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

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | |
| | : | DECISION OF THE |
| vs. | : | |
| | : | COMMANDANT |
| LICENSE NO. 719124 &<br>Merchant Mariner Document NO.<br>redacted | : | ON APPEAL |
| | : | NO. 2606 |
| Issued to Herbert J. Swan | : | |
| | : | |

This appeal is taken in accordance with 46 USC § 7702 and 46 CFR § 5.701.

By order dated February 16, 1996, the Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's license and document based upon a finding of a proved charge of *misconduct: 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 marijuana.

The hearings were held in Seattle, Washington, on December 20, 1995, and February 8, 1996. Appellant, represented by counsel, entered a response denying the charge and specification.

The Administrative Law Judge introduced into evidence thirteen exhibits. The Coast Guard introduced into evidence seven exhibits and the testimony of four witnesses. Appellant introduced into evidence two exhibits, his own testimony, and the testimony of one witness. The parties stipulated to the introduction into evidence of two exhibits.

Appellant received the transcripts of the hearing on April 4, 1996 and filed a timely notice of appeal. Appellant perfected the appeal on June 3, 1996.

APPEARANCE: Janet A. Irons, Mosler, Schermer, Wallstrom, Irons and Scruggs, Suite 3030, 1001 Fourth Avenue Plaza, Seattle, Washington 98154-1107.

## FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license authorizing him to serve as a third assistant engineer of motor vessels of any horsepower. See Investigating Officer (I.O.) Exhibit 2. Appellant was also the holder of the above-captioned document authorizing him to serve as Qualified Member of the Engineering Department, any unlicensed rating in the engine department. See I.O. Exhibit 1.

On July 23, 1995, Appellant submitted a urine sample on board the M/V ISSAQUAH, O.N. 624022, as a part of Washington State Ferry System's random drug-testing program. See Transcript (TR) at 21. Appellant submitted the sample under the direction of Mr. Bill Buenbrazo of Business Health Link who then assigned the identification number of U09213169 to the sample. See I.O. Exhibit 3. Appellant signed the Federal Drug Testing Custody and Control Form (DTCCF) certifying that the sample was sealed in his presence and that the information on the DTCCF and affixed to the sample was correct. See I.O. Exhibit 5. Mr. Buenbrazo released the sample to a courier on July 25, 1995, and it was delivered to the Laboratory Corporation of America (LCA) that same day. See TR at 69.

LCA, an approved urine testing facility for federal agencies, analyzed the sample on July 26, 1995, and confirmed a positive test for marijuana metabolite. See I.O. Exhibit 5. LCA forwarded the test results to Dr. Raymond F. Jarris, Jr., the Medical Review Officer contracted by Business Health Link. See TR at 94, 96. Dr. Jarris reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on August 5, 1995. See TR at 97-99; I.O. Exhibit 5. Dr. Jarris then informed the Washington State Ferry System that Appellant had tested positive for marijuana. See TR at 102.

## BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The chain of custody of Appellant's sample was fatally broken in violation of

Department of Transportation regulations.

2. The Coast Guard failed to prove that the testing laboratory conducted a pH

test on Appellant's sample.

3. The Medical Reviewing Officer and the sample collector were both

employed by the same company, constituting an impermissible conflict of interest.

4. The Medical Reviewing Officer failed to determine if Appellant had been using any legal drugs that would result in a positive test for marijuana metabolite.

5. The general requirement that drug testing be conducted in accordance with 46 CFR Part 16, as stated in Appeal Decision 2560 (CLIFTON), nullifies any drug test in which any error in the chain of custody occurs.

## OPINION

### I

Appellant contends that his sample's chain of custody was fatally flawed, thus the test results are not reliable. See Appellant's Brief (Brief) at 9.

