UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	
vs.	DECISION OF THE
LICENSE NO. 89368	COMMANDANT
	ON APPEAL
	NO. 2625
Issued to: Gary Lewis Robertson	

This appeal is taken in accordance with 46 U.S.C. § 7702 (b) and 46 C.F.R. § 5.701.[1]

By an order dated January 7, 1999, an Administrative Law Judge (ALJ) of the United States Coast Guard, revoked Respondent's license, captioned above, upon finding proved a charge of *Misconduct*. The single specification supporting the charge of *Misconduct* alleged that, Gary Lewis Robertson, "while serving as operator of the M/V FRED JORGER, O.N. 642287, an uninspected towing vessel of more than 26 feet in length, and acting under the authority of the above captioned license, did on May 6, 1998, wrongfully refuse to submit to a reasonable cause chemical test required by your Marine Employer MEMCO Barge Line, Inc. of Cape Girardeau, Missouri. In that you

[1] Since the time of Respondent's hearing, the regulations establishing procedures for Coast Guard Suspension and Revocation hearings have been amended. See 64 FR 28075 (May 24, 1999), 46 C.F.R. Part 5 (1999 edition), 33 C.F.R. Part 20 (2000 edition). Appellant's hearing occurred before the regulations changed. Therefore, this appeal is based on the regulations in place at the time of Respondent's 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). The new regulations at 33 C.F.R. Part 20 were originally scheduled to enter into effect before Respondent's hearing but were delayed as part of the public rulemaking process. The ALJ properly informed Respondent the rules at 46 C.F.R. Part 5 would be controlling during Respondent's hearing. [Tr. at 21]

submitted a urine sample that subsequently was found to have been adulterated, and thereby deemed a refusal by the Medical Review Officer." [Trial Record (Tr.) at 8-13; Decision and Order (D&O) dated March 2, 1999, page 2][2]

The hearing was initially scheduled for December 2, 1998, in St. Louis, Missouri. The Coast Guard rescheduled the hearing for January 7, 1999, and an amended charge sheet was served on Respondent on October 30, 1998. The hearing was held on January 7, 1999 in St. Louis, Missouri. [D&O at 2] Respondent appeared with counsel and entered a plea denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of four witnesses and 13 exhibits. Respondent introduced into evidence his testimony, the testimony of one additional witness, and no exhibits. [Tr. at 16]

The ALJ issued a D&O in which he found the charge of *Misconduct* with its single specification proved and entered an Order revoking Respondent's license. [D&O at 11, 20] The D&O was served on Respondent's attorney on March 2, 1999. Respondent filed a notice of appeal on March 30, 1999. Respondent was allowed to continue to work under the authority of the Coast Guard issued license captioned above pending resolution of his case. [Tr. at 182] On April 28, 1998, Respondent's new counsel filed an Entry of Appearance and a request for extension of time to file an appeal brief. The Chief ALJ granted Respondent's request for extension of time to file on April 30, 1999. Respondent then requested a second extension of time to file on May 20, 1999;

[2] The ALJ, in his footnote 2, correctly points out that the Charge Sheet misspelled the name of the vessel. The ALJ corrected this ministerial error in his D&O. The ALJ also explained an apparent conflict in the name of the marine employer in his footnote 3, "Throughout the transcript, METCO Barge Line, Inc. is used. METCO is a subsidiary of MEMCO Barge Line, Inc." This Commandant's Decision on Appeal also will refer to the marine employer hereinafter as "METCO".

the Chief ALJ by an Order dated May 20, 1999, also granted that request. Respondent perfected his Appeal on June 14, 1999. This Appeal is properly before me.

APPEARANCE: David Grounds, Esq., 301 Evans, Wood River, Illinois, 62095, for Respondent. Gail G. Renshaw, Esq., 7730 Forsyth, Suite 200, Clayton, Missouri, 63105, represented Respondent on appeal. The Coast Guard Investigating Officers were Lieutenant (Junior Grade) Chris T. O'Neil and Chief Warrant Officer William G. Perkins.

