

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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UNITED STATES COAST GUARD

vs.

LICENSE NO. 707643
AND
MERCHANT MARINER'S DOCUMENT
DOCUMENT NO. (REDACTED)
Issued to Earl Richard Wynn

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:
DECISION OF THE
:
COMMANDANT
:
ON APPEAL
:
NO. 2591
:
:
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This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated June 26, 1995, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, revoked Appellant's above-captioned license and document upon finding a charge of *use of a dangerous drug* and a charge of *violation of law or regulation* proved. The single specification supporting the charge of *use of a dangerous drug* alleged that Appellant was, as shown by a positive drug test, a user of marijuana. The first specification supporting the charge of *violation of law or regulation* alleged that Appellant, after failing the drug test and surrendering the captioned license to the Coast Guard, accepted reemployment and acted under the authority of the license in violation of 46 C.F.R. § 16.201(e). The second and final specification supporting the charge alleged that Appellant, while acting under the authority of the captioned license, failed to submit to a required drug test while employed by Seatow Sarasota in violation of 46 C.F.R. § 16.201(e).

The hearing was held in Cortez, Florida, on May 25, 1995. Appellant appeared *pro se* and entered a response denying the charges and specifications. The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and ten exhibits. Appellant introduced into evidence his own testimony and one exhibit.

The Administrative Law Judge's Decision and Order (D&O) was rendered on June 26, 1995.

On October 19, 1995, Appellant moved to reopen the hearing based on newly discovered evidence not available at the hearing. The Administrative Law Judge granted the motion and reviewed the documents that Appellant submitted. These documents became Appellant's second exhibit. The Administrative Law Judge introduced into evidence one exhibit. By Decision and Order dated November 20, 1995, the Administrative Law Judge reaffirmed the original Decision and Order. Appellant filed a notice of appeal on December 18, 1995, and perfected the appeal on December 19, 1995.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license, which authorized him to serve as master of near coastal steam or motor vessels of not more than 100 gross tons and to engage in commercial assistance towing. *See* Investigating Officer (I.O.) Exhibit 1. Appellant was also the holder of the above-captioned document, which authorized him to serve as able seaman, unlimited, as wiper, and as a member of the steward's department. *Id.*

On December 7, 1994, Appellant reported to the First Care Medical Clinic (First Care) in Bradenton, Florida, to submit a urine sample for a pre-employment drug test. *See* I.O. Exhibit 6, [Transcript (TR) at 40]. Under the direction of Ms. Dana Berry, Appellant submitted the sample to which Ms. Berry assigned the identification number of 1819111. *See* I.O. Exhibit 6, [TR at 41]. Ms. Berry properly sealed the bottle in the presence of Appellant. *See* I.O. Exhibit 6, [TR at 37, 39]. After the Drug Testing Custody and Control Form (DTCC) was completed and signed by both Appellant and Ms. Berry, the sample was picked up by a courier of the SmithKline Beecham Clinical Laboratories (SmithKline) on December 7, 1994. *See* I.O. Exhibits 6 and 7, [TR at 41].

SmithKline, an approved urine testing facility for Federal agencies located in Leesburg, Florida, tested the sample on December 12, 1994. *See* I.O. Exhibits 7 & 8. Ziwei Tang, a SmithKline Certifying Scientist, analyzed the sample and confirmed a positive test for marijuana metabolite. *See* I.O. Exhibit 7. SmithKline sent the results back to First Care where Dr. Anton D. Raff was the Medical Review Officer. [TR at 45]. Dr. Raff confirmed the positive test results. [TR at 46].

After the Administrative Law Judge issued the Decision and Order, Appellant moved to reopen the hearing based on evidence that he could not obtain for the hearing. The evidence contained three drug test results from February, 1993. The first, dated February 4, 1993, indicated a negative result for any dangerous drugs. The second, dated February 9, 1993, indicated a positive result for marijuana metabolite. The third, dated February 15, 1993, indicated a negative result for dangerous drugs. *See* Respondent Exhibit B.

BASIS OF APPEAL

Appellant contends that the drug test results from February, 1993, show that the drug testing process is not infallible. Therefore, the Coast Guard failed to prove that Appellant's December 7, 1994, positive test result was not erroneous.

OPINION

If a merchant mariner fails a chemical test for dangerous drugs, the individual will be presumed to be a user of dangerous drugs. *See* 46 C.F.R. § 16.201(b); Appeal Decision 2529 (WILLIAMS). To prove the specification, the Coast Guard must establish a *prima facie* case of *use of a dangerous drug*. *See* 46 C.F.R. § 5.539, Appeal Decisions 2379 (DRUM), 2282 (LITTLEFIELD). The Coast Guard may establish a *prima facie* case by showing that the respondent was tested for a dangerous drug, that the respondent tested positive for a dangerous drug, and that the test was conducted in accordance with 46 C.F.R Part 16. If the Coast Guard establishes a *prima facie* case, then the burden shifts to the respondent who must produce persuasive evidence to rebut this presumption. *See* Appeal Decision 2379 (DRUM). If the respondent produces no persuasive rebuttal evidence, the Administrative Law Judge, on the basis of the presumption alone, may find the charge proved. *See* Appeal Decisions 2266 (BRENNER), 2174 (TINGLEY).

The Administrative Law Judge is in the best position to weigh the testimony of witnesses and other evidence to determine if the Coast Guard has presented a *prima facie* case and to determine if Appellant has appropriately rebutted the Coast Guard's evidence. *See* Appeal Decisions 2421 (RADER), 2319 (PAVELIC). The Administrative Law Judge's findings must be supported by reliable, probative and substantial evidence. *See* 46 C.F.R § 5.63. I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), aff'd NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMENKE).

The Administrative Law Judge found that Appellant was tested for dangerous drugs, that Appellant tested positive for a dangerous drug, and that the test had been conducted in accordance with Department of Transportation regulations. Appellant contends that the questionable results from February, 1993, show that the drug testing process is not infallible. In the June 26, 1995, Decision and Order, the Administrative Law Judge addressed these 1993 test results and stated, "...giving Respondent full credence for his story about the tests in February 1993 there is nothing [in the record] that would affect the validity of the test conducted on December 7, 1995." [D&O at 15].

Appellant also submitted written references from former employers and landlords and a drug addiction evaluation from an addiction treatment center. Appellant contends that these exhibits, along with his unequivocal denial of drug use and the questionable test results from February, 1993, rebut the presumption of drug use. The Administrative Law Judge did not find that Appellant's testimony or other exhibits rebutted the presumption.

My review of the record finds that the Administrative Law Judge's findings were based on substantial, reliable, and probative evidence. Therefore, I find that the Administrative Law Judge's findings and decision are not arbitrary, capricious, clearly erroneous or based on inherently incredible evidence, and I will not upset them on appeal.

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 November 20, 1995, is **AFFIRMED**.

/S/

R. D. HERR
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington D.C., this 5th day of August, 1997.