U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	COMMANDANT
LICENSE NO. **715368** and Merchant Mariner s Document Issued to	:	ON APPEAL
Jeffrey Alain HACKSTAFF, Appellant	:	NO. 2603

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

By order dated 8 June 1993, an Administrative Law Judge (ALJ) of the United States Coast Guard at San Diego, California revoked Appellant's License and Merchant Mariner's Document upon finding proved the charge of *use of dangerous drugs*. The single specification supporting the charge alleged that, on or before 16 March 1993, Appellant used marijuana, based upon a urine specimen collected on that date which subsequently tested positive for the presence of marijuana metabolites.

A hearing was held at San Diego, California on 27 May 1993. Appellant appeared with professional counsel by whom he was represented throughout the hearing and this appeal. Appellant denied the charge and specification per 46 C.F.R. § 5.527. The Investigating Officer (IO) introduced into evidence five exhibits and the testimony of two witnesses. After the government rested, and after the ALJ denied Appellant's motion to dismiss, Appellant testified in his own behalf and introduced three exhibits. At the end of the hearing, the ALJ rendered an oral decision in which he found that the charge and specification were proved. The ALJ's written decision and order were entered on 8 June 1993 and were served on Appellant on 25 June 1993. Appellant filed notice of appeal on 14 June 1993. Appellant perfected his appeal by filing a brief on 16 November 1993, within the filing requirements of 46 C.F.R. § 5.703. Thus this appeal is properly before me.

Appearance: David W. Tiffany, attorney for Appellant, Centerside Tower I, 3111 Camino Del Rio North, Suite 1108, San Diego, CA 92108, (619) 528-2335.

FINDINGS OF FACT

At all times relevant herein, Appellant held the license and merchant mariner s document captioned above, issued to him by the United States Coast Guard. Appellant's license authorizes him to serve as Master of Near Coastal Steam and Motor vessels of up to 100 gross tons, up to 200 miles offshore. His license was issued on 16 June 1992 at Los Angeles.

On 27 May 1993, at U. S. Coast Guard Marine Safety Office, San Diego, California, Appellant and his counsel appeared in response to the instant charge. The hearing began and, after preliminary matters, Appellant denied the charge of drug use. TR at 11.

The Investigating Officer (IO) presented her case-in-chief, in the course of which she offered in evidence copies of drug testing custody and control forms allegedly used during the collection of a specimen from Appellant. *Id.* at 15-17. These documents were "certified" copies of a certain sample collection form, number 3788226, which were accepted by the ALJ subject to further foundation from the medical review officer (MRO) who completed the form. *Id.* Appellant objected to their admission absent any evidence of authenticity, and on grounds of hearsay. *Id.* at 16. In response, the IO made what amounted to an offer of proof, describing the testimony she expected to elicit from a witness. *Id.* Conditionally upon such testimonial evidence, the documents were admitted. *Id.* at 17. The IO then called one Marie Wilkerson, an employee of Shelter Island Medical Group, whose duties included collecting specimens for drug testing. *Id.* at 21. Ms. Wilkerson testified (by telephone) that she took a sample from "a

Mr. Hackstaff" on 16 March 1993. Appellant objected appropriately to the lack of foundation namely, that there was no evidence that the witness knew who Mr. Hackstaff was, or that she could identify or had identified him. *Id.* at 21. When asked how she knew that she had taken such a sample that day, the witness stated that she had a copy of something, but she was then unable to produce any such thing. *Id.* at 30. She gave no further evidence at all with respect to Appellant. Not surprisingly, counsel for Appellant had no questions of this witness. *Id.* Ms. Wilkerson was then dismissed and was never recalled. *Id.*

The MRO, Dr. Chambers, testified about how the collection form is completed at the collection site. However, Appellant objected on the grounds that such testimony called for speculation by the witness. *Id.* at 35. The record does not suggest that Dr. Chambers was present when any specimen was collected from Appellant. The MRO further testified about his meeting with a Mr. Hackstaff, and his decision that a certain sample should be considered positive for the drug marijuana. *Id.* at 37-38.