FACTS

At all relevant times, Respondent was the holder of the above-captioned license. At about 10:00 p.m. on April 22, 1998, somewhere along the banks of the Illinois River[3] the towboat BILLY BOLEN[4] transferred a tow of 15 barges to the towboat FRED JOERGER. [Tr. at 55-56] Sometime later that night, the FRED JOERGER began pushing the tow, including the barge MM 7927, downriver. [Tr. at 47] At that time, Respondent, Gary Lewis Robertson, was working as the Relief Pilot aboard the FRED JOERGER and on the day in question, Respondent worked a shift that started at midnight and lasted until 6:00 a.m. on April 23, 1998. [Tr. at 64-65]

At 6:10 a.m. on April 23, 1998, 10 minutes after Respondent went off watch, Respondent's relief, the Captain of the FRED JOERGER**,** discovered and reported to METCO's Port Captain that the barge MM 7927 was damaged and in danger of sinking.

[3] The record is not clear about the location.

[4] Respondent's counsel indicated in his Proposed Findings of Fact and Conclusions that the vessel's actual name was M/V BILLY BOLING. However, it was referred to throughout the hearing transcript and the Appellant/Respondent's Brief on Appeal as the BILLY BOLEN. This appears not to have caused any material confusion at the hearing since all parties apparently understood which vessel was being discussed. I will continue to refer to the second vessel as the BILLY BOLEN.

[Tr. at 47] Sometime thereafter, METCO removed the barge MM 7927 from the tow and sent it to dry-dock at National Marine Service in Wood River, Illinois for repairs. [Tr. at 43, 49] Mr. Harold Dobbs, Vice President of Boat Operations for METCO Barge Line, estimated the cost of the damage to the barge to be between $25,000 and $30,000. [Tr. at 43; Investigating Officer (IO) Exhibit 3]

Mr. Dobbs first learned of the casualty to the MM 7927 on April 26 or 27, 1998, when he returned from an out-of-town business trip. [Tr. at 47] Mr. Dobbs testified that he "didn't think a whole lot of it until a couple days later, you know, just got to looking, checking into it from the claims people, and my superior people wanted to know what happened to this damage, and I had to do a little investigating into it. Somewhere mid-week is when I got concerned about this accident. And also the pictures were brought to me and laid on my desk, and when I saw the pictures, I had a problem." [Tr. at 47-48; IO Exhibits 4a, 4b, 4c, 4d]

Sometime between April 23 and April 28, 1998, METCO's marine investigator, Paul Tobin, questioned the crew of the FRED JOERGER about the marine casualty but they were not able to explain how, or when, the damage to the MM 7927 happened. [Tr. at 45-46] This information was passed on to Mr. Dobbs who found the lack of information about the casualty incredible. "Based on my twenty years of piloting vessels, the barge sustained considerable damage which we've got pictures of. Somebody would have felt . . .We had to take the barge out to repair it to make it seaworthy. I mean, it was in trouble to sinking. We had to dry-dock this barge loaded, which is something you very seldom ever do." [Tr. at 46] **"**. . . [T]hese barges [are] . . . divided up in what's called wing tanks that are void. They're air tanks that keep the barges floating, afloat. If you

look at the picture, two of these wing tanks were knocked completely out. They were flooded to what you call water level. I mean, there was nothing to keep the water from coming. And another one [wing tank] was damaged. So that made the barge unseaworthy. And it was in the state of sinking or possibly sinking, and that's the reason we had to dry-dock the barge loaded, which is something I've never done before." [Tr. at 50-51]

