UNITEDSTATESOFAMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

vs.

LICENSE NO. 686709
AND
MERCHANT MARINER'S
DOCUMENT NO. (REDACTED)
Issued to Larry R. Mason

DECISION OF THE

COMMANDANT

ON APPEAL

NO. 2592

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

By an order dated December 21, 1995, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's above-captioned license and document, upon finding a charge of *use of a dangerous drug* proved. The single specification supporting the charge alleged that Appellant was, as shown by a positive drug test, a user of marijuana.

The hearing was held on December 6, 1995, in Portland, Maine. Appellant appeared *pro se* and entered a response denying the charge and specification. The Administrative Law Judge introduced into evidence seven exhibits. The Coast Guard Investigating Officer introduced into evidence the testimony of three witness and five exhibits. Appellant introduced into evidence his own testimony and three exhibits.

The Administrative Law Judge's Decision and Order (D&O) was served on Appellant on December 29, 1995. Appellant filed a notice of appeal on January 25, 1996, and received a copy of the transcript on February 16, 1996. Appellant's appeal was perfected on April 13, 1996.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license and Merchant Mariner's Document. The license authorized Appellant to serve as master of ocean steam or motor vessels of not more than 1600 gross tons, as master of ocean steam or motor and auxiliary sail vessels of not more than 100 gross tons, as chief mate of ocean steam or motor vessels of any gross ton, and as radar observer unlimited. The document authorized appellant to serve as able seaman in any waters unlimited, as tankerman for all grades, as wiper, and as food handler in the steward's department. [Transcript (TR) at 5-6].

On July 6, 1995, Appellant reported to the Examination Management Services, Inc. (EMSI) in Burlington, Vermont to submit a urine sample. *See* Investigating Officer (I.O.) Exhibit 1. Appellant submitted the urine sample because his Drug-Free Certificate would expire within a month. [TR at 121], *see* Respondent (R.) Exhibit C. Appellant submitted the sample under the direction of Ms. Louise C. Mone who then assigned the identification number of 1001617021 to the sample. *See* I.O. Exhibit 1. Appellant signed the Federal Drug Testing Custody and Control Form (DTCC) certifying that the sample was sealed in his presence and that the information on the DTCC and affixed to the sample was correct. *Id*. A courier picked up the sample on July 6, 1995, and delivered it to the Corning Nichols Institute Substance Abuse Laboratory (Corning) in San Diego, California on July 7, 1995. [TR at 104], *see* I.O. Exhibit 1.

Corning, an approved urine testing facility for Federal agencies, analyzed the sample on July 10, 1995, and confirmed a positive test for marijuana metabolite. *See* I.O. Exhibits 1 and 2. Corning forwarded the test results to Greystone Health and Sciences Corporation (Greystone) where Dr. David M. Katsuyama was acting as the Medical Review Officer. [TR at 38]. Dr. Katsuyama reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on July 12, 1995. [TR at 40], *see* I.O. Exhibit 1. George M. Ellis, Jr., President of Greystone, then informed the Senior Investigating Officer at Coast Guard Marine Safety Office, Portland, Maine, that Appellant had tested positive for marijuana. *See* I.O. Exhibit 1.

After the Coast Guard served the Notice of Hearing and Charge Sheet on him, Appellant retained Ms. Judith Brownlow, Attorney at Law. [TR at 127]. The Administrative Law Judge granted Appellant's motion for a continuance on October 23, 1995, and set the hearing for December 6, 1995, emphasizing that no more continuances would be granted. *See* Judge (J.) Exhibit V. On December 5, 1995, Ms. Brownlow informed the Administrative Law Judge and the parties that she was withdrawing her representation because Appellant had failed to communicate to her an answer to the charge. *See* J. Exhibit I. At the hearing on December 6, 1995, the Administrative Law Judge denied Appellant's request for another continuance. [TR at 29].

BASES OF APPEAL

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

1. The Administrative Law Judge violated Appellant's due process right to counsel in denying the request for a continuance.

2. The collection and handling of Appellant's urine sample was seriously flawed.

3. The Coast Guard failed to prove that the test results were not the result of only passive marijuana inhalation.

OPINION

I

Appellant contends that, because the Administrative Law Judge did not grant the motion for a continuance, the Administrative Law Judge violated Appellant's due process right to be represented by counsel. I disagree.

The decision to continue a hearing is within the sound discretion of the Administrative Law Judge. *See* 46 C.F.R. § 5.511. The Administrative Law Judge's decision can be reversed only for an abuse of discretion. See American Power and Light Co. v. S.E.C., 329 U.S. 90 (1946). This 'abuse of discretion' standard is difficult to articulate. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case." Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

Appellant contends that, because his counsel withdrew the day before the hearing and because he has a right to be represented by counsel, the Administrative Law Judge abused his discretion in denying the second continuance request. I agree that Appellant was entitled to be represented by professional counsel. *See* 46 C.F.R. § 5.519. However, "the responsibility of the government in this regard is fully exercised when the person charged has been duly informed of that right and given reasonable opportunity to procure representation." Appeal Decision 2008 (GOODWIN). The Coast Guard notified Appellant of his right to counsel on the Notice of Hearing and Charge Sheet. *See* J. Exhibit II. Appellant also requested and was granted a continuance for six weeks to obtain an attorney and form a defense. *See* J. Exhibit III. Therefore, the government informed Appellant of his right to counsel and granted Appellant time to retain representation.

