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
MERCHANT MARINER'S LICENSE NO. 88237	:	ON APPEAL
	:	NO. 2598
Issued to: Joseph Catton, Appellant	:	

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

By an order dated June 10, 1996, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, revoked Appellant's merchant mariner's license, upon finding proven a charge of *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 a dangerous drug, to wit; Marijuana.

A hearing was held in Cincinnati, Ohio on June 8, 1995. Appellant was represented by counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and seven exhibits. Appellant's counsel introduced into evidence the testimony of two witnesses and one exhibit. At the close of the hearing, the record was left open for a reasonable time in order to allow Respondent an opportunity to submit results of a retest of his original urine sample and to explore the possibility of submitting results of a hair follicle test. Appellant submitted the results of the retest of the urine sample, but did not submit to a hair follicle test.

The Administrative Law Judge's Decision and Order of Revocation was served on Appellant on June 12, 1996. Appellant filed a timely notice of appeal on July 10, 1996, and was granted an extension until September 23, 1996, to file his brief. Appellant perfected his brief on September 22, 1996.

APPEARANCE: Martin McHenry, Jacobs, Kleinman, Seibel and McNally, 2200 Kroger Building, 1014 Vine Street, Cincinnati, Ohio, 45202.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license issued by the U.S. Coast Guard. Appellant's merchant mariner's license authorized him to operate certain vessels upon the western rivers, limited to the Ohio River from Mile 51.010 to 51.0.

On July 11, 1994, Appellant was randomly chosen by his employer, Cincinnati Gas & Electric Company, to be tested for narcotics as required by Coast Guard regulations. Upon notification of his selection, Appellant, accompanied by his supervisor Mr. J. Meyer, visited the collection site of the Employee Health Professionals' mobile testing unit on the premises of the Cincinnati Gas & Electric Company, Eastbend Station in Milford, Ohio to provide a urine sample. [Transcript (TR) at 42-43]. Once at the collection center, but prior to the collection of the sample, Mr. Brown, the collection person for Employee Health Professionals, verified Appellant's identity through Mr. Meyer. [TR at 43] Also prior to the collection, Appellant certified on the Drug Testing Custody and Control Form (DTCC) that the sample belonged to him. [TR at159]. A copy of the DTCC was entered into evidence as Investigating Officer’s Exhibit 4. [TR at 84]. Appellant was not able to produce an adequate sample right away, so he waited in the van until ready. [TR at 160]. After Appellant was able to produce an adequate sample, he gave the sample to the collection person. [TR at 162]. The collection person placed the sample in his briefcase and delivered it to Doctor Urgent Care, where the sample was placed in a refrigerator to await the pickup by a courier from SmithKline Beecham Clinical Laboratories. [TR at 62]. All other facts concerning the collection of the sample from Appellant by Mr. Brown are discussed in the decision below.

BASES OF APPEAL

This appeal has been taken from the Administrative Law Judge's revocation of Appellant's license. Appellant’s brief on appeal denies the charge and the specification, and sets forth three bases for appeal:

I. The findings of the Administrative Law Judge were not supported by the record because the findings were based in part on the unreliable testimony of the collection person, Mr. Brown;

II. The findings of the Administrative Law Judge were not supported by the record because the collection procedures for Appellant's urine sample were undisputedly in clear violation of the regulations governing testing for dangerous drugs; and,

III. The findings of the Administrative Law Judge were not supported by the record because the evidence presented at the hearing failed to establish a complete chain of custody.

OPINION

I

Appellant contends that the findings of the Administrative Law Judge are not supported by the record because the testimony of the collection person for Employee Health Professionals, Mr. R. Brown, was not reliable. I disagree.

I have previously held that the trier of fact is the judge of credibility and determines the weight to be given evidence. Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS), 2017 (TROCHE). As Appellant correctly points out in his brief, a decision by the Administrative Law Judge as to the credibility of witnesses and weight to be given evidence will be upheld on appeal unless the decision is clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Appeal Decision 2570 (HARRIS) *citing* Appeal Decisions 2541 (RAYMOND), 2546 (SWEENEY), 2522 (JENKINS), 2492 (RATH), 2333 (AYALA). In Appeal Decision 2296 (SABOWSKI), I stated:

> The Administrative Law Judge is not bound by the witnesses' opinions, but must make his own determinations based on the facts and the law. It is his function to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this manner is not subject to being reversed on appeal unless it is shown that the evidence upon which he relied is inherently incredible. *(citations omitted.)*

