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 vs. LICENSE NO. 275818 Issued to Kevin L. Hufford	:	DECISION OF THE COMMANDANT ON APPEAL NO. 2596

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

By an order dated September 6, 1995, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's above-captioned license, 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 in Valdez, Alaska, on August 8, 1995. Appellant appeared *pro se* and entered a response denying the charge and specification. The Administrative Law Judge introduced into evidence nineteen exhibits and the testimony of one witness. The Coast Guard Investigating Officer introduced into evidence the testimony of three witnesses and five exhibits. Appellant introduced into evidence his own testimony and eight exhibits.

The Administrative Law Judge's Decision and Order (D&O) was rendered on September 6, 1995. Appellant filed a notice of appeal and perfected the appeal on September 28, 1995.

Appellant moved for a reopening of the hearing or for a reconsideration of the Decision and Order on September 6, 1995. The Administrative Law Judge denied the motion by order dated September 7, 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 operator of uninspected passenger vessels upon inland waters. [Investigating Officer (I.O.) Exhibit 1, Transcript (TR) at 4].

On May 13, 1995, Appellant reported to the Valdez Community Hospital in Valdez, Alaska, to submit a urine sample for a pre-employment drug test required by Maritime Consortium pursuant to 46 C.F.R. § 16.210(a). [I.O. Exhibit 3, TR at 11]. Under the direction of Mr. Mark Sibold, a laboratory technician at Valdez Community Hospital, Appellant submitted a sample for analysis.. [I.O. Exhibit 3, TR at 20].
Mr. Sibold properly sealed the bottle in the presence of Appellant. *Id*. The Drug Testing Custody and Control Form (DTCC) was completed and signed by both Appellant and
Mr. Sibold. *Id*. The sample, sealed in an envelope, was mailed to the National Reference Laboratory (National Reference) in Nashville, Tennessee, on May 15, 1995. [TR at 13-14].

National Reference received the properly sealed sample on May 17, 1995. [TR at 20]. National Reference analyzed the sample and confirmed that the sample tested positive for marijuana metabolite. [I.O. Exhibit 3, TR at 22]. National Reference forwarded the results to Dr. Ken Thompson, the Medical Review Officer under contract with Maritime Consortium. [I.O. Exhibit 5, TR at 31]. Dr. Thompson received the results from National Reference Laboratory on May 20, 1995. Dr. Thompson reviewed the results, conducted a telephone interview with Appellant, and confirmed the results on May 25, 1995. Dr. Thompson then notified Maritime Consortium that Appellant had tested positive for marijuana. [I.O. Exhibit 5].

BASES OF APPEAL

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

1. A witness was subpoenaed on the day of the hearing. As a result, Appellant was unprepared to examine the witness and allowed errors and omissions in the witness's testimony. Also, the Administrative Law Judge erred in assuming that Appellant did not discuss with the drug counselor Appellant's contention that the positive test was the result of accidental ingestion.

2. Appellant informed the Investigating Officer immediately after the hearing that Appellant would attend a rehabilitation program. The Investigating Officer stated that he would inform the Administrative Law Judge, but the Administrative Law Judge issued the Decision and Order anyway under which Appellant's license was suspended..

OPINION

I

Appellant contends that he was not given time to prepare for the examination of a witness called by the Administrative Law Judge. This lack of preparation caused Appellant to allow errors and omissions in the witness's testimony. Appellant also contends that the Administrative Law Judge erred by assuming that Appellant did not discuss with the drug counselor Appellant's contention that the positive test was the result of accidental ingestion. At the hearing, Appellant submitted into evidence a document signed by a drug and alcohol counselor. [Respondent (R.) Exhibit B]. That document included the statement, "Mr. Hufford said that he would be willing to complete the 16 week drug and alcohol treatment program offered by Valdez Counseling Center if necessary as a licensing requirement." At the hearing, Appellant specifically denied making that statement to the drug counselor. [TR at 62]. Consequently, the Administrative Law Judge subpoenaed the drug counselor during the hearing to clarify the contradiction. The witness appeared, and the Administrative Law Judge and the parties questioned her almost exclusively on the facts underlying the statement at issue. [TR at 64-68].

Appellant contends that he could have cross-examined this witness more effectively if he had been prepared. Appellant, however, did not move for a continuance or even a recess to prepare for the witness. He also never mentioned any problem with the testimony or a need to examine the witness again during the hearing. At the conclusion of the witness's testimony, the Administrative Law Judge twice asked Appellant if he had any more questions. Appellant answered 'no.' [TR at 67-68]. On appeal, I will review requests and rulings filed in the proceedings. *See* 46 C.F.R.
§ 5.563(c), *see also* Appeal Decisions 2458 (GERMAN), 2345 (CRAWFORD), 2289 (ROGERS), 2184 (BAYLESS), 1741 (GIL). The Appellant failed to move for a continuance or ask for a recess at that time and cannot bring this issue as a basis of appeal.