I concede, as did the Administrative Law Judge, that there was an error on the DTCCF. See Decision and Order (D&O) at 29. The sample collector indicated on the DTCCF that Appellant's urine sample was picked up by courier on July 23, 1995. See I.O. Exhibit 5. The sample collector testified that the sample was not actually picked up by the courier until July 25. See TR at 69. Additionally, the internal chain of custody documents for the testing lab indicated that the sample was in the custody of Laboratory Corporation on July 24, a day before it was delivered. See I.O. Exhibit 4. These two errors, appellant contends, are fatal flaws that require the dismissal of this case. I disagree.

Appellant relies on Appeal Decision 2555 (LAVALLAIS) in contending that the above errors are fatal flaws. In LAVALLAIS, the "Appellant's signature [was] conspicuously absent from the donor certification portion of the [DTCCF]." Id. at 7. The sample collector "failed to properly identify the Appellant prior to taking the sample....She further testified [telephonically] that she could not identify him if she were testifying in person at the hearing." Id. at 8. I found that this was a significant procedural error and dismissed the charge.

In LAVALLAIS, however, I also stated that minor procedural errors would not adversely affect the chain of custody. Id. at 6. "[A] positive test result of an individual's urinalysis sample may still be considered substantial evidence as long as the record indicates that the 'actual' chain of custody has been maintained." See Gallagher v. National Transportation Safety Board, 953 F.2d 1214 (10th Cir. 1992).[1] I find that the errors noted by Appellant, while not condoned, did not affect the 'actual' chain of custody. The purpose of the chain of custody is to ensure "that the chances of a specimen being altered, contaminated, switched, or lost are minimized and that test

results provided are, in fact, those of the indicated specimen." Lavallais at 6. The record shows no tampering with the specimen. Appellant presents no evidence suggesting that the sample tested was not the sample Appellant submitted. Though the DTCCF indicated the sample was delivered to the courier on July 23, the testimony presented to the Administrative Law Judge was that the sample was left in a locked refrigerator in a restricted area of the collector's office (see TR at 45),[2] that the collector, upon returning to work two days later, personally gave the sample to a courier (see TR at 47), and that the testing facility received the sample with the seal intact. See TR at 70. Notwithstanding the date discrepancies, the chain of custody is sufficient because it ensures "the identification and protection of the integrity of the specimen." Appeal Decision 2537 (CHATHAM)

Appellant contends that this date error is comparable to the error in LAVALLAIS. In LAVALLAIS, the missing signature on the DTCCF and the inability of the collector to identify Lavallais contributed to the break in the 'actual' chain of custody. These two significant errors made it impossible to link Lavallais to the tested sample. This is not the case here. The chain of custody evidence clearly shows that the sample supplied by Appellant was the sample that tested positive for marijuana metabolite. "When there is no evidence of tampering, a presumption of regularity attends the official acts of public

officials in custody of evidence." United States v. Aviles, 623 F.2d 1192 at 1198 (7th Cir. 1980). As there was no substantial evidence to overcome this presumption, I find that there was no break in the "actual" chain of custody.

II

Appellant contends that an additional flaw in the chain of custody was the failure of the testing laboratory to indicate that the pH level of the sample was tested. See Brief at 11. First, the Department of Transportation regulations on drug testing procedures do not require that the testing facility determine the pH of the sample. See 49 CFR Part 40. Second, Dr. Baker testified that though the pH test on the DTCCF was not initialed, the test is routinely done and if the results are abnormal (which may indicate tampering), the form would state that further testing was conducted. Coupling this testimony with the fact that the sample's seal was intact upon receipt by the testing facility, I agree with the Administrative Law Judge that this omission is irrelevant.