In his brief, Appellant asserts that the testimony of Mr. Brown, the collection person, was crucial to establishing that the collection procedure was completed properly and that the sample tested by the lab belonged to the Appellant. [Appellant Brief at 15]. Appellant also argues that Mr. Brown's testimony was confused, self-contradictory, and completely unreliable, and therefore should not have been relied upon by the Administrative Law Judge to support any determination. [Appellant Brief at 12]. Thus, Appellant contends that because Mr. Brown's testimony was inherently unreliable, and because Mr. Brown's testimony was crucial to ensuring a proper chain of custody, the finding by the Administrative Law Judge that Appellant was a user of dangerous drugs must have been based in part on unreliable testimony, and therefore should be overturned on appeal.

In the instant case, as in all cases, the Administrative Law Judge considered all of the evidence presented at the hearing before making a final determination. This evidence consisted not only of Mr. Brown's testimony, but the testimony of several other witnesses, as well as custody and control forms for the sample. As discussed above, it is the role of the Administrative Law Judge to weigh the credibility of all the evidence presented and, based on her assessment, decide what weight to give the various pieces of evidence. In the instant case, it is clear from the Decision and

Order that the Administrative Law Judge fulfilled her role: "Chain-of-custody issues go to the weight of the evidence, and the weight of the credible evidence supports a finding that the chain-of-custody evidence was sufficient to conclude that the urine that tested positive for marijuana was in fact Respondent's [now Appellant's] urine." [D&O at 5].

According to Appellant's argument, the testimony of Mr. Brown was the only evidence presented at the hearing which was capable of establishing that the proper procedures were followed in collecting, sealing, and identifying the sample provided by Appellant. [Appellant's Brief at 11]. This is not an accurate statement. In the Decision and Order, the Administrative Law Judge made it clear that the determination that the collection was proper was at least partially based on the DTCC as well as the testimony of Ms. Trojan, the Chief Scientist for the testing lab: "The same identifying numbers were found on the positive urine bottle as were found on [Appellant's DTCC] and the plastic bag that the urine was placed in to transport the urine." [D&O at 5]. Additionally, the Administrative Law Judge carefully assessed all of the evidence presented on the issue of whether the presence of a second person providing a sample could call the identification of the sample into doubt: "The weight of the credible evidence shows that there were not two people in the van giving a urine sample at the same time." [D&O at 5]. Furthermore, although not specifically discussed by the Administrative Law Judge in the Decision and Order, the testimony of Ms. Duff and Mr. Meyer, discussed in more detail in paragraph II below, supported the findings of the Administrative Law Judge as well. Therefore, contrary to Appellant's assertion, the relevant evidence on the issue of whether proper procedures were followed in collecting, sealing, and identifying the sample consisted of more than just Mr. Brown's testimony.

Appellant has not shown that findings of the Administrative Law Judge were based on evidence that was inherently incredible or that was clearly erroneous, arbitrary, capricious. Thus, I refuse to overturn the findings of the Administrative Law Judge on this ground.

II

Appellant’s second basis of appeal is that the findings of the Administrative Law Judge were not supported by the record because the collection procedures for Appellant's urine sample were undisputedly in clear violation of the applicable regulations governing testing for dangerous drugs. I disagree.

Specifically, Appellant contends that, during the collection of Appellant's urine sample for testing, the collection person for Employee Health Professionals, Mr. R. Brown, violated the applicable regulations governing testing for dangerous drugs through three different actions. Appellant contends that these violations were the failure to provide Appellant with a sealed specimen bottle (in violation of 49 C.F.R. § 40.23(b)(1)), the failure to properly seal and label the

specimen in Appellant's presence (in violation of 49 C.F.R. § 40.25(f)(17)), and supervising two donors in the collection van at the same time (in violation of 49 C.F.R. § 40.25(d)).

Under regulations promulgated by the Coast Guard, the Investigating Officer has the burden of proving all elements of the charge and specification in a suspension and revocation proceeding. *See* 46 C.F.R. § 5.539. This burden, as applied to the specification at hand, requires that the Investigating Officer must prove three elements: 1) the respondent was the individual that was tested for dangerous drugs; 2) the respondent failed the test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2379 (DRUM), 2279 (LEWIS). Once this burden is met, a presumption of use of a dangerous drug is established and the burden shifts to the respondent to go forward with evidence to rebut the 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*.