Even if timely raised, Appellant would not have prevailed on this issue. The truthfulness of the statement at issue does not go to the underlying case against Appellant, namely whether or not he was a user of a dangerous drug, but rather goes to the credibility of Appellant. Either Appellant is accurate in his depiction of his conversation with the drug counselor, or the drug counselor is accurate. Whether Appellant is telling the truth or not does not address the fundamental question at issue of whether Appellant was a user of drugs. Under Department of Transportation regulations, there is a presumption that an individual who fails a chemical test conducted under 46 C.F.R.
Part 16 for a dangerous drug is a user of dangerous drugs. *See* 46 C.F.R. § 16.201(b). According to Department of Transportation regulations, the Investigating Officer has the burden of proving all elements of the charge and specification. *See* 46 C.F.R. § 5.539. To meet this burden, as applied to the specification at hand, the Investigating Officer must prove three elements: 1) that the respondent was the individual that 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. Appeal

Decisions 2379 (DRUM), 2279 (LEWIS). This proof establishes a presumption of *use of a dangerous drug* and then shifts the burden of going forward with evidence to the respondent to rebut this presumption. *Id*. If the respondent produces no evidence in rebuttal, the Administrative Law Judge, on the basis of the presumption alone, may find the charge of use of a dangerous drug proved. *Id*.

On appeal, Appellant does not contest the finding by the Administrative Law Judge that the evidence presented by the Coast Guard established a presumption that Appellant used marijuana. [D&O at 22]. At the hearing, Appellant attempted to overcome the presumption by presenting evidence and testimony that his ingestion of marijuana was accidental. This evidence consisted of Appellant's own testimony and a variety of exhibits. [TR at 49-50, 55-56, Respondent's (R) Exhibits A-I]. Thus, the credibility of Appellant was a central issue in overcoming the presumption of use established by the Investigating Officer.

I have consistently held that the Administrative Law Judge is in the best position to determine the facts. *See* Appeal Decision 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, Appeal Decision 2420 (LENTZ), 2421 (RADER). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decision 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE). Furthermore, conflicting evidence will not be reweighed on appeal when the Administrative Law Judge's determinations can be reasonably supported. *See* Appeal Decision 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER). 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. Appeal Decision 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY).

In the instant case, I note that the letter from the drug counselor, contrary to the implication by the Administrative Law Judge and in accordance with Appellant's contention on appeal, described Appellant's visit as arising from a "positive urinalysis test that he says resulted from inadvertent ingestion of marijuana in food." [Administrative Law Judge (ALJ) Exhibit B]. The drug counselor was never questioned about this part of her letter during her testimony at the hearing. Thus, the Administrative Law Judge's statement to the contrary is in error. [D&O at 22]. However, this minor error is not enough to overturn the decision of the Administrative Law Judge. After a review of the record as a whole, the finding of the Administrative Law Judge that Appellant's contention of accidental ingestion was unsupported by the record is not inherently incredible, and I will not disturb this finding.

II

Appellant next contends that he informed the Investigating Officer immediately after the hearing that he would attend a rehabilitation program. The Investigating Officer stated that he would inform the Administrative Law Judge. Appellant was in the process of arranging counseling and other aspects of the rehabilitation program when the Administrative Law Judge issued the Decision and Order and suspended the license.

During the hearing, the Administrative Law Judge informed Appellant of the process of rehabilitation and cure. The Administrative Law Judge explained that Appellant could change his plea to admit or no contest and claim that the positive test result was due to experimental use at any time before the issuance of the Decision and Order. Appellant was also informed that if he did so, the Administrative Law Judge would consider the sanction of less than revocation, authorized by 5 C.F.R. § 5.59(a) to those who prove that a positive drug test was the result of experimental use. [TR at 75, 77]. The Administrative Law Judge explained that this change of plea must be made in writing and that "the onus" was on Appellant to ensure that the change was given to both the Coast Guard and the Administrative Law Judge. The Administrative Law Judge even emphasized this by asking, "Am I coming across? Am I making myself [clear]?" to which Appellant responded, "Loud and clear." The Administrative Law Judge then asked again, "Clear?" and Appellant responded again, "Very clear". [TR at 78]. It is quite apparent, therefore, Appellant knew that, if he wanted to change his plea, he had to notify the Administrative Law Judge in writing prior to the issuance of the Decision and Order. Thus, his assertion on appeal is irrelevant because at no time, including on appeal, has Appellant claimed that the positive drug test was due to experimental use. Therefore, the mere fact that Appellant was arranging a rehabilitation program does not make him eligible for a sanction less than revocation as is afforded in 5 C.F.R. § 5.59(a) to those who prove that a positive drug test was the result of experimental use.

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 September 6, 1995, is AFFIRMED.

/S/

R. E. KRAMEK
Commandant

Signed at Washington D.C., this 15th day of January, 1998.