

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

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vs.

MERCHANT MARINER'S DOCUMENT  
NO. Z (REDACTED)  
Issued to Michael L. Liston

: DECISION OF THE  
:  
: COMMANDANT  
:  
: ON APPEAL  
:  
: NO. 2590  
:

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

By an order dated December 15, 1995, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, revoked Appellant's above captioned 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 marijuana.

The hearing was held in Tampa, Florida, on December 12, 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 three witnesses and seven exhibits. Appellant introduced into evidence his own testimony and four exhibits.

The Administrative Law Judge's Decision and Order (D&O) was served on Appellant on December 18, 1995. Appellant received the transcript of the hearing on January 29, 1996. Appellant filed a timely notice of appeal on January 16, 1996, and perfected it on March 29, 1996.

APPEARANCE: Howard J. Shifke, 701 North Franklin Street, Suite 200, Tampa, Florida, 33602.

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FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned Merchant Mariner's Document authorizing him to serve as QMED-Fireman/watertender, oiler, pumpman machinist, engineman, ordinary seaman, steward's department (FH). [Investigating Officer (I.O.) Exhibit 7]. On May 25, 1995, Appellant reported to Standard Testing Service of Valdez, AK where, under the direction of Ms. Pat Caples, he submitted a urine sample. Ms. Caples assigned the identification number of 1001661802 to the sample. [See I.O. Exhibit 4]. After the Drug Testing and Control Form (DTCC) was completed and signed by both Appellant and Ms. Caples, a courier picked up and delivered the sample to the Corning Nichols Institute Substance Abuse Laboratory (Corning) in San Diego, California.

Corning, an approved urine testing facility for Federal agencies, received the properly sealed sample on May 27, 1995, and tested it on May 31, 1995. Ms. Joan Zou, the Certifying Scientist, analyzed the sample and confirmed a positive test for marijuana metabolite. [See I.O. Exhibits 4 & 6; TR at 38-39]. Corning forwarded the results to Greystone Health and Sciences Corporation (Greystone) where Dr. David M. Katsuyama was acting as the Medical Review Officer. [TR at 48-49]. Dr. Katsuyama reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on June 2, 1995. [TR at 49-50; *see also* I.O. Exhibit 4.] George M. Ellis, Jr., President of Greystone, then informed SeaRiver Maritime, Inc. that Appellant had tested positive for marijuana. [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 Coast Guard failed to show that Ms. Caples measured the sample temperature within four minutes of initial collection and thus the test results are invalid.
2. Because Appellant never failed a drug test in the past and because he received an excellent performance evaluation from his employer, he could not have been under the influence of marijuana.

### OPINION

#### I

Appellant contends that the Coast Guard did not prove that the sample temperature was measured within four minutes in accordance with 49 C.F.R. 40.25(f)(12). Therefore, the entire collection process was faulty, and the test results were not valid.

When the Administrative Law Judge makes a finding regarding conflicting testimony, I will not disturb the finding unless it is inherently incredible. *See* Appeal Decisions 2390 (PURSER), affirmed sub nom *Commandant v. Purser*, NTSB Order No. EM-130 (1986); 2116 (BAGGETT), 2386 LOUVIERE, 2492 (RATH). Ms. Caples, the sample collector, stated that she would not sign the DTCC unless all of the Department of Transportation regulations had been followed. She testified that it was her habit to record the temperature immediately after donation and that if she failed to measure the temperature within four minutes, she would have conducted a retest. [TR at 29-30]. Appellant presents no evidence showing that the temperature had not been taken within four minutes. The Administrative Law Judge found Ms. Caples' testimony credible. My review of the record finds that the Administrative Law Judge's finding was supported by the record and was not inherently incredible, and I will not upset it on appeal.

## II

Appellant also contends that because he had never failed a drug test and because he received good performance marks during the time period that he was charged with using marijuana, the Administrative Law Judge erred in finding the charge proved. I disagree. The Administrative Law Judge found that there was evidence of a reliable, probative, and substantial nature that Appellant used marijuana. This implies that, after considering all of the evidence, the Administrative Law Judge found that Appellant's previous negative drug tests and performance marks did not rebut the presumption of drug use. Such finding was not inherently incredible and, therefore, will not be upset on appeal.

## CONCLUSION

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

## ORDER

The Decision and Order of the Administrative Law Judge dated December 15, 1995, is **AFFIRMED**.

/S/

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

Signed at Washington D.C., this 5<sup>th</sup> day of August, 1997.