

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 728506	:	
AND	:	ON APPEAL
MERCHANT MARINER'S	:	
DOCUMENT NO. REDACTED	:	NO. 2614
	:	
<u>Issued to: Robert T. Wallenstein</u>	:	

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

By an order dated February 17, 1998, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia revoked Appellant's above-captioned license and document, upon finding proved a charge of *use of a dangerous drug*. The single specification supporting the charge alleged that Appellant was, as shown by a positive drug test, a user of cocaine.

The hearing was held on January 15, 1998, in Portland, Maine. 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 five exhibits. Appellant introduced into evidence his own testimony, one additional witness and two exhibits.

The Administrative Law Judge's Decision and Order was served on Appellant on February 17, 1998. Appellant filed a notice of appeal on March 12, 1998 and received a copy of the transcript on April 1, 1998. Appellant perfected this appeal on April 22, 1998. This appeal is properly before me.

APPEARANCE: Phillip J. Kaplan, Esq., 350 St. Marks Place, Staten Island, N.Y. 10301, for Appellant. The Coast Guard Investigating Officer was Chief Warrant Officer Charles S. Rathgeber.

FINDINGS OF FACT

At all relevant times, Appellant held the above captioned license and document. On and about August 18, 1997, the Appellant was employed and working for the Mobil Oil Corporation on a tug. On August 18, 1997, Appellant reported to Examination Management Services, Inc. (EMSI) located at the Mobil Oil Facility, Port Mobil, Staten Island, New York to provide a urine sample pursuant to a random drug test. Mr. George Schmerel served as the sample collector from EMSI responsible for collecting Appellant's urine sample. When the Appellant reported to the collection site, there were people already present for the random drug test. In particular, the following persons were present at the collection site: Mr. Arthur Crossen, Mr. Steve Dalton and Mr. Ron Garbs.

Mr. Schmerel collected a urine sample from the Appellant. As part of his normal routine, Mr. Schmerel would identify a donor, fill out the Department of Transportation Custody and Control Form (DTCCF), have a donor sign the DTCCF under Step 4 certifying the sample was sealed in the donor's presence and then provide the donor with a sample bottle to inspect. After completing this process, Mr. Schmerel would take a donor to the toilet to provide a urine sample.

On August 18, 1997, after Appellant provided his urine sample, he returned to the waiting area with Mr. Schmerel where Mr. Dalton and Mr. Garbs were present. At this time, an incident occurred involving a previous donor, Mr. Crossen, who provided his urine sample just before Appellant. It appears that Mr. Crossen left the collection site without signing for his specimen. The Appellant testified at his hearing that Mr. Schmerel asked Mr. Dalton, Mr. Garbs, and himself to sign for Mr. Crossen. In addition, the following exchange took place between Mr. Russell Lindblad, the Mobil Manager of Marine Personnel and Appellant's attorney, concerning this incident:

Q. Okay. And I add - - I direct your attention to the second page of that document [Respondent's exhibit A, letter dated August 30, 1997].

A. Okay.

Q. And particularly to the third paragraph there, which begins with a dot and with the words, the fact that in the brief moments we were before the collector he not only forgot to give at least two of us custody receipts but forgot to have Arthur Crossen sign his sample bag and in fact asked Ron Garbs and me to sign for him. We both deferred this request to S. Dalton, who also refused to sign for someone else and called Arthur back to the office, *et cetera*. Do you recall this portion of this document?

A. Yes, sir, I do.

Q. Did you take any steps to investigate this statement, the truth or falsity of this statement?

A. Yes, sir, I questioned Mr. Dalton, who was present for that, regarding, you know, what that had to do with and if in fact it was true. Mr. Dalton stated, yeah, he did – from his recollection there was some conversation regarding that . . .”

[TR at 22 and 23]

Mr. Dalton’s account of the incident, as told by Mr. Lindblad, appears to corroborate the Appellant’s assertion made in Respondent’s Exhibit A.

Appellant further alleged that his sample and Mr. Crossen’s sample were left together, unsealed, unlabeled and unattended by Mr. Schmerel, in the presence of other donors. That assertion has not been corroborated.

Mr. Dalton, Mr. Garbs and Mr. Crossen did not testify at the hearing. No reason for their absence is found in the record before me.

A urine sample marked as being that of the Appellant was received at SmithKline Beecham on August 20, 1997. The chain of custody within SmithKline Beecham was satisfactory. The sample tested positive for cocaine metabolite. A retest confirmed the result.

