

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA)	
UNITED STATES COAST GUARD)	DECISION OF THE
)	
vs.)	VICE COMMANDANT
)	
LICENSE NO. 037890 AND)	ON APPEAL
DOCUMENT NO. [redacted])	
)	NO. 2631
<u>Issued to William J. Sengel</u>)	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.¹

By Decision and Order (D&O) dated October 22, 1998, an Administrative Law Judge (ALJ) of the United States Coast Guard at Norfolk, Virginia revoked Appellant’s above captioned license and document upon finding proved the charge of *use of a dangerous drug*. The single supporting specification was found proved based on a positive drug test for marijuana.

The hearing was held on April 23, 1998, at the Maine Maritime Academy in Castine, Maine and June 18, 1998, at the Federal District Courthouse in Portland, Maine. The Appellant appeared without counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of seven witnesses and seven exhibits. Appellant introduced into evidence the testimony of five witnesses and five exhibits. The ALJ introduced into evidence six

¹ Since the time of Appellant’s hearing before the Administrative Law Judge, the procedural regulations for Coast Guard suspension and revocation hearings have been amended. *See* 64 Fed. Reg. 28075 (May 24, 1999), 46 C.F.R. Part 5 (2000 edition), 33 C.F.R. Part 20 (2000 edition). As Appellant’s hearing occurred prior to the change in the regulations, this appeal is based on the procedural rules in place at the time of the hearing. Any reference in this opinion to the regulations contained in 46 C.F.R. Part 5 (§§ 5.1-5.905) is a reference to 46 C.F.R. Part 5 (1998 edition).

exhibits. The charge was found proved and Appellant's license and document were revoked.

The ALJ's D&O was served on Appellant on September 21, 1998, with a subsequent final Order served on Appellant on October 22, 1998. Appellant filed a *pro se* Notice of Appeal on November 14, 1998. On July 5, 2000, the Appellant, through counsel, sought and was granted a continuance until August 6, 2000, to file his appeal. The cover letter for Appellant's appeal is dated August 7, 2000, and stamped RECEIVED by the ALJ Docketing Center, Baltimore, Maryland on August 8, 2000.

Appearance: Joseph J. Hahn, Esq., Bernstein, Shur, Sawyer & Nelson, P.A., 100 Middle Street, West Tower, Post Office Box 9729, Portland, Maine 04104-5029. The Investigating Officers were Lieutenant Charles I. Srioudom and Chief Warrant Officer Charles S. Rathgeber.

FINDINGS OF FACT

At all times relevant, the Appellant was the holder of the above captioned license and document. On November 11, 1997, the Appellant was serving as operator on board the tug GERALD-D, which is owned and operated by Weeks Marine. At that time, the tug was engaged in mobilizing and tending a dredge operation in Chesapeake Bay.

On November 11, 1997, American Maritime Safety, a non-profit consortium of maritime companies responsible for implementing Weeks Marine's drug testing program, notified Mr. Daniel Schwall of Weeks Marine that the crew of the GERALD-D had been selected for a random drug test and that all personnel aboard the tug would be involved.

Anderson-Kelly Associates, Inc. assigned Mr. David Schrock, a sample collector, to conduct the collection of urine samples from the members of the crew of the

GERALD-D and three other tugs owned by Weeks Marine. At or about 2000 hours, Mr. Schrock rode a launch out from Chestertown, Maryland to three of the four tugs. The fourth tug that had been assigned to Mr. Schrock never arrived for the collection.

After boarding the GERALD-D, Mr. Schrock collected urine samples from crewmembers including Appellant. During the collection of Appellant's sample, Mr. Schrock failed to positively identify Appellant and to include Appellant's social security number on the Department of Transportation Drug Testing Custody and Control Form (DTCCF). The laboratory attempted to correct the omission of the social security number by having Mr. Schrock complete and sign a Urine Custody and Control Form Memorandum to Recover Missing Information (Memorandum). It is clear that Mr. Schrock did not sign the Memorandum. Mr. Schrock committed other procedural errors during the collection of Appellant's sample. Mr. Schrock also testified that he had no training prior to being assigned as a sample collector; that he simply followed the instructions on the back of the DTCCF; and that he observed how someone else collected samples and attempted to imitate the procedure.