Finally, the IO introduced documents showing drug test results for a certain specimen, with Appellant stipulating to their authenticity but explicitly reserving objections to any connection between the test results and Appellant. *Id.* at 44. The Coast Guard then rested its case. *Id.* at 45.

Appellant immediately moved for dismissal, arguing that none of the evidence established any connection to Appellant. Denying Appellant s motion to dismiss, the ALJ attempted to bridge one gap in the government s case-in-chief by admitting, on his own motion, a copy of Appellant s license so as to have an exemplar of Appellant s signature. The ALJ deemed that signature similar to a signature on the specimen collection form. *Id.* at 46; ALJ Exhibit I. Following further argument, the ALJ again denied the motion to dismiss, and invited Appellant to present any defense. *Id.* at 48.

Appellant then testified in his own behalf and introduced some exhibits, after which he rested. Following brief

closing arguments, the ALJ found the charge proved.

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ. Appellant's brief on appeal raises the following issues:

I. Ms. Wilkerson, the specimen collector, never identified Appellant.

II. Dr. Chambers, MRO, never identified Appellant.

III. Government Exhibit 3 was never admitted in evidence, nor did the ALJ rule on Appellant's objection to that exhibit.

IV. The ALJ improperly denied Appellant's motion for dismissal at the conclusion of the government's case-in-chief.

V. The chain of custody for the sample was inadequate.

VI. The ALJ did not consider the evidence introduced by Appellant that cast doubt upon the integrity of the specimen collection.

OPINION

In light of my disposition of this case, I will not address Appellant s bases of appeal directly.

These hearings are conducted in accordance with the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* 46 C.F.R. § 5.501. The IO has the burden of proof. 46 C.F.R. § 5.539. The record of hearing, comprising the testimony and exhibits introduced, are the exclusive basis for the ALJ s findings and conclusions. 46 C.F.R. § 5.563. One basis for relief on appeal is clear error on the record. 46 C.F.R. § 5.701.

In all S&R cases, the Coast Guard must prove its case against the mariner charged on the basis of reliable, probative, and substantial evidence. 46 C.F.R. § 5.63. This "substantial evidence" standard has been determined to be the equivalent of the "preponderance of the evidence" standard. *See* Appeal Decision 2472 (GARDNER), *citing, i.a., Steadman v. SEC*, 450 U.S. 91 (1981), which concluded that the preponderance of evidence standard of proof shall be applied in administrative hearings governed by the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*., which governs suspension and revocation proceedings. 46 U.S.C. § 7702. Any relevant evidence, as determined by the ALJ, may be admitted towards this end. "The standard for admission of evidence in an agency proceeding is found in the Administrative Procedures Act and allows '[a]ny oral or documentary evidence' except 'irrelevant, immaterial, or unduly repetitious evidence.'" *Gallagher v. National Transp. Safety Bd.*, 953 F.2d 1214, 1218 (10th Cir. 1992) (*quoting* 5 U.S.C. § 556(d)). *See also* Appeal Decisions 2419 (MURPHY) (Relevant and material evidence is admissible in suspension and revocation proceedings); 2183 (FAIRALL) (All relevant and material evidence is to be available for consideration).

Regarding the charge of *use of a dangerous drug*, 46 C.F.R. § 5.35; 46 U.S.C. § 7704, the Coast Guard has, since 1988, brought cases founded solely upon the results of chemical testing by urinalysis. *See generally* 46 C. F.R. § 16; 46 U.S.C. § 7702 (c)(2). 46 C.F.R. § 16.201(b) provides that one who fails a chemical test for drugs under that part will be presumed to be a user of dangerous drugs. In turn, 46 C.F.R. § 16.105 defines "fails a chemical test for dangerous drugs" to mean that a Medical Review Officer (MRO) reports as "positive" the results of a chemical test conducted under 49 C.F.R. § 40.

In other words, 46 C.F.R. § 16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 C.F.R. § 40 chemical test of a merchant mariner s sample was reported as positive by an MRO.

