U N I T E D S T A T E S O F A M E R IC A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 799032	:	
	:	ON APPEAL
	:	
	:	NO. 2612
	:	
Issued to Kevin Spence DeGough	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated September 15, 1998, an Administrative Law Judge of the United States Coast Guard at Houston, Texas revoked Appellant's above-captioned license and document, upon finding proved the charge of *use of a dangerous drug*. The supporting specification found proved alleges that Appellant, "being the holder of above captioned license, [was] found to be a user of dangerous drugs, to wit: cocaine, as a result of a random drug screening test collected on February 11, 1998, and by a confirmatory test conducted on February 17, 1998."

There were three hearings held on May 22, June 26, and June 30, 1998, each in Galveston, Texas. Appellant appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of four witnesses and ten exhibits. Appellant introduced two exhibits, four witnesses, and chose to testify. The charge was found proved, and Appellant's license was revoked.

The Administrative Law Judge's Decision and Order was served on Appellant on September 22, 1998. Appellant filed a notice of appeal on October 15, 1998, and was sent a copy of the transcript on October 26, 1998. Appellant requested an extension of time to file an appeal on November 12, 1998. An extension of time was granted until

November 27, 1998. Appellant perfected this appeal on November 25, 1998. This appeal is properly before me.

APPEARANCE: James T. Liston, Esq., 7322 Southwest Freeway, Suite 1100, Houston, Texas 77074, for Appellant. The United States Coast Guard Investigating Officer was Chief Petty Officer Jim M. Scogin.

FINDINGS OF FACT

At all relevant times, Appellant held the above captioned license. His license authorized him to serve as a Master of Steam or Motor Vessels of not more than 150 gross tons upon or near coastal waters. Appellant has approximately eighteen (18) years experience in the maritime industry.

On and about February 11, 1998, the Appellant was employed and working under the authority of his captioned license for Trico Marine Operators, Inc. aboard the M/V FIRE HOLE. On February 11, 1998, Appellant was asked by Mr. Renee Gaudet of Trico Marine to provide a urine sample pursuant to a random drug test. On February 11, 1998, Mr. Lafayette Veals, a trained and experienced collector employed by Seacon Security Concepts, collected a sample of greater than 30 milliliters of urine from the Appellant. The container was properly sealed in the presence of the Appellant, who signed the appropriate section of the Drug Testing Custody and Control Form. Mr. Veals shipped the sample to a certified laboratory, PharmChem Laboratories of 7606 Pebble Drive, Fort Worth, Texas.

PharmChem received Appellant's urine specimen intact and properly identified, and conducted the prescribed tests. The screening test was positive for cocaine metabolites. The confirming Gas Chromatography/Mass Spectometry (GC/MS) test showed 336 nanograms/milliliter (ng/ml) of cocaine metabolite. Upon the request of the Appellant, an additional test was conducted on a portion of the remaining urine specimen by a second certified laboratory, Premier Analytical Laboratories, of Channelview, Texas. On February 17, 1998, Premier Analytical Laboratories also conducted a GC/MS test, which was positive for cocaine metabolites.

BASIS OF APPEAL

Appellant raises two issues on appeal. First, Appellant claims the use of single sample drug testing is a violation of the Fifth Amendment right to equal protection in light of the fact that other transportation agencies (e.g. FHWA, FAA, FTA and FRA) require split sample testing. Single sample drug testing requires the collection and testing of one container (30 milliliters) of urine. See 46 C.F.R. § 40.25(f)(10)(iii). Split sample testing requires the collection and splitting of one container (45 milliliters) of urine into two containers (primary specimen containing 30 milliliters and split specimen containing 15 milliliters). See 46 C.F.R. § 40.25(f)(10)(ii). If the primary specimen tests positive for a dangerous drug then the donor may request that the split sample be tested in a different DHHS-certified laboratory. See 46 C.F.R. § 40.25(f)(10)(ii)(E).

Second, Appellant claims there was not substantial evidence to support the finding of use of a dangerous drug. I find that Appellant's issues are without merit and AFFIRM the Administrative Law Judge's Decision.

OPINION

I.

Appellant challenges the single sample drug test that was the basis of the charge and specification in this case as violating the Appellant's Fifth Amendment right to equal protection. Appellant raises this issue inappropriately in this forum. The purpose of these proceedings is remedial in nature and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 U.S.C. § 7701, 46 C.F.R. § 5.5. The urinalysis collection and testing programs are conducted in accordance with regulations promulgated in accordance with the Administrative Procedures Act (5 U.S.C. § 552 *et seq*.) set forth in 46 C.F.R. Part 5. Those regulations specifically detail the authority of the Administrative Law Judge at the hearing level and the Commandant at the appellate level. Single sample testing is explicitly authorized under 49 C.F.R. § 40.25(f)(10)(i)(A).

Neither the Administrative Law Judge nor the Commandant are vested with the authority to decide constitutional issues; that is exclusively within the purview of the federal courts. See Appeal Decision Nos. 2546 (SWEENEY) and 2560 (CLIFTON). That which Appellant requests is beyond the purview and authority of Suspension and Revocation Proceedings and this appeal.

II.

Appellant claims there was not substantial evidence upon which the Administrative Law Judge could find that the Appellant had used the dangerous drug cocaine. I disagree.

