UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. MERCHANT MARINER'S DOCUMENT NO. REDACTED Issued to: Tommy A. White	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2632

This appeal is taken in accordance with 46 USC §7704, 46 CFR §5.701, and the procedures in 33 CFR Part 20.

By an Order dated September 5, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard at Seattle, Washington, revoked Respondent's above captioned merchant mariner's document upon finding proved a charge of *use of a dangerous drug*. The single specification supporting the charge alleged that on July 22, 1999, Respondent had cocaine metabolite present in his body as shown by a random drug-screening test.

A hearing (hereafter referred to as Hearing I) was held on January 27, 2000, in Juneau, Alaska. Subsequent hearings were held on May 17, 2000, and May 25, 2000, in Juneau, Alaska (hereafter referred to collectively as Hearing II). Respondent appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and ten exhibits. Respondent introduced into evidence his own testimony, one additional witness, and one exhibit.

The ALJ's Decision and Order (D&O) was served on Respondent on September 5, 2000. Respondent filed his appeal on November 3, 2000. This appeal is properly before me.

APPEARANCES: Randall P. Ruaro, Esq., Keene & Currall, 540 Water Street, Suite 302, Ketchikan, Alaska, 99901, for Respondent. The Coast Guard Investigating Officer (IO) was Lieutenant Eric Bauer.

FINDINGS OF FACT

At all relevant times, Respondent held the above captioned document. On July 22, 1999, Respondent was employed by the Alaska Marine Highway System as a wiper on the M/V AURORA and provided a urine sample in compliance with his employer's random drug testing program. [D&O at 1, TR Vol. I at 21 and Vol. II at 60-63]. Mr. Greg Karlik served as the sample collector who collected Respondent's urine sample. [IO Exhibit 1] Respondent signed the Custody and Control form to certify that he had submitted an unadulterated urine specimen. [IO Exhibit 1] Respondent's urine sample was sent to Northwest Toxicology Drug Laboratory, a Department of Health and Human Services approved drug-testing laboratory. [IO Exhibits 2 and 3]. Upon receipt, an internal chain of custody and numbering system was established and the seals on each package and bottle were examined to ensure they were intact. [IO Exhibit 3]. Respondent's sample was initially tested by immunoassay screening analysis, and tested positive for cocaine metabolite. The second and more specific gas chromatography/mass spectrometry (GC/MS) test confirmed the initial test. The results were then forwarded to the Medical Review Officer (MRO), Dr. Mary Demers. [IO Exhibit 7].

The MRO interviewed the Respondent and concluded that despite the Respondent's denial of drug use, there was no reasonable medical explanation for the presence of cocaine metabolite in Respondent's body on the date the specimen was collected. The MRO certified that the Respondent tested positive for cocaine metabolite. [IO Exhibit 7]. Respondent, through his attorney, stipulated at the outset of the hearing that he submitted a urine sample, that he signed the drug testing custody and control form, and that the sample tested positive for cocaine metabolite. [D&O at 1 and Respondent's Answer dated October 12, 1999].

BASES OF APPEAL

Respondent asserts the following bases of appeal from the decision of the ALJ:

I. The ALJ applied an incorrect standard of the evidence necessary to rebut the presumption of being a user of a dangerous drug.

II. The ALJ erred in not considering and assigning evidentiary value to undisputed facts in the Respondent's favor. Respondent argues this error allowed the court to rule that Respondent had not successfully rebutted the presumption of being a user of a dangerous drug.

III. The ALJ erred by misapprehending the testimony of the Respondent at the first hearing and finding his credibility to be in doubt.

IV. The ALJ erred in not considering and assigning evidentiary value in the Respondent's favor regarding the low level of his positive test result.

V. The ALJ erred in finding the Respondent's testimony alone insufficient to rebut the presumption of being a user of a dangerous drug.

VI. The ALJ erred in implying from a statute that "de-cocainized" teas exist and are available for purchase and the ALJ drew the wrong inference from the statute.

VII. The presumption created by 46 CFR §16.201 (b) generally violates the Due Process Clause of the United States Constitution.

VIII. The presumption created by 46 CFR §16.201 (b) violates the Due Process Clause of the United States Constitution as specifically applied in this case.

IX. The collection of Respondent's urine is a violation of the United States Constitution's protection against unreasonable search and seizure.

X. The hearings conducted by the ALJ contained multiple procedural irregularities.

XI. The ALJ erred in referencing unindexed Commandant Decisions on Appeal.

XII. The Respondent recommends the Commandant vacate the ALJ Decision and dismiss the charges.

OPINION

I.