III

Appellant also contends that the Medical Reviewing Officer was employed by the same company that collected Appellant's sample. This, Appellant concludes, constituted a conflict of interest that renders the test results unreliable. I disagree. The Department of Transportation regulations

state that the Medical Reviewing Officer may be an employee of a transportation employer or a private physician retained for this purpose. See 49 CFR §40.33. The regulations say nothing about the Medical Reviewing Officer (MRO) being employed by the company collecting the samples. Additionally, Dr. Jarris was not employed by the collecting company but was an independent contractor hired by that company. See TR at 96. Appellant provides no reasoning showing how this amounts to a conflict of interest. Appellant's assertion is without support in the record. First, there is no evidence that Dr. Jarris was biased in his review of the test results. In fact, the evidence is to the contrary. The record reflects that Dr. Jarris competently carried out his prescribed duties as MRO. See TR at 95-103. Second, there is no evidence that Dr. Jarris would actually profit from Appellant's positive test results. It is well established that questions involving the credibility of a witness, even in light of allegations of bias and self interest, are best decided by the Administrative Law Judge who presides at the hearing. See Appeal Decisions 2017 (TROCHE), aff'd NTSB Order No. EM-49 (1976); 2253 (KELLY); 2279 (LEWIS); 2290 (DIGGINS); 2395 (LAMBERT); 2575 (WILLIAMS). The Administrative Law Judge's determination will be upheld absent a showing that he was arbitrary or capricious. Id. Here, the record contains substantial evidence that Dr. Jarris correctly carried out his duties, and there is no evidence that his actions were in any way adversely or improperly affected by his personal or financial interests.

IV

Appellant contends that the Medical Reviewing Officer failed to determine if Appellant had been using any legal drugs that would result in a positive test for marijuana metabolite. I disagree.

The record indicates that the Dr. Jarris did ask appellant if he had a prescription for marijuana. See TR at 99. Even if the Medical Reviewing Officer did not determine

if Appellant had been using any other drug that may contain THC, the Administrative Law Judge allowed Appellant to submit for testing any drug he had been using. See TR at 162, 166. This test was conducted, and no drug Appellant submitted contained THC. See TR at 6. Therefore, even if Dr. Jarris had failed to investigate other drugs that Appellant contended he was taking, this error was rectified by the Administrative Law Judge. Because the drugs in question were tested and found not to contain any THC, this basis for appeal is without merit.

V

Appellant’s final claim, that a technical error in the chain of custody invalidates a drug test without a demonstration that the integrity of the specimen was actually compromised, is without support in the law. Tests that contain technical errors, which do not affect the integrity of the sample, will still create the presumption of drug use. See Gallagher v. National Transportation

Safety Board, 953 F.2d 1214 (10th Cir. 1992). The errors alleged in this case did not affect the sample integrity or indicate an actual break in the chain of custody.

## CONCLUSION

The findings of the Administrative Law Judge 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 February 16, 1996, is AFFIRMED.

/S/

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

Signed at Washington, D.C. this Friday, day of February 19 , 1999.

[1] In Gallagher, the technician at a medical clinic applied the tamperproof seal improperly. The court determined that in spite of the procedural error, there was no evidence of an ‘actual’ break in the chain of custody. Thus, where evidence establishes that the ‘actual’ chain of custody has been maintained, the test results of such samples may still create the presumption of drug use, notwithstanding the lack of donor signature on the [DTCCF]." LAVALLAIS at 7.

[2] Appellant’s contention that the sample "spent two days in an untaped duffel bag that would bear not [sic] indication of tampering if such occurred" clearly ignores undisputed testimony. See Brief at 14. First, though the duffel bag was "untaped," the collector testified that the duffel bag was locked so that there was "no way to get into the [sample] bags really without destroying the [duffel] bag." (see TR at 44). Second, the sample was not left in this duffel bag for two days, but taken out. "Those specimens [taken off of the ISSAQUAH on July 23] [were] put into another plastic bag to group those specimens together. And they’re stored away and it’s locked up in refrigeration." (see TR at 45). Third, even if the refrigerator was somehow compromised (of which there is no contention), the seal on Appellant’s sample was intact when the sample was delivered to the testing facility. (see TR at 70).