

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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UNITED STATES COAST GUARD

vs.

LICENSE NO. 740972

AND

MERCHANT MARINER'S

DOCUMENT NO. [REDACTED]

Issued to Kenneth E. Meyer

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DECISION OF THE

COMMANDANT

ON APPEAL

NO. 2589

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

By an order dated February 26, 1996, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's above-captioned license and Merchant Mariner's Document 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.

The hearing was held in Norfolk, Virginia, on February 13, 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 nine exhibits. Appellant introduced into evidence his own testimony.

The Administrative Law Judge's Decision and Order (D&O) was rendered and served on Appellant on February 26, 1996. Appellant filed a notice of appeal on March 25, 1996. The record does not indicate the date that Appellant received a copy of the transcript. Appellant perfected the appeal on May 19, 1996.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license, which authorized him to serve as chief engineer on motor vessels of any horsepower and as third assistant engineer on steam vessels of any horsepower. [Transcript (TR) at 5]. At all relevant times, Appellant was the holder of the above-captioned document, which authorized him to serve in any unlicensed rating assignment in the engine department and as lifeboatman. [TR at 4-5].

On November 21, 1995, Appellant reported to the Family Medical Clinic in Lemont, Illinois, to submit a pre-employment urine sample at the request of a prospective employer, Hannah Marine Corporation. *See* Investigating Officer (I.O.) Exhibit 4; [TR at 33, 35, 92]. Under the direction of Mr. Robert A. Militello, Appellant submitted the sample to which Mr. Militello assigned the identification number of 1001769257. [TR 36], *see* I.O. Exhibit 4. Mr. Militello properly sealed the bottle in the presence of the Appellant. *See* I.O. Exhibit 4. After the Drug Testing Custody and Control Form (DTCC) was completed and signed by both Appellant and Mr. Militello, the sample was delivered to the Corning Nichols Institute Substance Abuse Laboratory (Corning) in San Diego, California. *See* I.O. Exhibit 4, [TR at 80].

Corning, an approved urine testing facility for Federal agencies, received the properly sealed sample on November 22, 1995, and tested it on November 25, 1995. *See* I.O. Exhibits 4 & 8. Corning analyzed the sample and confirmed a positive test for marijuana metabolite. *Id.*, [TR at 80-81]. Corning forwarded the results to Greystone Health Sciences Corporation (Greystone) where Dr. David M. Katsuyama was acting as Medical Review Officer. [TR at 82, 56]. Dr. Katsuyama reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on November 28, 1995. *See* I.O. Exhibit 4, [TR at 61-63]. George M. Ellis, Jr., President of Greystone, informed Appellant's employer, the Hannah Marine Corporation, of the test results. *See* I.O. Exhibit 4. Hannah Marine Corporation then notified the Marine Safety Office, Burr Ridge, Illinois, of the test results. *See* I.O. Exhibit 3.

BASES OF APPEAL

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

1. The Administrative Law Judge erred in denying Appellant's request for a continuance to obtain legal counsel and to obtain character witnesses.
2. Appellant's clear denial of drug use and Appellant's good character rebut the presumption of drug use from a positive urinalysis.
3. The Marine Safety Office, Hampton Roads, tacked seized licenses and documents on a wall in

the office. This created an atmosphere of fear and intimidation, leaving Appellant with the belief that he could not obtain a fair hearing.

OPINION

I

Appellant contends that the Administrative Law Judge erred in denying Appellant's repeated request for a continuance. Appellant contends that this denial prevented him from retaining legal counsel and from obtaining character witnesses.

The Coast Guard served Appellant with the Notice of Hearing and Charge Sheet on December 5, 1995. *See* I.O. Exhibit 1. The hearing was scheduled for February 13, 1996. *Id.* At the hearing, the Administrative Law Judge explained that two months was adequate time to retain counsel and that it was the respondent's responsibility to retain counsel. "You can't just sit around." [TR at 9-10]. The Administrative Law Judge then stated that he would grant a continuance for 30 days. [TR at 9]. Appellant decided to forego the continuance and proceed with the hearing. *Id.* Appellant also stated that he debated over obtaining character references and that he chose not to get any because they "didn't seem to make much difference". [TR at 29].

I will not consider rulings on motions that were waived during the hearing. *See* 46 C.F.R. § 5.701 (b)(1). Appellant decided that he did not want a continuance and thus waived his motion for a continuance. Appellant cannot now raise this as a basis of appeal.

II

Appellant contends that his consistent denials of drug use and good character rebut the presumption of drug use from a positive urinalysis.

Appellant fails to recognize that Department of Transportation regulations dictate that 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 then 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 the 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). I will reverse the findings only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. See Appeal Decisions 2570 (HARRIS), aff'd NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMLENKE).

The Administrative Law Judge found that Appellant was tested for dangerous drugs, that Appellant tested positive for a dangerous drug, and that the test was conducted in accordance with Department of Transportation regulations. Appellant offered only his own testimony in his defense, stating that he did not ingest marijuana. The Administrative Law Judge did not find 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.

III

Finally, Appellant contends that the Marine Safety Office, Hampton Roads, Virginia, tacked seized licenses and documents on a wall in an office used to interview Appellant. This created an atmosphere of fear and intimidation leaving Appellant with the belief that he could not obtain a fair hearing.

The record does not contain any mention of this issue and I will not review its questionable relevancy. 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 proceeding. See 46 C.F.R. § 5.563(c); see also 46 C.F.R. § 5.701(b). I will not address this issue 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).

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 26, 1996, is
AFFIRMED.

/S/

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

Signed at Washington D.C., this 5th day of August, 1997.