Respondent asserts the ALJ applied an incorrect standard of the evidence necessary to rebut the presumption of being a user of a dangerous drug. 46 USC §7704 (c) requires revocation of a mariner's license or document if it is shown that he has been a user of a dangerous drug unless the mariner provides satisfactory proof that he is cured. Appeal Decision 2529 (WILLIAMS). If a mariner fails a drug test, he is presumed to be a user of a dangerous drug. 46 CFR §16.201 (b), Appeal Decisions 2584 (SHAKESPEARE), 2529 (WILLIAMS). To prove this specification, the Coast Guard must establish a *prima facie* case of use of a dangerous drug by the mariner. 46 CFR §5.539, Appeal Decisions 2584 (SHAKESPEARE), 2379 (DRUM), 2282 (LITTLEFIELD), 2589 (MEYER), 2592 (MASON), 2529 (WILLIAMS), 2583 (WRIGHT).

The Investigating Officer has the burden of proving all the elements of the charge and specification in a suspension and revocation proceeding. Appeal Decisions 2598 (CATTON), 2583 (WRIGHT). The Coast Guard may establish a *prima facie* case of illegal drug use by showing that (1) the Respondent was tested for a dangerous drug, (2) the Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 49 CFR Part 40. Appeal Decisions 2584 (SHAKESPEARE), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF), 2598 (CATTON), 2583 (WRIGHT).

If the Coast Guard establishes a *prima facie* case, a presumption of use of a dangerous drug arises, and the burden then shifts to the Respondent to produce persuasive

evidence to rebut the presumption. Appeal Decisions 2584 (SHAKESPEARE), 2379 (DRUM), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF). If the Respondent fails to rebut the presumption, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 584 (SHAKESPEARE), 2266 (BRENNER), 2174 (TINGLEY), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF).

In determining whether the government has established a *prima facie* case and, or whether the Respondent has successfully rebutted the presumption that arises when a *prima facie* case has been established, the ALJ's findings must be supported by reliable, probative, and substantial evidence. 46 CFR § 5.63, Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF). This "substantial evidence" standard has been determined to be the equivalent of the preponderance of the evidence standard. Appeal Decisions 2603 (HACKSTAFF), 2472 (GARDNER).

In the present case, the Coast Guard established a *prima facie* case of the use of a dangerous drug by satisfying the necessary elements. First, the Coast Guard showed that Respondent was the person who was tested for dangerous drugs. Respondent reported to the sample collection site without identification, at which time the collector took Respondent's picture after he provided Mr. Karlik with a urine specimen. [TR Vol. I at 21] Second, the Coast Guard showed that Respondent screened positive for the use of a dangerous drug on July 22, 1999, as evidenced by the Custody and Control form and lab results. [IO Exhibit 3 and TR Vol. I at 20-22]. The MRO reviewed and verified that the Respondent tested positive for cocaine metabolite and the Respondent was unable to offer a medical explanation for the presence of cocaine metabolite in his body when informed by the MRO that he failed the drug test. Finally, the Coast Guard showed that

Respondent's urinalysis was processed in accordance with 49 CFR Part 40. This involved proof of the collection process, proof of the chain of custody, proof of how the specimen was handled and shipped to the testing facility, and proof of the qualifications of the laboratory. [D&O at 3-4, IO Exhibits 1-8]. After the Respondent provided his urine and certified that it was his, it was sent to Northwest Toxicology Drug Laboratory, where a sample processor assumed custody of the specimen, and ensured that the identification number on the Custody and Control Form matched the number on the specimen container. [D&O at 4, IO Exhibit 3].

Based on the record and the ALJ's D&O, I find that the ALJ did not err in holding that the Investigating Officer established a *prima facie* case by a preponderance of the evidence that Respondent was a user of a dangerous drug.

II-VI.

In his bases of appeal II through VI, Respondent asserted cumulatively that the ALJ did not give appropriate weight and consideration to Respondent's evidence and testimony in order to rebut the presumption of drug use established by the Coast Guard. Because appeal bases II through VI address the ALJ's broad discretion to evaluate the credibility and admissibility of evidence, they will be consolidated and discussed below.

Respondent first argues that the ALJ erred in not considering and assigning sufficient weight to undisputed facts in the Respondent's favor.

