UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATE OF AMERICA UNITED STATES COAST GUARD	)	
vs.	)	DECISION OF THE
MERCHANT MARINER'S LICENSE No. 887187 AND DOCUMENT No. [redacted]	)	VICE COMMANDANT ON APPEAL
Issued to David Brian Shaffer	)	NO. 2627

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 8, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard at New Orleans, Louisiana, found proved a charge of *misconduct* with one supporting specification. The single specification alleges that Appellant, did, on July 7, 1999, while employed as a tankerman at Economy Boat, provide an adulterated urine specimen as evidenced by nitrate found during a drug test administered on the urine specimen collected on that date.

At a hearing held on January 12, 2000, at the United States Coast Guard Marine Safety Unit, Baton Rouge, Louisiana, the Appellant appeared with counsel and entered a denial of the charge and specification. The Coast Guard Investigating Officer introduced eleven exhibits and called four witnesses. Appellant introduced two exhibits and called four witnesses. The ALJ introduced two exhibits. The charge and specification were found proved and Appellant's license and document were revoked.

The D&O was served on Appellant on June 8, 2000. Appellant filed a Notice of Appeal on July 6, 2000, and an appeal brief on October 20, 2000. A supplementary appeal brief was filed on November 20, 2000. This appeal is properly before me.

APPEARANCE: Madro Bandaries, Esq., Post Office Box 56458, New Orleans, Louisiana 70156-6458 for the Appellant. The Investigating Officer was LT(jg) Christopher J. Gagnon, U.S. Coast Guard.

FACTS

At all times relevant, the Appellant was the holder of the above captioned license and document. On July 7, 1999, the Appellant was employed as a tankerman by Economy Boat Store, New Orleans, Louisiana. At that time, the Appellant was engaged in transporting supplies by boat to various shore-side and offshore petroleum related facilities and vessels.

On July 7, 1999, Ms. Paula Landry, a specimen collector employed by West Baton Rouge Medical Clinic, a company retained to implement the Economy Boat Store's drug testing program, conducted a random collection of urine specimens at the offices of Economy Boat Store. The Appellant was the last employee to provide a specimen that day.

At the time of the collection, the Appellant was given a specimen cup and directed to the only bathroom on site to provide his specimen. The Appellant was observed entering the bathroom alone and later exiting with his specimen. He placed his specimen on the table in front of Ms. Landry, who poured it into two containers for shipment to the laboratory. The Appellant prematurely left the collection site before initialing the two labels used to seal the two specimen containers. The Appellant returned immediately after Ms. Landry called him back, and completed the collection process by signing the labels. The Appellant's sample was shipped to Laboratory Specialist, Inc. for testing.

At the laboratory, Appellant's sample initially screened at 69 ng/ml for THC and was determined to contain a nitrate concentration of 1112 mg/ml. The Department of Health and Human Services defines a urine specimen as adulterated if the nitrate concentration in the sample is greater than or equal to 500 mg/ml. The laboratory determined that Appellant's sample was adulterated and forwarded its results to the Medical Review Officer, Dr. Patrick Daigle.

Dr. Daigle reported Appellant's sample as adulterated and labeled copy four, block eight, of the custody and control form as "test not performed" in accordance with a U.S. Department of Transportation Memorandum to Medical Review Officers dated September 28, 1998.

BASES FOR APPEAL

I. The ALJ erred in finding that regulatory procedures were complied with regarding the collection and processing of the Appellant's urine sample.

II. The ALJ erred inasmuch as he was arbitrary and capricious in holding that there was no breach in the chain of custody. The Appellant argued that there was clear and convincing evidence that other credible explanations existed that would explain the apparent adulteration of the Appellant's urine specimen.

III. The ALJ erred in not providing the Appellant with a complete transcript of the hearing with all exhibits, and the ALJ did not have the transcript of the hearing before rendering his decision.

OPINION

Before proceeding to the merits, it is necessary to clarify the jurisdictional basis of the specification. Appellant was charged with misconduct and the underlying specification states in part, "The sample was found to contain a high concentration of nitrates and determined to be adulterated by the laboratory and Medical Review Officer." The specification could be read as though the laboratory or Medical Review Officer adulterated Appellant's sample. Based on the record and Appellant's vigorous defense, it is clear that neither the Coast Guard nor the Appellant interpreted the specification in this manner. Both parties understood the specification to mean that Appellant adulterated the specimen. Although the specification may not have been artfully worded, this does not necessarily constitute reversible error. Findings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated. Appeal Decisions 1792 (PHILLIPS) and 2422 (GIBBONS), citing *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950).

The record clearly demonstrates that the Appellant understood which act constituted the basis for the misconduct charge, namely, his providing an adulterated

urine specimen. This is the offense that was actually litigated by the parties, regardless of the deficiency in the specification. Furthermore, Appellant did not object to the wording of the specification, either at the hearing or on appeal. Therefore, there was no prejudice to Appellant and the specification will not be set aside. Appeal Decisions 2386 (LOUVIERE) and 2578 (CALLAHAN).

