Transportation's regulations implementing drug testing programs, including the regulation describing the duties of the Medical Review Officer, 49 CFR 40.33, in question in this case. From the time of the publication of the proposed HHS guidelines to the publication of DOT's final rule, no comments on, or changes to, the role of the Medical Review Officer were ever made. Therefore, the language in the proposed HHS guidelines provides the only elaborating statements on the role of the Medical Review Officer besides the plain language of the regulation. The proposed guidelines state:

> The role of the MRO [Medical Review Officer] is to review and interpret positive test results. . .. In the conduct of this responsibility, the MRO should undertake the examination of alternate medical explanations for a positive test result. This action could include conducting employee medical interviews, review of employee medical history, or the review of any other relevant biomedical factors. The MRO is required to review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication. *See* Reporting and Review of Results, HHS Proposed Guidelines, 52 FR 30638, August 14, 1987.

The fact that the focus of the Medical Review Officer's duties is on purely medical explanations for a positive test result was addressed during the examination of Mr. Ellis, the President of Greystone Health Sciences Corporation. Greystone provides the Medical Review Officers for Masters, Mates and Pilot. In his testimony, Mr. Ellis stated that there are only two legitimate medical explanations under the Department of Transportation's regulations for a positive test. The first is that the donor holds a legitimate Federal prescription for marijuana. The second

explanation is that the donor had been prescribed a drug known as Marinol, which is a synthetic marijuana and is "believed can cause a positive test." [Oct TR at 143] Mr. Ellis went on to say that if neither of those explanations were relevant to a particular sample, then it would be the Medical Review Officer's determination that there is no alternative verifiable legitimate medical explanation for the positive test result. [Oct TR at 144]

In the instant case, the Administrative Law Judge determined as a matter of fact that as required by 49 CFR 40.33, the Medical Review Officer had reviewed the results of Appellant's test to determine whether there was an alternative medical explanation for a positive result and had reviewed the chain of custody to ensure that the chain was complete and sufficient on its face. Other than use of marijuana, the Medical Review Officer found no reasonable medical explanation for the presence of the illicit substance in Appellant's person on the date of collection and that there were no difficulties with the chain of custody. [D&O at 5]. Thus, the Administrative Law Judge determined as a matter of law that the Medical Review Officer had performed both parts of his duty required by Coast Guard regulations. [D&O at 9-10]. The Administrative Law Judge specifically rejected the unsubstantiated claims of Appellant's family physician that Appellant's ingestion of medication and/or herbal tea may have lead to a false positive result on the test, stating that it was without support and anecdotal. [D&O at 10]. Appellant has not shown on appeal that the Administrative Law Judge's determination that the Medical Review Officer's findings were clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Accordingly, I decline to accept Appellant's argument and Appellant's appeal on this issue is denied.

CONCLUSIONS

The findings of the Administrative Law Judge are supported on the record by substantial evidence of a reliable and probative nature.

ORDER

The decision of the Administrative Law Judge dated April 10, 1995, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

/S/
R. D. HERR
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 7th day of July, 1997.