These more recent regulations on drug testing do not, however, displace or amend the fundamental standard of proof in these proceedings, which remains the substantial evidence / preponderance standard discussed at length in previous opinions. When the terms of
46 C.F.R. § 16.201(b) are satisfied, the presumption of drug use may be relied upon not as an exception to the hearing regulations in 46 C.F.R. § 5, but because a properly established legal presumption does, in fact, constitute substantial evidence of a reliable and probative nature.

However, where the Coast Guard seeks to rely upon the regulatory presumption, all the terms which form the predicates for the presumption must be established according to the same standard of proof. That is to say, the elements of the case must be shown by substantial evidence of a reliable and probative nature.

There are, of course, many necessary parts to the government s case, such as jurisdiction, sufficiency and appropriateness of the charge and specification, notice of the hearing, and more. My focus in this appeal, however, is limited to the elements of a case of presumptive drug use.

As I have stated in many previous opinions, to establish the 46 C.F.R. § 16.201 (b) presumption, the Coast Guard must prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Proof of those three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 2592 (MASON); 2584 (SHAKESPEARE); 2560 (CLIFTON); 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).

The first element is to show that the respondent was the person who was tested for dangerous drugs. This necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample
(46 C.F.R. § 16.350).

The second element is to show that the respondent failed the test. This necessarily involves proof of the test results (46 C.F.R. § 16.360), proof of the MRO s status and qualifications; proof of the test results review by the MRO, and proof of his report of the results as "positive"

(46 C.F.R. § 16.370).

The third element is to show that the test was conducted in accordance with 46 C.F.R.
Part 16. This necessarily involves proof of the collection process (46 C.F.R. § 16.310); proof of the chain of custody (46 C.F.R. § 16.320); proof of how the specimen was handled and shipped to the testing facility (46 C.F. R. § 16.330); and proof of the qualification of the test laboratory
(46 C.F.R. § 16.340).

In considering the proof of all these elements, 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).

Only if there is proof substantial, reliable, and probative evidence of all these elements has the foundation been laid for the presumption of drug use in 46 C.F.R. § 16.201(b).

I decline to assert how, precisely, any given element must be shown, for our standard of proof may be met by many means.[1]

In the present case, the government s case-in-chief did not establish a *prima facie* case of drug use by Appellant. Although Ms. Wilkerson testified that she had taken a urine sample from "Mr. Hackstaff," she was relying upon a document which she was unable to produce. Subsequent testimony from the MRO about his interview with someone is no substitute for proper authentication of the specimen collection on which it depends.

As counsel for Appellant pointed out in arguing his motion to dismiss, the government s case provided no evidence identifying the signature of the putative collector of the specimen, Ms. Wilkerson; no evidence that she had identified Appellant; no authentication of the collection form itself from the collector; and indeed no evidence whatever from the collector about the particular collection form in question. TR at 47. What Ms. Wilkerson customarily does was not at issue: the question was what, if anything, she did concerning Appellant. On that question the record is mute.

Nor did anything else in the government s case-in-chief prove that Appellant was present at the collection site on the day in question, or that any particular procedures were carried out with respect to identifying him and properly securing a urine sample.

On that basis, Appellant s counsel raised the due process argument he has renewed on appeal. *Id.* Did the Coast Guard establish a *prima facie* case against Appellant; did the ALJ err in denying Appellant s motion to dismiss; was Appellant denied due process? These are three aspects of what is essentially the same issue on appeal.[2]

Appellant was charged with use of drugs on the theory that he provided a urine specimen which indicated such drug use. The identity of the person providing a specimen is an essential element to be proven. *See, e.g.,* Appeal Decision 2542 (DEFORGE)[3] The Coast Guard had thought to rely upon testimony from the collector of the specimen, Ms. Wilkerson, to establish this element. As Appellant s counsel argued, Ms. Wilkerson gave no

testimony whatever as to the sample collection form at issue, including the identity of the person providing a specimen, because she did not have the collection form with her. Nor, for the same reason, could she authenticate her own signature or attest to the circumstances surrounding the completion of that form. Citing these reasons, Appellant s counsel moved for dismissal.