BASES OF APPEAL

Appellant asserts the following bases for appeal from the D&O of the ALJ:

- (1) The ALJ's Findings of Fact 4 and 5 are erroneous and not supported by the evidence.²

² Findings of Fact 4 and 5 read as follows on pages 5 and 6 of the D&O:

Finding of Fact 4: Mr. Schrock, a collector employed by Anderson-Kelly Associates, Inc., was assigned to conduct the collections. He arrived at Chestertown, Maryland at about 2000 hours and rode a launch out to the three Weeks Marine tugs involved. (TR I-65-66). He carried the collection kits provided by the drug testing laboratory (Quest). Schrock boarded the GERALD D and performed the urine collections on all crew members. Schrock instructed each mariner to fill out the Drug testing and Control form; provided each mariner with the collection cup from the kit; and poured the urine from the cup into the collection bottle. Each person initialed the forensic seal for the bottle before it was applied (TR I-71). Each bottle was identified by the mariner-donor as his and the seal was secured to the bottle in his presence (Id). Each sealed bottle was sealed inside the shipping envelope before the next collection was initiated. Mr. Schrock made a number of collections on three tugs that night. On one tug, he returned to the boat and reopened the

- (2) The ALJ's findings of fact are erroneous and unsupported by the evidence because the required collection procedures were not followed.
- (3) The ALJ's conclusions of law numbers 3 and 4 are incorrect as a matter of law.
- (4) The punishment imposed is inappropriately severe.³

OPINION

As a preliminary matter, I will address the timeliness of Appellant's appeal in this case. Appellant filed his appeal two days after the filing date. Appellant's appeal was due on August 6, 2000, and it was filed on August 8, 2000. I have previously considered timeliness as essential for me to have jurisdiction to consider an appeal. Appeal Decisions 2553 (ROGERS) and 1161 (DOROBA). Thus, in the vast majority of circumstances untimely appeals will be terminated pursuant to 46 C.F.R. § 5.705(b)(1). Only in cases of extraordinary or extenuating circumstances will the Coast Guard deviate from its practice of strict adherence to the timeliness of procedural requirements. Appeal Decision 2553 (ROGERS). Extraordinary circumstances exist "[w]hen some clear error appears in the record or when the case presents some novel policy consideration." 46

kits to have the individuals insert their Social Security numbers on the form. He opened the kits and resealed them in those mariners' presence (TR II-136). None of those collections involved the GERALD D or the Respondent's sample. (TR II-136).

Finding of Fact 5: On the return trip to shore after all the collections that night were completed, Schrock called Ms. Anderson and notified her that he neglected to include the donor's Social Security Number in a number of other collections including the one take from the Respondent. (TR I-73-74) Subsequently, Ms. Anderson notified the laboratory (TR II-105-106). Later, the "Urine Custody and Control Form Memorandum to Recover Missing Information" was sent by Quest to the Anderson-Kelly office (TR II-105-106). There, the Office Manager (E. Bellis) filled out the form and inserted Mr. Sengel's Social Security number. On November 14, 1997, the form was sent to the collector (TR II-118). Mr. Schrock signed the form and sent it to Anderson-Kelly a few days later on November 21, (TR II-139). In turn, the form was sent to the testing laboratory that same day. Initially, the spelling of the collector's name was inserted by the laboratory on the form as Shrick instead of Schrock. (TR II-107-108), 143). Also, Anderson-Kelly had preprinted the home address of the collector on the Drug Testing Custody and Control form. (TR II-100).

C.F.R. § 5.705(b)(2). Although Appellant failed to file his appeal in a timely manner, I will consider it because there are extraordinary circumstances that warrant further consideration.

I.

Appellant asserts that the ALJ's Findings of Fact 4 and 5 concerning the collection of Appellant's sample are based on unreliable and insufficient evidence. These findings were primarily based on the testimony of the sample collector, Mr. David Schrock, and to a lesser extent, his supervisor, Ms. Constance Anderson. Appellant specifically asserts that Mr. Schrock lacked sufficient training, failed to follow the applicable collection procedures found at 49 C.F.R. Part 40 and the attempt to correct his collection mistake was based on fraud. Such conduct, if true, would cast significant doubt as to the integrity of the entire system in place on the day and at the place in question. Appeal Decision 2614 (WALLENSTEIN). Therefore, it is critical to resolve the question of whether the evidence regarding Appellant's collection is credible.

The Coast Guard may establish a *prima facie* case for *use of a dangerous drug* by showing: (1) that the respondent was tested for a dangerous drug; (2) that the respondent tested positive for a dangerous drug; and, (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2279 (LEWIS), 2379 (DRUM), 2592 (MASON), 2621 (PERIMAN). In the present case, the Coast Guard introduced into evidence the testimony of seven witnesses and seven exhibits in order to satisfy these elements. Evidence was presented that Appellant was tested for the presence of dangerous drugs in his system and that the presumptive test results indicated the presence

³ Several other potential bases of appeal appear in Appellant's brief and the record. Given the ultimate disposition of the case, *infra*, they need not be considered here.

of marijuana. In order to show that Appellant's test was conducted in accordance with 46 C.F.R. Part 16, a critical witness for the Coast Guard's case was the collection site person, Mr. Schrock, who testified about sample collection procedures and the DTCCF. The issue for this appeal is whether the ALJ's findings, based on Mr. Schrock's testimony and the testimony of other witnesses regarding the collection, are supported by the record in this case.

