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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	ON APPEAL
	:	NO. 2641
MERCHANT MARINER DOCUMENT	:	
Issued to: Renaldo Jones	:	

This appeal is taken in accordance with 46 U.S.C. § 7702, 46 C.F.R. § 5.701, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (D&O) dated June 12, 2002, an Administrative Law Judge (ALJ) of the United States Coast Guard at New Orleans, La., revoked Mr. Jones' (Respondent's) merchant mariner document upon finding proved a charge of *misconduct*. The specification found proved alleged that "[o]n August 3, 2001, Respondent refused a random drug test ordered by Kirby Corporation."

PROCEDURAL HISTORY

The hearing was held on May 15, 2002, in New Orleans, La., where Respondent appeared and entered a response denying the charge and specification. The Coast Guard Investigating Officers introduced the testimony of two witnesses and three exhibits into evidence. Respondent did not call any witnesses but introduced two exhibits into evidence.

The ALJ's D&O was served on Respondent on June 12, 2002, and Respondent filed a notice of appeal on July 10, 2002. The deadline for the submission of an appellate brief by Respondent was August 12, 2002. Respondent did not request an extension of time within which to file his brief; however, within the filing deadline, Respondent submitted three letters to the ALJ Docketing Center. The first letter was undated but was received at the ALJ Docketing Center on July 17, 2002. The second letter was dated July 27, 2002, and the third letter was dated August 5, 2002. In the interest of fairness, I will recognize these letters collectively as Respondent's appellate brief. Therefore, this appeal is properly before me.

APPEARANCE: Renaldo Jones, *pro se*. The Coast Guard was represented by LCDR Andrew Norris, USCG, and LTJG Joni Clifton, USCG, Marine Safety Office, New Orleans, La.

FACTS

At all relevant times, Respondent held the above captioned merchant mariner document.

On August 3, 2001, Kirby Inland Marine Corporation (hereinafter "Kirby Marine") ordered the crew of the M/V LADY G II to submit to a random urinalysis drug test. [Trial Record (Tr.). at 30; I.O. Exhibit 1, 3] The order was based upon a computer program that randomly selected five vessels, including the M/V LADY G II, for crew testing during August 2001. [Tr. at 26, 30] Respondent was a tankerman aboard the M/V LADY G II and was in the second day of a two-week work detail on August 3, 2001. [I.O. Exhibits 1, 3] Respondent refused to undergo drug testing on August 3, 2001, despite being directed to do so. [Tr at 28, 52, 56; I.O. Exhibits 1, 2] After refusing

to submit his urine for testing, Respondent abandoned his duties with the vessel. [I.O. Exhibit 3]

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of *misconduct* and revoking Respondent's merchant mariner license. I have summarized the substance of Respondent's three letters and have divided his assignments of error into four arguments:

I. *The ALJ erred by finding the misconduct charge proved because Kirby Marine is not Respondent's employer and, as a consequence, did not have the right to require him to submit to a random drug test and, in so doing, violated his Privacy Act rights.*

II. *A marine employer can direct an employee to submit to drug testing only if there is reasonable suspicion of drug use and sufficient notice is provided. Since neither reasonable suspicion of drug use nor sufficient notice of the drug test existed in the instant case, the ALJ erred by finding the misconduct charge proved.*

III. *The ALJ erred by both allowing the Coast Guard Investigating Officers to submit "fraudulent paperwork" into evidence at the hearing and by using that paperwork in reaching his decision.*

IV. *Respondent was the victim of racial discrimination because the ALJ Docketing Center engaged in a racist practice by signing letters addressed to him in blue ink.*

OPINION

I.

The ALJ erred by finding the misconduct charge proved because Kirby Marine is not Respondent's employer and, as a consequence, did not have the right to require him to submit to a random drug test and, in so doing, violated his Privacy Act rights.

Respondent first asserts that the ALJ should not have found the *misconduct* charge proved because Kirby Marine was not his employer and, as a result, did not have the authority to require him to submit to a random drug test. Respondent contends that his personal employment records, including his IRS W-2 forms, clearly indicate that Lorris G Towing, not Kirby Marine, is his employer. As a result, he contends that Kirby Marine, who both identified him and selected him for random drug testing by using his Social Security Number, had no right to use such information and, in doing so, violated his rights under the Privacy Act. After a thorough review of the record, I find Respondent's argument, in this regard, to be without merit.

I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff 'd* NTSB Order No. EM- 182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). The findings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSEN), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD) and 2614 (WALLENSTEIN). The standard of proof for suspension and revocation proceedings is that the ALJ findings must be supported by reliable, probative, and substantial evidence. 46 CFR 5.63, Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF, and 2575 (WILLIAMS).

In relevant part, 46 C.F.R. § 16.230(b) makes clear that "marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of

crewmembers on uninspected vessels who…perform the duties and functions directly related to the safe operation of the vessel." As a tankerman aboard the M/V LADY G II, Respondent performed duties and functions directly related to the safe operation of the vessel. As a result, his employers could properly require that he submit to random drug testing.

Although Respondent believes that Kirby Marine was not his employer because the company was not noted as such on his tax information, he fails to acknowledge the definition of "marine employer" applicable to the instant case. 46 C.F.R. § 16.105 makes clear that the term "marine employer" means "the owner, managing operator, charterer, agent, master, or person in charge of a vessel." In the "Findings of Fact" portion of his D&O, the ALJ found that "Kirby Inland Marine charters all vessels owned and operated by Lorris G. Towing." [D&O at 3] Therefore, as charterer of the M/V LADY G II, Kirby Marine met the Coast Guard's definition of marine employer. As a result, Kirby Marine acted within the scope of the Coast Guard's drug testing regulations when it directed Respondent to submit to a random drug test. In this context, Respondent's argument that Kirby Marine was not his employer is without merit.