A party has a fundamental right to dismissal of a case where an essential element of the charge has not been proven. *Gracey v.Gayneaux*, NTSB Order No. EM-113 (1984), *reversing* Appeal Decision 2288 (GAYNEAUX). A motion to dismiss should be granted when the IO fails to introduce any evidence in support of a required element of the government s case. Appeal Decision 2479 (BRANCH), *citing, inter alia*, Appeal Decision 2461 (KITTRELL). When the IO rests his case and Appellant moves for dismissal, there is only one question before the ALJ: whether there is, or is not, a *prima facie* case against Appellant. If there is not, the motion must be granted. The ALJ may defer his decision until the defense is complete, Marine Safety Manual, Commandant Instruction M16000.10, Vol. V, paragraph 2-F-11, but where as here there is a plain gap in the *prima facie* case, there is no reason for deferral or other delay. A motion to dismiss should be granted when the Investigating Officer fails to introduce any evidence in support of one or more required elements of the government's case. *See* Appeal Decisions 2479 (BRANCH); 2461 (KITTRELL); 2321 (HARRIS); 2294 (TITTONIS). *Cf.* Appeal Decision 2368 (MADJIWITA), *aff'd sub nom*. Commandant v. Madjiwita, NTSB Order No. EM-20 (1985).

Furthermore, in *Gayneaux*, the NTSB considered the harm to an Appellant from an ALJ s deferral of a ruling on a motion to dismiss. The Board noted that, inasmuch as "it was the motion itself which apparently alerted the Coast Guard to the necessity for further proof of its case, the deferral also effectively turned the exercise of that right against him." *Gayneaux, supra.* In this case, the ALJ s denial of the motion to dismiss caused similar harm to Appellant: by denying Appellant s motion, with its clearly articulated grounds, the ALJ effectively used Appellant as a guide to repairing the government s case. Elementary notions of due process and fair play cannot permit that in this case any more than in *Gayneaux*.

Because the Coast Guard s *prima facie* case lacked certain necessary elements, the ALJ should have granted Appellant s motion. *Gayneaux, supra*.

CONCLUSION

The ALJ's decision will not be changed unless it is clearly erroneous or is an abuse of his discretion. Appeal Decisions 2542 (DeForge), 2424 (Cavanaugh), 2423 (Wessels). The ALJ s second finding of fact (D&O at 4), to the effect that Appellant provided a urine sample which was found to contain marijuana metabolites, was not supported by the evidence presented in the government s case-in-chief. The ALJ s denial of the motion constitutes error and requires reversal.

ORDER

The decision and order of the Administrative Law Judge dated 8 June 1993 at San Diego, California are VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED pursuant to 46 C.F. R. § 5.705.

J. C. CARD
Vice Admiral, U. S. COAST GUARD
Acting Commandant

Signed at Washington, D.C., this 10 day of August 1998.

[1]For example, Appellant might normally be identified at the specimen collection facility by showing a passport or other documents to the collection clerk. However, testimony from someone who knew him and saw him there would be perfectly admissible evidence that Appellant was at the collection facility at a certain time.

[2]After Appellant s motion to dismiss was denied, Appellant testified in his own behalf. His testimony covered two points: that he did not use drugs, and that he had provided a sample to Ms. Wilkerson on the day in question. It is not necessary, however, to decide whether Appellant s testimony may be used to satisfy the IO s burden of proof, because the ALJ explicitly rejected Appellant s testimony. D&O at 5. The issue in this case is simply whether the ALJ erred by denying Appellant s motion to dismiss at the close of the IO s case-in-chief. In any case, evidence adduced from the Appellant s case in defense may be used to fill gaps in the government s *prima facie* case, absent a stipulation to the contrary. *See* Appeal Decision 2215 (Riley). However, in this case, Appellant timely objected and moved for dismissal for the reasons discussed. Such action by Appellant was plainly such a "stipulation to the contrary."

[3]Whether Appellant was adequately identified as the donor of the urine sample which showed drug use, is a question of fact for the Administrative Law Judge." DeForge at 5.