Respondent also argues that the ALJ did not consider favorable character testimony regarding Respondent's work on the M/V AURORA. On this point, Respondent's argument is clearly without merit. The transcript clearly shows that the

ALJ heard and considered this evidence, but chose to discount it due to its lack of probative value. [*See,* TR Vol. II at 61 - 62]

Respondent also argued that the ALJ did not give sufficient weight to the fact that Respondent had previously tested negative for drugs and had received a physical examination where he tested negative for drugs. I agree that the ALJ does not address this issue directly in his D&O. However, in his D&O the ALJ writes,

> Consequently, <u>after consideration of the full record</u>, consisting of the exhibits, testimony of the witnesses including a transcript of proceedings, and the Coast Guard's written closing arguments, the following constitutes the decision in this matter.

[D&O at 2, emphasis added].

Respondent also contended that the ALJ did not consider the presence and illegal sale of Peruvian Inka tea in South Florida to support the fact that it was highly likely that he digested Peruvian Inka tea laced with cocaine. Respondent contended that illegal Peruvian tea did exist and produced evidence that the DEA had been trying for ten years to stop the flow of Peruvian Inka tea containing coca leaves from entering the United States. [*See* Respondent's Brief at 5]. Respondent also asserted that the ALJ erred by misinterpreting Respondent's testimony at Hearing I and finding his credibility to be in doubt. For that proposition, Respondent cites several instances in which the ALJ considered Respondent's evidence, but then came to a conclusion different from that of the Respondent. [*See* Appellate Brief of Respondent, Thomas White dated November 3, 2000].

Respondent next argued that the ALJ erred in not considering and assigning sufficient evidentiary value in Respondent's favor regarding the low level of his positive

test result. Dr. Cholakis testified that Health Inka tea is a product that has been known for thousands of years to be used for cultural purposes and contains cocaine. [TR Vol. I at 6]. Dr. Cholakis also testified that Respondent's test results of 1965 nanograms per milliliter (ng/ml) are consistent with the levels reported in scientific literature for persons drinking cocaine-laden tea. [TR Vol. I at 80]. However, Dr. Cholakis also stated that test results of 1965 ng/ml are also consistent with someone who uses cocaine. [TR Vol. I at 82].

Respondent also argued that the MRO erred when she did not ask Respondent whether he had imbibed Peruvian Inka tea. When verifying a positive test result, an MRO is required only to examine alternative medical explanations for positive test results. Appeal Decision 2583 (WRIGHT).

Finally, Respondent argued that the ALJ erred in concluding that his evidence of possible innocent ingestion of cocaine was not sufficient to rebut the presumption of drug use established by the Coast Guard. The ALJ found that Respondent might have consumed "de-cocanized" tea. However, the ALJ did not find that Respondent had innocently imbibed tea laced with cocaine. [D&O at 7].

In each of the bases of appeal listed above, the central issue is the question of whether the ALJ considered Respondent's testimony, evidence, and arguments, whether the ALJ gave that evidence the appropriate weight, and finally, whether the ALJ reached appropriate conclusions based on that evidence.

A careful review of the record reveals no instance in which the ALJ failed to consider the evidence presented by Respondent. That leaves us with the question of

whether the ALJ gave appropriate weight to the evidence and came to appropriate conclusions regarding the evidence.

In evaluating the evidence presented at a hearing, the ALJ is in the best position to weigh the testimony of witnesses and assess the credibility of evidence. Appeal Decisions 2584 (SHAKESPEARE), 2421 (RADER), 2319 (PAVELIC), 2589 (MEYER), 2592 (MASON), 2598 (CATTON). The ALJ has broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in evidence. Appeal Decisions 2560 (CLIFTON), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2598 (CATTON), 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS). The ALJ's Decision is not subject to reversal on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'd* NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2589 (MEYER), 2592 (MASON), 2560 (CLIFTON).

Using the standards described above, I find that the ALJ's determinations regarding the evidence, its weight, and the credibility of the witnesses were not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Therefore, I find that the ALJ did not err in his evaluation of the evidence and Respondent's testimony in this case.

VII-IX.

Respondent next lists a number of Constitutional issues in summary fashion.

Suspension and Revocation proceedings are administrative, not judicial, proceedings whose purpose is to promote safety at sea; judicial review is available in the Federal Courts. Suspension and revocation proceedings have as the focus of their inquiry issues of compliance with statutes and regulations; Constitutional issues are the province of the Federal Courts. 46 USC §7701 *et seq.*

The Coast Guard's urinalysis collection and testing programs are conducted in accordance with regulations promulgated under the Administrative Procedure Act (APA). 5 USC 552 *et seq.* Those regulations, set forth at 46 CFR Part 16 and 49 CFR Part 40, describe the procedures for drug specimen collection and the forms of testing that marine employers may conduct on their employees. With respect to determinations of Constitutionality, the Courts have long held that although an administrative "…agency may always determine questions about its own jurisdiction…[t]he law has long been clear that agencies may not nullify statutes." *Public Utilities Commission v. U.S.*, 355 U.S. 534, 539 (1958); *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Moore v. City of East Cleveland*, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting). That is exclusively within the purview of the Federal Courts. Appeal Decisions 2560 (CLIFTON), 2546 (SWEENEY). Therefore, I will not make a determination on Respondent's constitutional claims.

