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

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	
	:	COMMANDANT
vs.	:	
	:	ON APPEAL
LICENSE NOS. 641035 AND R35012 Issued to David R. Shakespeare	:	
	:	NO. 2584

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

By an order dated February 1, 1996, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, revoked Appellant s above captioned licenses, 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 marijuana.

Hearings were held in Savannah, Georgia, on December 29, 1995, and January 26, 1996. Appellant appeared *pro se* and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of four witnesses and twelve exhibits. Appellant introduced into evidence his own testimony and five exhibits.

The Administrative Law Judge s Decision and Order (D&O) was served on Appellant on February 5, 1996. Appellant filed a timely notice of appeal on March 4, 1996 and perfected it on March 28, 1996.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned licenses which authorized him to serve as a master of near coastal steam or motor vessels of not more than 100 gross tons and to serve as a radio telegraph operator on merchant vessels of the United States. [Transcript of December 29th 1995 (TR Dec) at 7; Investigating Officer (I.O.) Exhibit 1].

On September 25, 1995, Appellant reported to Examination Management Services, Inc. (EMSI) in Atlanta, Georgia, to submit a urine sample upon request of his labor union, The American Radio Association. [TR Dec at 36-37]. Under the direction of Mr. Rick D. Johnson, Appellant submitted the sample to which Mr. Johnson assigned the identification number of 1001773762. [TR Dec at 36; I.O. Exhibits 3 and 4].
Mr. Johnson properly sealed the bottle in the presence of the Appellant. [I.O. Exhibit 3]. After the Drug Testing Custody and Control Form (DTCC) was completed and signed by both Appellant and Mr. Johnson, the sample was delivered to Corning Nichols Institute Substance Abuse Laboratory (Corning) in San Diego, California. [TR Dec at 84-85].

Corning, an approved urine testing facility for Federal agencies, received the properly sealed sample on September 28, 1995, and tested it on September 29, 1995. [I.O. Exhibits 6 and 3]. Dr. Anthony P. D Addario, Corning s Technical Director, analyzed the sample and confirmed a positive test for marijuana metabolite. [I.O. Exhibit 5]. Corning forwarded the results to Greystone Health Sciences Corporation (Greystone) where Dr. David M. Katsuyama was acting as Medical Review Officer. [TR Dec at 99]. Dr. Katsuyama reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on October 4, 1995. [TR Dec at 101; I.O. Exhibit 4]. George M. Ellis, Jr., President of Greystone, then informed the Senior Investigating Office, Coast Guard Marine Safety Office, Savannah, GA, that Appellant had tested positive for marijuana. [I.O. Exhibit 7].

After his phone interview with Dr. Katsuyama, Appellant had his urine sample mailed from Corning to the Smith Kline lab in Atlanta, Georgia, where it was re-tested. [TR Dec at 38, 40]. Again, the urine tested positive for marijuana metabolite. [Respondent Exhibit C].

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge s findings and opinions are inaccurate.

2. Because the sample did not test positive for codeine, which Appellant alleges he had taken, the sample tested was not his.

3. The Coast Guard should allow for a small margin of human error in testing urine samples. This lack of flexibility explains why Appellant tested positive for marijuana when he has not used it for many

years.

OPINION

I

Without stating any specifics, Appellant contends that the findings and opinions contained in the Administrative Law Judge s Decision and Order are inaccurate. I disagree.

If a merchant mariner fails a chemical test for dangerous drugs, the individual will be presumed to be a user of dangerous drugs. *See* 46 C.F.R. § 16.201(b); Appeal Decision 2529 (WILLIAMS). To prove the specification, the Coast Guard must establish a *prima facie* case of *use of a dangerous drug*. *See* 46 C.F. R. § 5.539, Appeal Decisions 2379 (DRUM), 2282 (LITTLEFIELD). The Coast Guard may establish a *prima facie* case by showing that the respondent was tested for a dangerous drug, that the respondent tested positive for a dangerous drug, and that the test was conducted in accordance with 46 C.F.R Part 16. If the Coast Guard establishes a *prima facie* case, then the burden shifts to the respondent who must produce persuasive evidence to rebut this presumption. *See* Appeal Decision 2379 (DRUM). If the respondent produces no persuasive rebuttal evidence, the Administrative Law Judge, on the basis of the presumption alone, may find the charge proved. *See* Appeal Decisions 2266 (BRENNER), 2174 (TINGLEY).