The findings of the ALJ will not be disturbed unless they are inherently incredible. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2506 2506 (SYVERSTEN), 2492 (RATH), 2378 (CALICCHIO), 2333 (AYALA), 2302 (FRAPPIER), 2614 (WALLENSTEIN). The ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2614 (WALLENSTEIN). Findings of the ALJ need not be consistent with all 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 (JEPSON), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2614 (WALLENSTEIN). However, the ALJ is required to resolve serious conflicts in testimony that exist on the record and issue specific credibility findings. Appeal Decisions 2489 (JUSTICE), 2492 (RATH), 2614 (WALLENSTEIN).

At the hearing held on April 23, 1998, Mr. Schrock testified that he had no training prior to being assigned as a sample collector; he never read the federal regulations concerning the collection of urine specimens or any employer instructions;

and that he was guided by the instructions on the back of the DTCCF and what his friend told him. [Hearing Transcript I at 67-70, hereinafter TR I] He further testified that he did not positively identify each member of the crew of the GERALD-D being tested; that he failed to put each donor's social security number on the DTCCF, including Appellant; and he required the donor to certify the sample before the person provided it rather than after as required by 49 C.F.R. § 40.25(f)(22)(i). [TR I at 73, 78, 81-82] He also failed to initially include the paperwork with the samples from another tug after packing them for shipment to the laboratory. [TR I at 154] Notwithstanding these admissions, Mr. Schrock signed the certification that the sampling had been conducted in accordance with federal regulations. [TR I at 73]

The Government offered the testimony of Mr. Schrock's former employer, Ms. Constance Anderson, in an attempt to rehabilitate his testimony. [Hearing Transcript II at 98 – 111, hereinafter TR II] She testified that her "understanding" about Mr. Schrock's training was that he had been trained on collection procedures by a former employer. [TR II at 101] She also testified that she "assumed" he had training at a previous company and this carried over when Mr. Schrock worked for her. [TR II at 101-102] At another point during her testimony, Ms. Anderson testified that Mr. Schrock had been trained by her company. [TR II at 101] However, she does not keep training records and could not verify his training. [TR II at 111]

The Government took the position that the failure to include the donor's social security number on the DTCCF was rectified by the submission of the Memorandum. [Investigating Officer Exhibit 3, hereinafter IO Exhibit] The laboratory forwarded the Memorandum to the collector to have him ensure that the sample and the donor matched

before the laboratory would commence its testing procedures. [TR II at 177-178] The Memorandum was prepared and returned to the laboratory. Based on the record, it is not clear who actually signed Mr. Schrock's name on the Memorandum. Mr. Schrock testified that he did not specifically recall preparing the Memorandum. [TR I at 74 and TR II at 140, 143] Mr. Schrock subsequently testified that he did sign the Memorandum; he also testified that he did not have a copy of the document in front of him and was not looking at it while he was testifying. [TR II at 139] It is clear that when the signature on the Memorandum is compared to Mr. Schrock's signature on the DTCCF, the two signatures are not the same. [IO Exhibit 3 and IO Exhibit 6] Based on the record, there is a substantial question as to the genuineness of the Memorandum.

In the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40 are followed to maintain the system. Appeal Decisions 2614 (WALLENSTEIN) and 2621 (PERIMAN). Indeed, I have long held that a positive test must be based on credible evidence to support a *prima facie* case. In considering whether a *prima facie case* exists, however, it must be kept in mind that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decisions 2575 (WILLIAMS), 2522 (JENKINS), 2537 (CHATHAM), 2541 (RAYMOND), aff'd sub nom NTSB Order No. EM-175 (1994); Appeal Decision 2546 (SWEENEY), aff'd sub nom NTSB Order No. EM-176 (1994). I have previously held that the trier of fact is the judge of credibility and determines the weight to be given to the evidence presented in a case. Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN); 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS), 2017 (TROCHE).

In the present case, there is considerable confusion as to both how the specimen donor was identified at the time of collection and the identity of the person who signed the memorandum rectifying the incomplete DTCCF. Pursuant to 33 C.F.R. §20.1004, I am remanding this case for further proceedings consistent with this opinion. Specifically, the ALJ shall determine: 1) how the donor was identified when the urine sample was collected; and, 2) who signed the memorandum from Anderson-Kelly Associates that transmitted the social security number of the donor to the laboratory in order to rectify the incomplete DTCCF.

CONCLUSION

The orders of the Administrative Law Judge dated September 21, 1998 and October 22, 1998, are VACATED. The case is REMANDED for further proceedings consistent with this decision.

ORDER

The case is REMANDED for further proceedings consistent with this decision.

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

Signed at Washington, D.C. this 7th day of August, 2002.