Mr. Dobbs testified that he became concerned about the casualty when neither he nor Mr. Tobin could develop information about the casualty that he, Dobbs, believed the crew should have been able to explain. "Well, I had my opinion that somebody was holding out telling us what happened to damage this barge, whether it was a pilot, mate, or whoever. Somebody in my opinion knew when this happened, and I thought I had a reduction in performance . . . if you damage a barge this severe, you should, somebody should know . . .They should feel it hit. It would shake the boat around, move the boat around. You don't slide into the objects and not feel them." [Tr. at 48-49]

As part of his investigation, Mr. Dobbs also spoke to METCO's crew dispatcher, Mr. Kurt Louder. Mr. Louder informed Mr. Dobbs that on April 22, 1998, during the transfer of the 15-barge tow from the BILLY BOLEN to the FRED JOERGER, a crewmember from the FRED JOERGER visited the cook of the BILLY BOLEN in her quarters. [Tr. at 57] Captain Hugh Alrich, captain of the BILLY BOLEN, told the dispatcher about the visit. [Tr. at 57-58] Captain Alrich knew about the visit because he had been watching his cook because she had been exhibiting "erratic behaviors". [Tr. at 58] The visit between the FRED JOERGER crewmember and the BILLY BOLEN cook happened while the two vessels were exchanging tows – about 10:00 p.m. on April 22,

1998. [Tr. at 55-57] During their conversation, the dispatcher also told Mr. Dobbs there were rumors in the company that the BILLY BOLEN cook had been selling drugs.[5] [Tr. at 57-58]

On May 6, 1998, Mr. Dobbs ordered a reasonable cause drug test for the FRED JOERGER's crew. At that time, METCO had a drug and alcohol policy that was set out in the company's employee handbook. The company had a practice of showing and explaining the handbook to METCO employees when they were hired, and thereafter, every payday the employees would verify that they understood METCO's drug and alcohol policy. [Tr. at 53-54, 56-57] The relevant portion of the Handbook is as follows:

> c. "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon: abnormal conduct or erratic behavior while at work or a significant deterioration of work performance."

(Tr. at 53-54; IO Ex. 5, p. 14, Section E (1)(c)(2))

Near the end of his testimony, Mr. Dobbs summarized his reasons for drug testing the crew of the FRED JOERGER by saying, "After what the crew dispatcher brought to me and this came from another captain off the other vessel, then after we had the accident or whatever happened, and my claims people couldn't come up with no answers why it happened, I just had my suspicions. I thought I had a problem on board the boat, and I got ten crew members on there and I was concerned about their safety, and I figured my job, my position, that's what I'm entitled to do." [Tr. at 59-60, 48, 52, 54]

[5] There is no evidence on the record that the BILLY BOLEN's cook was drug tested or found to be selling drugs. Additionally, the ALJ asked Mr. Dobbs if he had any proof the BILLY BOLEN's cook was selling drugs. Mr. Dobbs responded, "I have no proof, no, sir. This is strictly hearsay from the crew dispatcher".

On May 6, 1998, Respondent and nine other crewmembers of the FRED JOERGER, submitted urine samples to Mr. Barry Goddard, owner of Maritime Consultants, a company that manages drug and alcohol testing programs for marine transportation companies. [Tr. at 41, 60, 108-111]

Respondent testified that on May 6, 1998, Mr. Goddard used a space onboard the FRED JOERGER called the deck locker to do his sampling. Respondent testified that Mr. Goddard used a four to five foot long deep freeze located in the deck locker as a workbench and that Mr. Goddard "had a lot of plastic bags and stuff" laid on top of the deep freeze while he was preparing to collect urine samples from the crew. [Tr. at 169] Respondent testified that he was about the fourth person to give a specimen on May 6, 1998, and that when it was his turn to give a urine sample, he "picked up a cup [from the top of the deep freeze] and proceeded to the bathroom." [Tr. at 171] Respondent testified that the sample cup he used was not wrapped or sealed and was selected at random from a group of about 10 or 12 on top of the deep freeze. [Tr. at 171] Respondent testified that after filling the sample cup, he gave it to Mr. Goddard who "just kind of looked at it, at the heat tape on it, and then he commenced to put it into two, I think he done a split that day." [Tr. at 172] Respondent then testified that Mr. Goddard "split" the sample by pouring the contents of the specimen cup into two bottles that also had been set out on the deep freeze. [Tr. at 172] On cross-examination, Respondent admitted that, although he did not look closely, he did not notice any foreign material in the sample cup he used. [Tr. at 178-179] Nor, for that matter, did he see foreign substances on or in the collection containers into which the collector split the sample. [Tr. at 179] Respondent concluded