The Coast Guard Investigating Officer presented evidence that Appellant provided a urine sample and observed that it was properly sealed prior to being sent to a certified laboratory. The laboratory performed a screening test that was positive for cocaine metabolites and a GC/MS confirmatory test that indicated 336 ng/ml of cocaine metbolite, which is more than twice the cutoff level of 150 ng/ml. A separate, certified laboratory performed an additional test at the Appellant's request. That test was also positive for cocaine metabolite.

Appellant suggests the positive test result is attributable to: trace cocaine that is present on nearly 95% of all U.S. Currency combined with the fact that the Appellant did not wash his hands prior to giving the sample; the accessioning worker at the PharmChem laboratory contaminated the sample; a carry over residue from a previous test contaminated his sample; and, inherent imprecision in the testing equipment. I will address each of these possibilities in turn.

A.

The Appellant asserts that the urine sample at issue is unreliable because Appellant was not required to wash his hands immediately prior to providing the sample. The requirement for an individual to wash his/her hands was promulgated to ensure the individual providing the sample does not surreptitiously adulterate the urine sample. See Appeal Decision No. 2522 (JENKINS). The urine sample is not invalidated by the mere fact that the Appellant did not wash his hands prior to donating the sample. See Appeal Decision Nos. 2522 (JENKINS) and 2541 (RAYMOND). Appellant presented no substantial evidence that his failure to wash his hands caused the sample to be positive.

The record and the testimony of defendant's expert allude to the fact that the test was just barely over 300 ng/ml, a "borderline positive." See Transcript (Tr.) at 214, 270, 275. However, the confirming GC/MS was 336 ng/ml and the cutoff level for that test is 150, not 300. See Tr. at 270. The Appellant's expert admitted that the GC/MS test is a very reliable test. See Tr. at 231, 232. It was further noted by the Appellant's expert that

these cutoff levels are chosen at levels high enough to account for "environmental exposures" such as any inadvertent contamination that could result from normal handling of dollar bills tainted with traces of cocaine. See Tr. at 268, 276. In fact, in response to questions regarding the possibility that the Appellant's sample was tainted from trace cocaine commonly found on U.S. Currency, Appellant's expert stated "I'm reaching here. I'm becoming a T.V. director." See Tr. at 262. Appellant's expert later admitted that the levels in this case were way above the levels that might result from contamination from cocaine tainted currency. See Tr. at 271.

B.

Appellant points to the accession worker as the probable cause of a contaminated sample. Appellant cites to the fact that the accession worker who handled his sample was fired for sleeping on the job only months after handling Appellant's sample. Appellant makes no connection between sleeping on the job and contaminated samples. Appellant's expert claimed an accession worker could contaminate a sample in several ways: re-using a pipette, by splashing a drop of one sample into another sample, by placing a lid from a positive sample onto a negative sample. PharmChem's director, Dr. Armbruster who is also a certifying scientist for Health and Human Services, discounted all these claims. Dr. Armbruster stated that accession workers at PharmChem do not use pipettes and only have one bottle open at a time, which would preclude cross splashing or lid swapping. See Tr. at 315, 322. PharmChem received five consecutive proficiency ratings of 100% covering the past year, including the date of Appellant's test. See Tr. at 329.

C.

Appellant next asserts that the test may have been positive as a result of carry over from a previous positive sample because a negative control was not run immediately after Appellant's sample tested positive. While having a negative control run immediately before and after the positive would be ideal, Appellant's own expert admitted on cross examination that in this case, there was no carry over because there were negative samples between the last positive sample (# 6998) and the Appellant's sample (#7002). See Tr. at 254, 255.

D.

Lastly, Appellant asserts that there is inherent imprecision of as much as 20% in PharmChem's equipment which would place Appellant's 336 ng/ml sample, viewed in a light most favorable to him, at 268.8 ng/ml. Appellant mistakenly compares this number to the screening level cutoff of 300 ng/ml for an initial positive result to the 150 ng/ml cutoff level established for the decidedly more accurate GC/MS confirmatory test. It was the confirmatory GC/MS test, not the initial screening, which resulted in the Appellant's 336 ng/ml reading. Even assuming the Appellant's argument has merit, an adjusted value of 268.8 ng/ml is still significantly over the GC/MS cutoff level of 150 ng/ml.

Appellant presented only the *possibility* that the results were contaminated by trace cocaine on currency, accessioning workers, or carry over from previous samples. Each of these possibilities were directly refuted if not outright eliminated by the Appellant's own expert. Even when considered as a whole, it is mere speculation that any or all of these possibilities may have created a positive test result. Appellant presented no substantial or persuasive evidence that cocaine metabolite was accidentally introduced into his sample by some extrinsic source. Mere supposition or speculation unfounded in fact will not serve to vitiate a certified laboratory analysis conducted in accordance with applicable regulations. See Appeal Decision No. 2527 (GEORGE).

In this case, the chain of custody, laboratory procedures and medical review all substantially demonstrate that no irregularities of any significance occurred. Accordingly, the findings of the Administrative Law Judge can not be disturbed because there has been no showing that the evidence relied upon was inherently incredible. See Appeal Decision Nos. 2506 (SYVERSTEN); 2492 (RATH); 2378 (CALICCHIO); 2333 (AYALA); 2302 (FRAPPIER).

CONCLUSION

The charge and specification alleged are supported by substantial, reliable and probative evidence. In addition, a review of the record reveals no clear errors or novel policy considerations. Therefore, the finding of *proved* as relates to the charge and specification is AFFIRMED.

ORDER

The Decision and Order of the Administrative Law Judge dated September 15, 1998, is AFFIRMED.

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J. C. CARD
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 05 day of October, 1999.