X.

Respondent asserts that the hearing conducted by the ALJ contained multiple irregularities. Specifically, at Hearing I on January 27, 2000 held at Juneau, AK, severe weather conditions prevented the court reporter from attending the hearing to transcribe

the testimony. [D&O at 1]. It is well established that in the absence of the transcript of a hearing, the Commandant has no "sufficient legal basis" upon which to affirm the findings and order of the ALJ. Appeal Decision 2517 (BURRUS), 2394 (ANTUNEZ). However, this case is distinguished from *BURRUS* and *ANTUNEZ.* Tape recordings were made of the telephonic testimony of the witnesses at Hearing I. [D&O at 1]. However, the ALJ later determined that the tape recordings were not suitable for transcription. Based on that finding, the ALJ vacated Hearing I and ordered a rehearing, which was held on two subsequent days, May 17 and May 25, 2000 (Hearing II). [*See* D&O at 2 and ALJ Notice of Rehearing dated March 3, 2000] A transcript was made of Hearing II, which the ALJ relied upon in making his determination. [D&O at 2]. Respondent also argued that when the ALJ convened a rehearing, the Coast Guard was given time to examine Respondent's wooden box which allegedly held Peruvian Inka Tea and that, based on that examination, the Coast Guard was able to show there was little likelihood that the box had ever contained cocaine – Respondent argues that this was prejudicial to his case. Respondent also argued that the ALJ compared and contrasted Respondent's demeanor and testimony in Hearing I against his demeanor in Hearing II and the ALJ gave insufficient weight to Respondent's testimony in Hearing II. Respondent's arguments are without merit. When the ALJ determined the tape recordings of Hearing I were not transcribable, he properly decided to rehear the case. A review of the record demonstrates that the ALJ and the parties properly addressed the issues related to the charge and specification brought against Respondent's merchant mariners document. Regarding the issue of the ALJ examining Respondent's demeanor to determine his credibility, as was stated above, the ALJ has broad discretion to make

determinations of witness credibility and to resolve inconsistencies in evidence. Appeal Decisions 2560 (CLIFTON), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2598 (CATTON), 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS). All of the issues raised by Respondent above were well within the ALJ's discretion to resolve. I can find no instance where the ALJ was arbitrary, capricious or clearly erroneous in his decisions.

XI.

Finally, Respondent argued that the ALJ erred in referring to un-indexed Commandant Decisions on Appeal (CDOA). Title 5 USC 552 (a) (2) provides that an opinion or final order that affects a member of the public may be relied on or cited as precedent only if has been indexed and either made available or published. Appeal Decision 2451 (PAULSEN). In the present case, the CDOA cited by Respondent, Appeal Decisions 2592 (MASON) and 2584 (SHAKESPEARE) were indexed and available to Respondent in accordance with the regulations governing suspension and revocation proceedings:

> Copies and indexes of decisions on appeal are available for inspection and copying at . . . the document inspection facility at the office of any Coast Guard District, Activity, or Marine Safety Office . . . the public reading room at Coast Guard Headquarters . . . [or] the public reading room of the Coast Guard ALJ Docketing Center, Baltimore, MD. . . Any person wanting a copy of a decision may place a request with the Hearing Docket Clerk.

33 CFR § 20.1103

I find Respondent's argument is without merit.

XII.

Respondent concluded by recommending that I vacate the ALJ's D&O and dismiss the charges. For the aforementioned reasons, I will not.

The ALJ found that the Coast Guard satisfied its burden of establishing a *prima facie* case of use of a dangerous drug. The burden then shifted to the Respondent to rebut the presumption that he was a user of a dangerous drug. Although the Respondent testified that he was not a user of cocaine, the ALJ's Decision was based on the totality of the evidence, which indicated that the Respondent failed to satisfy his burden of rebutting the presumption of use of a dangerous drug.

CONCLUSION

The findings of the ALJ are supported by reliable, probative, and substantial evidence. The ALJ's Decision was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Administrative Law Judge's Decision and Order dated September 5, 2000 is AFFIRMED.

Signed at Washington, D.C., this 9th day of August, 2002