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[Tr. at 58] There also is no evidence in the record as to the identity of the FRED JOERGER crewmember

the portion of his direct examination relating to the May 6, 1998, sampling by denying that he adulterated, tampered with, or placed any foreign material in the urine specimen he gave Mr. Goddard. [Tr. at 173]

Respondent then called Mr. Gene Massengill to testify. Mr. Massengill served as first mate aboard the FRED JOERGER and also was drug tested on May 6, 1998. Massengill testified that the collector took sampling jars out of a Ziplock bag and when a crewmember would present the collector with a filled sample bottle, Mr. Goddard would put a piece of tape on the bottle to test its temperature, then pour the sample into another bottle, seal that bottle, initial it to make it tamper proof, then finish the crewmember's paperwork. [Tr. at 159 -161] Mr. Massengill did not remember whether the collector split his sample on May 6, 1998. [Tr. at 160] Finally, Mr. Massengill testified that he saw the collector, Mr. Goddard, leave the deck locker once before the testing began and once during the testing, step into the next space, which was the galley, to pour a cup of coffee. [Tr. at162-163]

The collector, Mr. Goddard, testified that his company, Marine Consultants, had been doing specimen collection since 1989. [Tr. at 108] Mr. Goddard testified he received his training through laboratory tours and on-the-job-training and that he also had been a specimen collector while he was a Petty Officer in the Coast Guard. Mr. Goddard testified there are no regulations either in Title 46 or Title 49 of the Code of Federal Regulations that set the minimum level of training a collector must have to conduct DOT sampling. [Tr. at 109-110] In 1989, upon being discharged from the Coast Guard, Mr. Goddard started his company, and estimated at the hearing that between 1989 and 1998

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that visited the BILLY BOLEN cook.

he had collected "8,000 or so" samples. [Tr. at 110] Marine Consultants began sampling for METCO in 1991. [Tr. at 111]

Mr. Goddard testified that on May 6, 1998, he boarded the FRED JEORGER at about 12:10 in the afternoon at a facility called Economy Boat Store near Cairo, Illinois. [Tr. at 116, 118] Mr. Goddard testified that when he boarded the FRED JOERGER on May 6, he first went to the starboard head in the forward deck locker; there, he placed a dye-coloring agent in the toilet and its tank and secured the sink to prevent crewmembers from running the water. [Tr. at 124] Mr. Goddard testified that he knew most of the crewmembers by sight and that he knew Respondent by sight because he had taken urine samples from Respondent in the past. [Tr. at 125] Mr. Goddard testified that, because he knew Respondent by sight, he did not ask for Respondent's identification on May 6, 1998. [Tr. at 125-126] Mr. Goddard testified that he followed the usual formalities when collecting Respondent's urine sample: identify the person, initiate the paperwork including collecting the Social Security Number (which was provided by Respondent on May 6, 1998), collect the urine sample, complete the paperwork, seal the sample jars, prepare the samples for shipment, and give a copy of the paperwork to the person tested. [Tr. at 126, 127] Mr. Goddard testified that he collected 10 samples while onboard the FRED JOERGER on May 6, 1998. [Tr. at 118]