Appellant states that the Administrative Law Judge's Decision and Order should be vacated based on Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988). In Anderson, the district court

denied the plaintiff's motion for a continuance when the plaintiff's attorney withdrew from the case two days before the scheduled hearing. The Sixth Circuit held that this denial violated the plaintiff's due process right to counsel. However, Anderson involved a "complex Title VII case." Id. at 748. "We find it untenable that a client would be able to secure new counsel" for such a complex action in a short amount of time. *Id.* The Sixth Circuit also emphasized that the district court was hostile toward the plaintiff "not only because he had successfully appealed the district court's earlier disposition of the case, but also because he refused to accept the settlement offer..." *Id.* at 749. These circumstances did not "justify denying the litigant a reasonable opportunity to retain ...counsel. In sum, a court should not use the threat of trial without counsel as a means of achieving a pretrial disposition of a case." *Id.*

Clearly, the Administrative Law Judge was not threatening Appellant when denying the continuance request. The Administrative Law Judge granted Appellant reasonable time to obtain counsel, and the subject matter of Appellant's case was not complex. As Appellant notes, his counsel based her withdrawal on the fact that Appellant did not articulate an answer to the charge. *See* Appellant Brief at 5, [TR at 18]. Appellant did not ensure that his defense was properly prepared prior to the hearing date. Appellant "voluntarily chose this attorney as his representative in the action, yet he cannot now avoid the consequences of the acts or omissions of this freely-elected agent. Any other notion would be wholly inconsistent with our system of representative litigation." Link v. Wabash R.R., 370 U.S. 626, 632 (1962). *See also* Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984) (an attorney is only a client's representative and a client is legally responsible for his attorney's conduct); Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 609 (7th Cir. 1986) (holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply). If Appellant had actively worked with his lawyer and could not have come to an agreement over his answer to the charge, he should have notified the Administrative Law Judge long before the hearing. Additionally, Appellant fails to recognize that the Administrative Law Judge, in granting the first continuance, emphasized that he would grant no more continuances. *See* J. Exhibit III. Appellant was responsible for ensuring that he and his attorney had a well-established defense long before the scheduled hearing.

Though another Administrative Law Judge may have granted the continuance, this Administrative Law Judge did not abuse his discretion in denying it. "The matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process, even if the party fails to offer evidence or is compelled to defend without counsel." Unger, 376 U.S. at 589. "These matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional." Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978). Knowing that the Administrative Law Judge would be at least hesitant to grant another continuance, Appellant should have been proactive in resolving the conflict with his lawyer. Under these circumstances, denial of the continuance request on the day

of the scheduled hearing did not constitute an abuse of discretion.

II

Appellant contends that the Administrative Law Judge's decision should be vacated because the collection of Appellant's urine sample was faulty and thus the test results were not valid.

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. 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 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY). Furthermore, conflicting evidence will not be reweighed on appeal where the Administrative Law Judge's determinations can be reasonably supported. *See* Appeal Decisions 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER). 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 (CARMIENKE).

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. The Administrative Law Judge did not find the Appellant's testimony credible. Appellant contends that the sample was not sealed in his presence. However, Appellant signed the DTCC, stating that the sample was sealed in his

presence. *See* I.O. Exhibit 1. Appellant next contends that he submitted his sample directly into the specimen bottle and that the Department of Transportation regulations dictate that he must submit the sample into a separate collection container. However, the regulations indicate that submitting the sample into the specimen bottle is proper. *See* 49 C.F.R. § 40.23(b) ("*If urination is directly into the specimen bottle*, the specimen bottle shall be provided to the employee still sealed in its wrapper..." (emphasis in original)). Finally, Appellant contends that the collection process was faulty because Corning mistakenly sent a portion of his sample to the wrong testing facility. While Corning stated that the wrong mailing label had been affixed to the portion, they also stated that this mistake had not affected the portion. [TR at 89].

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.

III

Finally, Appellant contends that the Coast Guard failed to prove that the test results could not be attributed to passive inhalation.

As stated above, once the Coast Guard has presented a *prima facie* case of drug use, the respondent has the responsibility of producing persuasive evidence to rebut this presumption. Appellant, in contending that he only passively inhaled second-hand marijuana smoke, presented only his own testimony as proof. The Coast Guard presented the testimony of Corning's Scientific Director who stated that "the cutoff levels in the federal standards were established deliberately to exclude passive inhalation from causing a positive for marijuana." [TR at 64]. Dr. Katsuyama testified that the Department of Transportation reduced the threshold level from 100 to 50 nanograms per milliliter and then to 15 nanograms per milliliter "to eliminate all the pack of inhalers." [TR at 47]. Appellant submitted no evidence to rebut these statements. The Administrative Law Judge did not rely on inherently incredible evidence, and his findings are supported by the record.

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 December 21, 1995, is

AFFIRMED.

/S/

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

Signed at Washington, D.C. this 6th day of August,1997.