I will now address Respondent's assertion that Kirby Marine violated his Privacy Act Rights by using his Social Security number to select him for random drug testing. Because Kirby Marine is, as I noted above, Respondent's "marine employer," this argument is wholly without merit. In addition, 46 C.F.R. § 16.230(c) makes clear, that random testing may be based upon either the random selection of employees by "Social Security numbers, payroll identification numbers, or other comparable identification numbers" or "by periodically selecting one or more vessels and testing all crewmembers

covered by this section." As I noted above, Respondent was selected for random drug testing via the latter method. Therefore, because Kirby Marine did not use Respondent's Social Security number as a basis to select him for random drug testing, any discussion of the use of his Social Security number is not relevant to the instant case.

II.

A marine employer can direct an employee to submit to drug testing only if there is reasonable suspicion of drug use and sufficient notice is provided. Since neither reasonable suspicion of drug use nor sufficient notice of the drug test existed in the instant case, the ALJ erred by finding the misconduct charge proved.

Respondent next asserts that Kirby Marine did not have the authority to compel him to submit to a random drug test. After a careful review of the applicable regulations, I do not find Respondent's argument to be persuasive.

46 C.F.R. Part 16 makes clear that drug testing is required in five specifically enumerated circumstances: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Serious marine incident testing; and, 5) Reasonable cause testing. Therefore, contrary to Respondent's assertion, random testing is specifically authorized by Coast Guard regulation and may, by its very nature, be conducted without notice or any suspicion of drug use. 46 C.F.R. § 16.230. As I noted above, the random selection process used by Kirby Marine to select Respondent for random testing satisfied all of the Coast Guard's regulatory requirements. Therefore, I find Respondent's second argument to be without merit.

III.

The ALJ erred by both allowing the Coast Guard Investigating Officers to submit "fraudulent paperwork" into evidence at the hearing and by using that paperwork in reaching his decision.

Respondent next asserts that I.O. Exhibit 3 should not have been admitted into

evidence because it was fraudulent.

I.O. Exhibit 3 consists of four pages. The first page is a letter from the office manager at Lorris G Towing to the Coast Guard explaining the relationship between Lorris G Towing and Kirby Marine. This page also introduces the remaining three pages. The second page is the Kirby Marine Drug and Alcohol Abuse policy issued on August 1, 2000, revealing that all personnel are subject to drug testing. Page three is the second page of a notice of receipt of the drug and alcohol abuse and testing policy signed by Respondent and a representative from Lorris G Towing. The final page is a Kirby Marine and Lorris G Towing drug and alcohol policy notice concerning three vessels including the M/V LADY G II.

Respondent raised many of the same arguments at the hearing when the Coast Guard moved to admit I.O. Exhibit 3 into evidence. [Tr. at 73-80] Respondent objected to the admission of the evidence on the ground that he had not signed pages 1, 2, and 4, and because he asserted that page 3 was not an original. Furthermore, Respondent objected that his name did not appear on the drug and alcohol policy statements. Finally, Respondent alleged that the documentation was merely typed up for the hearing and was, therefore, not reliable. [Tr. at 80] The record indicates that the ALJ fully considered Respondent's arguments and subsequently admitted I.O. Exhibit 3 into evidence in its entirety. [Tr. at 80-81]

As I have already noted, I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff 'd* NTSB Order No. EM- 182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS),

2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). Pursuant to 33 C.F.R. § 20.802, hearsay evidence, including documentary evidence containing hearsay, is admissible in S&R proceedings. It is without question that Kirby Marine had a drug testing policy in effect and Respondent, by signing page 3 of I.O. Exhibit 3, showed that he was aware of that policy. There is simply no evidence in the record to indicate that I.O. Exhibit 3 is either irregular or fraudulent. Since Respondent did not submit any evidence to support his assertion that the contents of I.O. Exhibit 3 were fraudulent, the record does not indicate that the ALJ's admission of the exhibit was arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Therefore, the ALJ did not err in admitting I.O. Exhibit 3 into evidence or in considering that evidence in reaching his decision.

IV.

Respondent was the victim of racial discrimination because the ALJ Docketing Center engaged in a racist practice by signing letters addressed to him in blue ink.

Finally, Respondent contends that the ALJ Docketing Center discriminated against him because it signed letters sent to him in blue ink.

I have thoroughly reviewed the record in this case and conclude that there is insufficient evidence to support Respondent's allegation of racism. Respondent has not provided any evidence, other than his own assertion, to indicate that the use of blue ink by the ALJ Docketing Center is anything more than standard practice. I will presume normalcy in how Respondent's case was handled and a mere assertion of racism, without supporting evidence, will not sustain an allegation. As indicated, I will reverse the

decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM- 182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). Since Respondent has not submitted any evidence to support his assertion, the record does not indicate that the ALJ's decision was arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Therefore, I find Respondent's final argument to be without merit.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings and order of the ALJ. I find Respondent's bases of appeal are without merit.

ORDER

The Administrative Law Judge's Decision and Order of July 12, 2002, is AFFIRMED.

//S//

T. J. BARRETT
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 31st day of August, 2003.