Contrary to Respondent and First Mate Massengill's testimony, Goddard testified that the sampling kits he used on May 6, 1998, were sealed in plastic. He indicated that his company ordered sample kits from the same laboratory that tests the samples. The laboratory provided sealed kits in "certified to be drug-free pouch[es]" which were used on May 6, 1998. [Tr. at 139-140] Mr. Goddard also said that, although he did not

specifically look for contaminants in the sample jar on May 6, 1998, such contaminants would have been easy to see. [Tr. at 128-129, 133] Mr. Goddard then testified that when Respondent returned from the deck locker head with his urine sample, Mr. Goddard "split" the sample, pouring about 20 milliliters into one jar and at least 15 milliliters into a second jar, both of which had come from a sealed plastic bag opened in front of the Respondent. [Tr. at 131] Mr. Goddard then prepared the samples for shipping in the manner described above. [Tr. at 131] On cross-examination, Respondent's counsel pointed out to Mr. Goddard that he had not marked the block on the sample custody and control form to indicate that he had taken the sample's temperature. [Tr. at 141] Mr. Goddard agreed that he had not marked the form, but it was not a "fatal flaw" in the sampling process. [Tr. at 141] The laboratory forensic toxicologist, Mr. Ronald Bacher, who tested Respondent's urine sample indicated that the collector's failure to mark whether the temperature had been taken would "have no bearing" on the laboratory's analysis. [Tr. at 101]

On May 7, 1998, a Department of Health and Human Services approved lab, Universal Toxicology, received the samples by overnight mail service. As Respondent's urine specimen was being prepared for testing, a laboratory technician noticed the smell "of the odor of bleach, and bleach contains chlorine." [Tr. at 97-98] Nevertheless, the technician sent Respondent's urine sample for immunoassay screening where it tested negative for drugs. [Tr. at 98, 107] However, because of its odor, Respondent's sample also was tested for chlorine where it was shown to have one to two parts per million of chlorine - far in excess of that which would be found occurring naturally in human urine (approximately .5 parts per million). [Tr. at 101-102] Because Respondent's sample

tested positive for chlorine in excess of that which occurs naturally, the technician for Universal Toxicology determined the sample had been adulterated and marked the custody and control form as "test not performed" in accordance with federal regulations. [Tr. at 98, 100-105] Based on the laboratory's findings, the Medical Review Officer (MRO) determined that Respondent's specimen had been adulterated and characterized Respondent's drug test as a "refusal to submit." *See* 46 C.F.R. 16.105. On May 11, 1998, the MRO advised Respondent's employer to obtain another urine sample from Respondent. Mr. Goddard returned to the FRED JOERGER to take a second urine sample from Respondent on May 9, 1998. [Tr. at 120-121] Respondent submitted a second sample at that time which subsequently tested negative for drugs. [Tr. at 120, 144]

BASES OF APPEAL

Respondent contends that the ALJ's decision should be vacated or, in the alternative, the sanction of revocation is too severe. Respondent asserts three bases for appeal:

1. The evidence was insufficient to sustain the allegations of refusal to submit to a drug test because the employer did not meet the requirements for "reasonable cause" drug testing.

2. The evidence was insufficient in establishing proper collection and a proper chain of custody involved in the urine sample submitted by Respondent because there was evidence that Respondent's urine sample was left unattended in an area accessible by other persons and the collector did not comply with all procedures.

3. The order revoking Respondent's license was too severe under the circumstances where Respondent had a good working record as a merchant marine[r] for approximately 19 years, he had not previously used drugs and he submitted a second sample within three days of the first sample, which tested negative.

OPINION

I.