The Administrative Law Judge is in the best position to weigh the testimony of witnesses and other evidence to determine if the Coast Guard has presented a *prima facie* case and to determine if Appellant has appropriately rebutted the Coast Guard s evidence. *See* Appeal Decisions 2421 (RADER), 2319 (PAVELIC). The Administrative Law Judge s findings must be supported by reliable, probative and substantial evidence. *See* 46 C.F.R § 5.63. Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. *See* Appeal Decisions 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY). Furthermore, conflicting evidence will not be reweighed on appeal where the Administrative Law Judge s determinations can be reasonably supported. *See* Appeal Decisions 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *affd* NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE).

The Administrative Law Judge found that Appellant was tested for dangerous drugs, that Appellant tested positive for a dangerous drug, and that the test had been conducted in accordance with Department of Transportation regulations. The Administrative Law Judge did not find the Appellant s testimony credible. My review of the record finds that the Administrative Law Judge s findings were based on substantial, reliable, and probative evidence. Therefore, I find that the Administrative Law Judge s findings and decision are not arbitrary, capricious, clearly erroneous or based on inherently incredible evidence, and I will not upset them on appeal.

II

Appellant contends that, when he submitted his urine sample, he informed the sample collector that he had been taking codeine and that the collector failed to note this on the DTCC. Therefore, Appellant argues, because the test results did not indicate that he had ingested codeine, the sample that tested positive for marijuana was not his sample. The Administrative Law Judge determined that Appellant s testimony was not credible. "[T]he record contains no substantiation of Respondent s claim that he did, in fact, take codeine just prior to the test in question." [D&O at 12]. The sample collector testified that, had Appellant informed him of taking codeine, he would have noted this on the DTCC. [TR Jan at 11]. The Administrative Law Judge s finding that Appellant s testimony was not credible was supported by the record and, thus, did not constitute persuasive rebuttal.

Appellant further contends that a pharmacy record submitted with his appeal brief shows that he purchased codeine in January, 1995, and should have tested positive for codeine in his September 25, 1995, urinalysis. Appellant did not present this pharmacy record at the hearing below. Without assessing the probative value of this pharmacy record and its questionable relevancy to a urinalysis conducted approximately ten months later, I will not review documentary evidence submitted on appeal.

On appeal, I will only review the hearing record. The hearing record consists of the testimony and the exhibits presented, along with all papers, requests and rulings filed in the proceedings. *See* 46 C.F.R. § 5.563(c); *see also* 46 C.F.R. § 5.701(b). I will not review this pharmacy record because it "was not raised at the hearing where evidence and testimony of witnesses from both sides could have resolved the matter. It, therefore, cannot be raised for the first time on appeal." Appeal Decision 2458 (GERMAN); *see also* Appeal Decisions 2345 (CRAWFORD), 2289 (ROGERS), 2184 (BAYLESS), 1741 (GIL).

III

Finally, Appellant questions the marijuana metabolites cut-off level, contending that the level is set too low and does not allow for any margin of error. I disagree. Department of Transportation regulations establish the initial cutoff level for marijuana at fifty nanograms per milliliter. *See* 49 CFR § 40.29. Therefore, the regulation allows for a fifty nanogram per milliliter margin of error. Further, this initial level, which is determined through an immunoassay that meets the requirements of the Food and Drug Administration, must be verified by a second test, using a gas chromatography/mass spectrometry (gc/ms) technique. *See* 49 C.F.R. § 40.29(e) and (f). This gc/ms test is "the most sensitive and specific method of drug detection available...This procedure is widely recognized as "the state of the art" in drug detection." U.S. v. Arguello, 29 M.J. 198 (C.M.A. 1989). *See also* Transport Workers Union of Phila., Local 234 v. Southeastern Pa. Transit Authority, 670 F. Supp. 543 (E.D. Pa. 1988) (gc/ms [is] considered to be the most accurate [drug detection] technology available.)

The cutoff level for the gc/ms is fifteen nanograms per milliliter. The Department of Defense has established the same cutoff limits for the initial immunoassay and the final mc/gs tests. The U.S. Court

of Military Appeals stated that these settings were "designed to prevent misidentifying nonusers [of marijuana]...[The cutoff values are set high to] prevent a positive reading which might result from some extraneous cause (such as passive inhalation)." Arguello at 202-203. Thus, if the first test result is erroneous, the second, more accurate test will expose the error. Moreover, the cutoff limits are high so that "false positives are virtually nonexistent." *Id.* at 204.

CONCLUSION

The findings of the Administrative Law Judge are supported by reliable, probative and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Decision and Order of the Administrative Law Judge dated February 1, 1996, is AFFIRMED.

/S/

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

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