I & II

Appellant asserts that the urinalysis results should not have been considered by the ALJ because the collection process did not meet all the technical requirements of the regulations. Appellant contends there were various discrepancies with the chain of custody. Furthermore, Appellant asserts that the ALJ was arbitrary and capricious in not finding a breach in the chain of custody based on Appellant's clear and convincing evidence. I have previously held that the failure to meet a technical requirement of a regulation does not vitiate an otherwise proper chain of custody. Appeal Decisions 2562 (BEAR), 2542 (DEFORGE), 2522 (JENKINS), and 2537 (CHATHAM). A drug use charge may be found proved even when minor procedural errors not adversely affecting the actual chain of custody or specimen integrity exist. *Gallagher v. National Transportation Safety Bd.*, 953 F.2d 1214 (10th Cir. 1992). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff* NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN).

In the present case, Appellant alleges that there were various flaws with the chain of custody. The record establishes that the collection, chain of custody, and the testing of Appellant's urine specimen were all in substantial compliance with the drug testing regulations found at 49 C.F.R. Part 40. Appellant was identified at the collection site. [Trial Record (TR) at 93] Appellant provided a urine specimen that the sample collector poured into a bottle and sealed in Appellant's presence, albeit after he stepped away from the collection site and was called back after a very brief period. [TR at 99-101] The specimen bottle was sealed with a tamper-proof seal. [TR at 101] Appellant's personal information and the unique control number were recorded on a Drug Testing Custody and Control Form. [TR at 102] Appellant signed this form and certified that he provided his

urine to the collector; that the specimen bottle was sealed with a tamper-proof seal in his presence; and that the label and control numbers affixed to the specimen bottle were correct. [TR at 102-103] The specimen was properly delivered to the laboratory. [TR at 116-117] There is no evidence that the specimen was ever opened prior to being received by the laboratory and there is no contention that the handling of the specimen at the laboratory and its testing were improper.

Based on the foregoing, I find that Appellant's specimen was submitted, collected and transported in full accordance with standard federal drug testing rules, procedures and regulations. I also find that any discrepancies were minor and technical in nature and did not adversely affect the chain of custody or specimen integrity. Therefore, I will not disturb the findings of the ALJ who did not act arbitrarily and capriciously in this case.

III

Appellant asserts that the ALJ erred by not providing the Appellant with a complete transcript of the hearing that included all hearing exhibits. An Appellant will be provided a transcript of the hearing as part of the appeal process pursuant to 33 C.F.R. § 20.1002. In the absence of the complete transcript, the D&O of the ALJ cannot be reviewed under the standards established in applicable law. 5 U.S.C. §§ 556(d), (e); 46 U.S.C. § 7702(a); 46 C.F.R. § 5.701(b).

In the present case, the entire record of the hearing was provided to the Appellant who perfected the appeal that is now before me. Initially, it appears that the ALJ forwarded the transcript to Appellant without any hearing exhibits. *See* ALJ letter dated November 7, 2000. Appellant alleged this was an error in his original appeal brief dated October 19, 2000. However, Appellant did not bring this omission to the attention of the ALJ until he filed his original brief. On November 7, 2000, the ALJ forwarded the missing exhibits to Appellant's counsel and indicated that he would have forwarded the exhibits earlier if the Appellant had notified him. *See* ALJ letter dated November 7, 2000. Subsequently, Appellant's counsel filed a supplementary appeal brief and again alleged the same error. The ALJ did not violate the applicable regulation when he forwarded the transcript to Appellant. 33 C.F.R. § 20.1002. In any event, the ALJ forwarded the hearing exhibits to Appellant, and Appellant submitted a second brief. The Appellant was not prejudiced by not having the exhibits earlier.

The Appellant also contends that the ALJ erred inasmuch as he rendered his decision without the transcript of the hearing. 33 C.F.R. § 20.902(b) provides that the decision of the ALJ must rest upon a consideration of the whole record of the proceedings. 33 C.F.R. § 20.903(a) further provides that the "transcript of testimony" is part of the official record of a proceeding. This definition is consistent with the Administrative Procedures Act (APA). 5 U.S.C. § 556(e). Even though the definition of record includes the transcript of testimony, the APA does not require an ALJ to wait until the testimony is transcribed to render a decision and most agencies do not produce a transcript of a proceeding unless there is an appeal. *See* 5 U.S.C. § 557(b) and Attorney General Manual on the APA at 79, reprinted in Federal Administrative Procedure Sourcebook 2d Ed. (1992) at 145. Furthermore, 33 C.F.R. Part 20 does not require that the ALJ delay his decision until a transcript is produced. Judicial expediency would dictate otherwise. It is clear from the record and the D&O that the ALJ considered the testimony of the witnesses who appeared at Appellant's hearing. Given that the ALJ conducted, and was present for, the entire hearing, the Appellant's argument that the ALJ erred because he did not consider the transcript of hearing is without merit.

Based on the foregoing, I find that the ALJ did not err by forwarding only the transcript to the Appellant. I also find that the ALJ did not err when he rendered his decision without the transcript of testimony. I note that the appellate record submitted to the Commandant contains the transcript and all exhibits, and this decision was based on the record of proceedings.

CONCLUSION

The findings of the ALJ are supported by reliable, probative and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Decision and Order of the Administrative Law Judge dated June 8, 2000, is AFFIRMED.

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T. H. COLLINS
Vice Commandant
Acting Commandant

Signed at Washington, D.C. this 25th day of February, 2002.