Respondent argues there was no reasonable cause to require a drug test of the entire crew of the FRED JOERGER and states that "a reasonable basis for believing one person aboard a vessel was using drugs does not automatically extend to the entire crew." (Appellant/Respondent's Brief on Appeal at 8) Therefore, Respondent argues, since METCO had no particularized reasonable suspicion that Respondent was using drugs, his act of providing an adulterated urine sample when tested should not be considered by the ALJ. Respondent argues, essentially, that the Exclusionary Rule should apply to Coast Guard Suspension and Revocation cases. In Immigration and Naturalization Service v. Lopez-Mendoza et al., 468 U.S. 1032 (1984) the Supreme Court severely restricted use of the Exclusionary Rule in administrative proceedings. In Lopez-Mendoza, two aliens, both citizens of Mexico, (Lopez-Mendoza and Sandoval-Sanchez) were arrested by police in separate jurisdictions. The arrests were subsequently deemed unlawful. Nevertheless, in the course of their arrests, both aliens admitted to being illegally in the country. Based on their admissions, the aliens were taken to INS deportation proceedings where their statements were used as evidence against them. Both Respondents in Lopez-Mendoza were ordered deported and they appealed, arguing that the evidence used by the INS in their administrative proceedings was obtained in violation of their Fourth Amendment rights and should be excluded from the proceeding as fruits of an unlawful arrest. In its analysis, the Court examined the purpose of a deportation hearing, "[A] deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country.

Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Id*. at 1032, 1038, 1039.

Next, the Court applied a balancing test to determine whether the Exclusionary Rule properly should be used in the administrative deportation hearing. The Court examined the value of deterring police misconduct by excluding illegally gained evidence from the hearing against the cost of frustrating enforcement of U.S. immigration laws. *Id.* at 1042-1051. The Court decided that the police misconduct to be deterred in that case was so attenuated from the administrative deportation hearing that there was little value in applying the rule; especially when weighed against the cost of losing useful and probative evidence at the deportation hearing.

I believe the analysis in Lopez-Mendoza should apply to this case. The Exclusionary Rule is a device created by the courts to deter police misconduct. Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471(1963). First, as was the case in Lopez-Mendoza, the ALJ in this case has no power to impose a criminal sanction on Respondent for adulterating his sample. Respondent's hearing was for the sole purpose of examining his fitness to hold a Coast Guard-issued license. Second, there is no police misconduct to deter. In this case, the decision to drug test Respondent was made by the marine employer in a good faith effort to comply with the company's drug and alcohol policy -- a policy Respondent knew he was subject to as a condition of his employment. Courts have long held that employers may conduct drug testing on employees where the employer has a reasonable, good faith, objective suspicion of an employee's drug use, particularly so where the employee is in a position where public safety or safety of others is concerned. *See* Edward P. Twigg, Jr. v. Hercules

Corporation, 185 W. Va. 155, 406 S.E. 2d 52 (1990). Third and finally, the costs of applying the Exclusionary Rule in this case are high. To do so would be to frustrate the purpose of the regulations to promote a drug free work environment in the marine industry. I have held in other cases that the Exclusionary Rule should not apply to Coast Guard Suspension and Revocation proceedings. Appeal Decisions 2297 (FOEDISCH), 2135 (FOSSANI). I believe that reasoning still is sound. Therefore, even assuming that Mr. Dobbs did not have reasonable suspicion to drug test the entire crew of the FRED JOERGER (an issue I will address in more detail below), it would not be appropriate to apply the Exclusionary Rule to the facts of Respondent's case.

Next, Respondent argues that because all 10 crewmembers of the FRED JOERGER were drug tested, if Mr. Dobbs' reasonable suspicion analysis did not apply to all of them, then all the results must be ignored by the ALJ. I believe the more rational approach is to ask whether the Marine Employer properly found reasonable suspicion to drug test the Respondent.

METCO described its "reasonable suspicion" drug-testing standard in its employee handbook. The handbook said the decision to conduct a reasonable suspicion drug test must be:

> "drawn from specific, objective, articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon: abnormal conduct or erratic behavior while [the employee is] at work or a significant deterioration of [the employees] work performance."

The ALJ found that METCO's "reasonable suspicion" drug testing standards were consistent with the Coast Guard's "reasonable cause" standards at 46 C.F.R. § 16.250(b):

> "The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use."