In the instant case, Appellant produced evidence to rebut the evidence presented by the Investigating Officer on two of the required elements -- whether Appellant was the individual tested for the drugs and whether the test was conducted in accordance with the applicable regulations. Of the three alleged violations by Mr. Brown of the collection standards, only one, Appellant’s allegation that Mr. Brown failed to provide Appellant with a sealed specimen bottle, was not contradicted by evidence presented by the Investigating Officer. [TR at 80]. The other two allegations of violations, that Mr. Brown failed to properly seal and label the specimen in Appellant's presence and that he allowed two donors to be under his supervision in the collection van at the same time, were contradicted by evidence presented by the Investigating Officer at the hearing.

The Administrative Law Judge found as a matter of fact that Appellant's specimen was "collected, labelled and sealed in substantial accordance with applicable federal regulations." [D&O at 3]. In her decision, the Administrative Law Judge acknowledged that Appellant presented evidence showing that the collection of the urine sample did not completely comply with the applicable regulations. However, she decided that the evidence of variation from the required procedures was not sufficient to warrant disregarding the positive test results. For the reasons discussed below, I will not overturn this finding.

The first violation of procedures asserted that Appellant was not furnished with a sealed bottle, does not cast doubt on the test results and does not justify overturning the finding of the Administrative Law Judge. The fact that Mr. Brown unwrapped the specimen bottle in view of Appellant and then handed the bottle to Appellant instead of handing Appellant a sealed bottle does not alone invalidate the sample results. According to Mr. Brown, he "unsealed a new bottle, took it out of the plastic bag, give [sic] him [Appellant] a new bottle." At that point, Appellant took the bottle and went back into the restroom. [TR at 80]. There is no conflicting evidence as to

these events. From the time the bottle was unwrapped by Mr. Brown until handed to Appellant, there is evidence that the bottle was in full view of both Mr. Brown and of Appellant. There is not a shred of evidence that this action by Mr. Brown made the positive test results any less credible or unreliable.

There is conflicting evidence surrounding the other two violations of collection procedure asserted by Appellant. For both of these violations, there was evidence presented that supports a finding that the correct collection procedures were followed. As discussed in paragraph I above, the Administrative Law Judge is the judge of credibility of witnesses and determines the weight to be given evidence. A decision by the Administrative Law Judge as to whether the required collection procedures were violated will not be overturned unless it is clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. As Appellant did not present evidence which met this standard for either of the other two violations asserted, I will not overturn the findings of the Administrative Law Judge on this issue.

One of the contested procedural violation asserted by Appellant is that Mr. Brown failed to properly seal and label the sample in Appellant's presence. [TR at 162-3]. This evidence is directly contradicted by the testimony of Mr. Brown. Mr. Brown testified that he placed the security seal on the sample bottle in Appellant's presence, that Appellant then initialed the seal, and that he, Mr. Brown, placed the sealed bottle into another bag, which was also sealed, all in Appellant's presence. [TR at 58]. Additionally, Miss Trojan, the Senior Certified Scientist for SmithKline Beecham Clinical Laboratories, Schaumburg, IL, the medical lab where Appellant's sample was tested, testified that Appellant's sample would not have been tested if there were any irregularities with the custody and control of the sample, such as tampered or missing seals. [TR at 97-98, 114]. In her opinion, the Administrative Law Judge found that the evidence showed that the sample was sealed and marked in the presence of Appellant with tamper proof seals and that the bottle with Appellant's sample was not out of the presence of the collector from the time Appellant supplied the sample until placed and sealed in the plastic bag. [D&O at 5]. This finding is well within the discretion of the Administrative Law Judge as the judge of credibility and as the person responsible for determining the proper weight to be given evidence.

As to Appellant's assertion that Mr. Brown allowed two donors to be under his supervision in the collection van at the same time, again the witnesses presented by the Investigating Officer contradict the testimony of the Appellant. Appellant testified that Ms. Duff, the second donor, was present in the van when he entered the restroom to provide a sample, and that when he exited the restroom with a complete sample, the second donor had departed the van. [TR at 162]. On the other hand, Mr. Brown testified that he entirely completed the necessary procedures for the second donor during the time that Appellant was unable to supply an adequate sample. Mr. Brown also testified that Appellant waited "a period of probably an hour" from the time the procedure was completed for the second donor and the time Appellant was able to provide an

adequate sample. [TR at 56-57]. The testimony of Mr. Meyer, Appellant's supervisor, also contradicts the testimony of Appellant on this point. Mr. Meyer testified that he accompanied Appellant into the collection van, was present when Appellant could not provide an adequate sample and heard Appellant being told to wait until he could provide a sample. Mr. Meyer testified that he exited and reentered the collection van a few times while Appellant waited inside the van to provide a sample. According to his testimony, Mr. Meyer saw Ms. Duff, the second donor, head towards the collection van and later witnessed Ms. Duff exit the van. Contrary to Appellant's assertion, Mr. Meyer also testified that subsequent to witnessing Ms. Duff exit the van, he reentered the van and Appellant was still waiting to provide a sample. [TR at 170-171].