BASIS OF APPEAL

Appellant contends that the Administrative Law Judge’s decision should be vacated because the collection of Appellant’s urine sample was faulty, thus the test results were not valid. Based on the record before me, I am unable to agree or disagree with the Appellant’s claim. Therefore, I must remand this case for further proceedings.

OPINION

Appellant challenges the validity of the drug test that formed the basis of the charge and specification in this case. 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. See Appeal Decisions 2279

(LEWIS), 2379 (DRUM), 2592 (MASON). In the present case, the Coast Guard introduced into evidence the testimony of four witnesses and five exhibits in order to satisfy these elements. Evidence was presented that respondent was tested for the presence of dangerous drugs in his system and that the presumptive test results indicated the presence of cocaine metabolite. 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 (sample collector), Mr. Schmerel, who testified about sample collection procedures and that the DTCCF was prepared in the normal course of the collection process. The issue for this appeal, *inter alia*, is whether the Administrative Law Judge's findings, based on Mr. Schmerel's testimony and the testimony of other witnesses, are supported by the record in this case.

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

The instant case turns on an allegation that Mr. Schmerel solicited three people to sign for another donor's sample. [TR at 22, 23, 114] This is a critical factual determination. If found true, then Mr. Schmerel solicited these individuals to commit forgery, calling into question Mr. Schmerel's credibility in all other matters relating to Respondent's urine test. In order for a test to be conducted in accordance with 46 C.F.R. Part 16, the sample collector must carry out the procedures found in 49 C.F.R. Part 40. See 46 C.F.R. § 16.301. These procedures include having the examinee sign and initial

portions of the sample package. See 49 C.F.R. §§ 40.25(f), 40.25(f)(20), (22). Further, both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. See 49 C.F.R. §40.25(f)(17).

These procedures are in place “to ensure that unadulterated specimens are obtained and correctly identified” and to ensure the integrity of the entire drug testing system. See 49 C.F.R. § 40.25(f).

Where technical infractions of the procedures in 46 C.F.R. Part 16 and 49 C.F.R. Part 40 occur, the testing procedure is not vitiated where the infractions do not breach the chain of custody or violate the specimen’s integrity. See Appeal Decisions 2541 (RAYMOND), 2537 (CHATHAM). Having others sign for an absent examinee while his or her specimen sits improperly labeled is not a mere technical infraction. 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. Therefore, it is critical to resolve the question of whether Mr. Schmerel asked Mr. Dalton, Mr. Garbs, and Appellant to forge Mr. Crossen’s signature.

The Administrative Law Judge heard testimony from Mr. Schmerel, Mr. Lindblad and Appellant about the allegation of forgery. Appellant testified that Mr. Schmerel asked three people to sign Mr. Crossen’s sample after Mr. Crossen departed the collection site. [TR at 114] Based on Mr. Lindblad’s testimony concerning what Mr. Dalton told him about the allegation, it appears that Appellant’s testimony is corroborated on this point. [TR at 22, 23] On the other hand, Mr. Schmerel testified that, to his knowledge, he has never had to call a donor back to sign a specimen. [TR at 50] The testimony of these witnesses created a serious conflict that the Administrative Law Judge did not resolve. However, Mr. Dalton and Mr. Garbs were present at the collection site at the time of incident and could presumably provide testimony as to whether Mr. Schmerel solicited them to sign Mr. Crossen’s name on his sample. In addition, Mr. Crossen could testify as to whether he failed to sign for his sample, as Appellant alleged, or a non-essential exterior bag, as Mr. Lindblad claims Mr. Dalton told him. [TR at 23-24, 115] Finally, Mr. Dalton and Mr. Garbs could testify as to whether Appellant’s sample was ever left unlabeled with Mr. Crossen’s sample. The Administrative Law Judge did

not seek testimony from these potential witnesses to resolve the conflicting testimony of the Appellant and Mr. Lindblad versus that of Mr. Schmerel. The lack of specific credibility findings on a matter placing into question the integrity of the drug testing system used in this case, and the presence of unresolved, significantly conflicting testimony renders the Administrative Law Judge's determination, at this juncture, inherently incredible. See (JUSTICE) 2489, (RATH) 2492.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The Administrative Law Judge erred by failing to resolve the conflicting testimony and issue credibility findings concerning the allegation that the collection site person (sample collector) solicited the Appellant and two others to commit forgery.

ORDER

The Administrative Law Judge decision dated February 17, 1998 is SET ASIDE and his order VACATED. The case is REMANDED with instructions to initiate further proceedings consistent with this opinion.

//S//

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

Signed at Washington, D.C. this 2nd day of February, 2000.