The ALJ found that the marine casualty that damaged the MM 7927 happened on Respondent's watch on May 23, 1998. [D&O at 5] Mr. Dobbs clearly thought so too.

Mr. Dobbs had a number of facts to consider. He had a barge so severely damaged it was in danger of sinking and had to be dry-docked while it still held cargo, a highly unusual event. Mr. Dobbs believed that Respondent should have discovered the casualty and been able to explain how it happened, especially when the damage was so obvious that the Captain of the towboat discovered it within 10 minutes of relieving the watch at 06:00 a.m. on April 23, 1998.

These are specific, objective, articulable facts that Mr. Dobbs assessed in light of his 20 years of experience in the towing industry. In light of that analysis, Mr. Dobbs concluded that Respondent was experiencing a diminution in performance similar to that described in the employee handbook and determined that he had a duty to drug test Respondent.

The ALJ made findings of fact that Mr. Dobbs' decision to drug test Respondent was supported by the facts and reasonable under the circumstances.

Additionally, the ALJ found that the provisions of 33 CFR § 95.035(a)(1) which authorize a marine employer to direct an individual operating a vessel to undergo a reasonable cause chemical test when he is directly involved in a marine casualty were applicable to Respondent. The ALJ found the definition of marine casualty at 46 U.S.C. § 6101(a)(4), which includes "material damage affecting the seaworthiness or efficiency of the vessel." [D&O at 13-14] The ALJ found that the damage to the MM 7927 met the

definition of marine casualty as set out above; that as the pilot of the FRED JOERGER at the time of the casualty, Respondent was directly involved in the marine casualty; and, based on the findings above, that METCO was authorized to require Respondent to submit to a drug test. [D&O at 14]

The standard of proof applicable in Suspension and Revocation proceedings is described at 46 C.F.R. § 5.63, which states "findings must be supported by and in accordance with the reliable, probative, and substantial evidence." Appeal Decision 2477 (TOMBARI). "[T]he term 'substantial evidence' is synonymous with the 'preponderance-of-the-evidence' standard". Appeal Decision 2477 (TOMBARI) *citing* Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The ALJ's duty is to evaluate the testimony and evidence presented at the hearing. There is longstanding precedent in Suspension and Revocation proceedings that the findings of fact of the ALJ are to be upheld unless they are shown to be arbitrary and capricious, unsupported by law, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2610(BENNET); 2557 (FRANCIS); 2452 (MORGANDE) and 2332 (LORENZ); 2570 (HARRIS), *aff* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (AIRIES), and 2614 (WALLENSTEIN). Arbitrary and capricious means "willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." Black's Law Dictionary 105 (6th ed. 1990). As a basis for appellate review, a finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. 5 Am.

Jur. 2d *Appellate Review* § 672 (1997); Black's Law Dictionary 251 (6th ed. 1990). Accordingly, the ALJ's determination will only be overturned if he acted arbitrarily and capriciously, his decision was based on inherently incredible evidence, his decision is unsupported by law, or he was clearly erroneous in determining that Respondent 's employer had "reasonable cause" to order Respondent to submit to a drug test. I find the ALJ's determination was not arbitrary or capricious, was not clearly erroneous, was supported by law and was not clearly erroneous.

II.

I will begin this portion of my opinion by disagreeing with one factual observation of Respondent's brief on appeal. In that brief, at page 6, *Bases for Appeal,* Respondent contends that ". . . there was evidence that Respondent's urine sample was left unattended . . ." A review of the Hearing Transcript, Respondent's Brief of Appeal, and briefs submitted by Respondent at the hearing demonstrates there was no allegation at the hearing that Respondent's urine sample ever was left unattended by the collector, Mr. Goddard, on May 6, 1998. Instead, Respondent and Mr. Massengill testified that on at least one occasion during the testing period, Mr. Goddard left the room where the empty, unused sample jars were set out on the deep freezer. There is no allegation that Respondent's urine sample ever was left unattended from the time he produced it until Mr. Goddard secured it for shipment. To the contrary, the hearing transcript shows clearly that Respondent's sample was under control, either by Respondent or the collector, from the time Respondent produced it until the time the collector secured it for shipment. [Tr. at 171-172].

Beyond the suggestion that Respondent's urine sample was left unattended, Respondent's appeal rests on allegations of several inconsistencies in the collection

process, among them that the collector did not ask Respondent for identification during the collection. The ALJ determined that the collector found a proper means to identify the Respondent before collecting his urine specimen consistent with the regulations. [D&O at Finding of Fact 29] 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). The findings of fact of the ALJ are upheld in S&R proceedings unless they can be shown to be arbitrary and capricious or there is a showing that they are clearly erroneous. Appeal Decisions 2610 (BENNET); 2557 (FRANCIS); 2452 (MORGANDE) and 2332 (LORENZ). Again, the findings of the ALJ will not be disturbed unless they are inherently incredible. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2506 (SYVERSTEN), 2492 (RATH), 2378 (CALICCHIO), 2333 (AYALA), 2302 (FRAPPIER).

Respondent also showed that the collector did not mark the custody and control form to indicate that the temperature of the sample was taken, and argued that the sample cups were not sealed prior to being used. The ALJ addressed these issues in his D&O at findings of fact 21 through 57 and in his Opinion. The ALJ determined that even in cases where there are multiple, technical infractions of the regulations, the testing procedure is not vitiated where the infractions do not breach the chain of custody or violate the specimen's integrity. I concur. Appeal Decisions 2537 (CHATHAM) 2555 (LAVALLAIS), 2541 (RAYMOND); Gallagher v. NTSB, 953 F.2d 1214 (10th Cir., 1992).

As to evaluating the conflicting testimony of Respondent and Mr. Massengill on the one hand and the collector, Mr. Goddard, on the other, regarding whether the specimen cups were sealed, the ALJ listened to the witnesses, and determined that the specimen cups had been properly maintained prior to and after being used by Respondent. "Where there is a conflict in the testimony, it is the duty of the Administrative Law Judge to resolve that conflict." Appeal Decision 2239 (VINCENT).

I find that, as to all the factual allegations discussed above, the ALJ properly exercised his discretion in evaluating the testimony. Further, I find the ALJ's conclusions were not arbitrary, capricious, clearly erroneous, or inherently incredible. Therefore, I will not overturn his findings.

III.

Respondent argues that the award in this case is too severe when taking into account his good working record as a merchant mariner for approximately 19 years, the fact that he had not previously used drugs, and that he submitted a second sample within three days of the first sample, which tested negative. Respondent's previous drug history may have had some relevance in mitigation, as might the fact that he submitted a second urine sample three days after the initial test, which tested negative. I have no reason to believe the ALJ did not consider these facts along with Respondent's work record during his deliberations. It is well settled that the degree of severity of an order is a matter particularly within the discretion of the ALJ and will not normally be disturbed on appeal. Appeal Decisions 2234 (REIMANN), 2465 (O'CONNELL), 2414 (HOLLOWELL), 2391 (STRUMES), 2593 (MOWBRAY), 2313 (STAPLES). Even without that deference, I would not be disposed to reduce the ALJ's award in this case.

The ALJ points out, quite correctly, that the Congressionally mandated drug-testing regulations are designed to minimize use of intoxicants by merchant mariners and to promote a drug free and safe work environment. I have previously said that that goal would be severely undermined if merchant mariners could refuse a chemical test and face a lesser award than if they tested positive for a controlled substance. Appeal Decision 2578 (CALLAHAN). Therefore, I will not disturb the Order of the ALJ.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. There is substantial evidence of a reliable and probative nature to support the finding of the Administrative Law Judge.

ORDER

The Administrative Law Judge Decision and Order dated March 2, 1999 is AFFIRMED.

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T. H. COLLINS
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 13th day of February 2002.