In his argument, Appellant emphasizes the allegation that Mr. Brown allowed two donors to be under his supervision in the collection van at the same time. The applicable regulation, 49 C.F.R. § 40.25(d) states,

> . . .In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of the specimens, the collection site person shall have only one donor under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialed, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of an employee who was unable to provide a complete specimen, has entered a waiting area). (*emphasis added*).

Thus, if Appellant entered a waiting area, as he appears to have done, and remained in that area during the entire time of the collection procedure with regard to the second donor, then no violation of the applicable regulations occurred. In her opinion, the Administrative Law Judge found that the second donor was completely processed and out of the van before Appellant left the waiting area and entered the restroom to provide a sample. [D&O at 5].

For the reasons stated above, I will not overturn the decision of the Administrative Law Judge that Appellant’s sample was collected, labeled and sealed in substantial accordance with applicable federal regulations.

III

Appellant's third basis for appeal is that the findings of the Administrative Law Judge were not supported by the record because the evidence presented at the hearing failed to establish a complete chain of custody. Appellant argues that the Coast Guard failed to establish the required chain of custody throughout the handling of Appellant's sample. Specifically, Appellant challenges the chain of custody on three grounds; 1) the unreliability of the evidence presented by

Mr. Brown, as discussed in paragraph II above, regarding the proper labeling and sealing of Appellant's sample and its shipment to the laboratory, 2) the fact that the Coast Guard presented no evidence as to what happened with the sample at Doctor Urgent Care, the facility that accepted the sample from Mr. Brown, and 3) the lack of evidence that the sample released by Doctor Urgent Care was the sample which tested positive for marijuana. Additionally, Appellant attacks as inadmissible the testimony of Ms. Trojan, the Senior Certified Scientist for SmithKline Beecham Clinical Laboratories, Schaumburg, IL, (SmithKline) regarding the chain of custody of the sample at the laboratory where the sample was tested because her testimony was offered by telephone without notice to Appellant prior to the hearing.

The Administrative Law Judge found as a matter of fact that the chain of custody of the sample was intact from the time of its collection through its testing at the laboratory. [D&O at 4]. Again, as discussed in paragraphs I and II above, a decision by the Administrative Law Judge as to the credibility and weight to be given evidence will be upheld on appeal unless the decision is clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence.

Appellant asserts that the chain of custody for his sample was incomplete in three separate places. The first of these involves the collection, labeling and sealing procedures which occurred at the collection site. For the reasons discussed in paragraph II above, I refuse to overturn the findings of the Administrative Law Judge regarding this element of the chain of custody.

Next, Appellant argues that the chain of custody is not complete because the Coast Guard presented no evidence as to what happened with the sample at Doctor Urgent Care, the facility that accepted the sample from Mr. Brown. Appellant also asserts that the chain of custody is materially deficient due to the lack of evidence that the sample released by Doctor Urgent Care was the sample which tested positive for marijuana. At the hearing, there was evidence presented that the sample which tested positive for marijuana at SmithKline would not have been tested if it had not arrived with intact seals on the sample and intact tamper-proof packaging. [TR at 98]. Additionally, evidence showed that the sample would have been rejected if there had been any irregularities with the physical state of the sample itself or with the accompanying Drug Testing Custody and Control form. [TR at 114]. I have previously held that there is no obligation on the part of the Investigating Officer to introduce the testimony of every individual who handled a sample to prove a proper chain of custody. Appeal Decision No. 2527 (GEORGE). In this case, all the pertinent documentation regarding Appellant's sample was admitted into evidence. [I.O. Exhibits 1(a), 1(b) and 4-6.] The testimonies of the Collection Officer, the Medical Review Officer and the Senior Certified Scientist for SmithKline corroborate the documentary evidence, identify the documentary evidence as having been made within the regular course of the collection, processing and testing procedures, and ultimately support the integrity of the chain of custody.

Appellant also challenges the testimony of the Chief Scientist, Ms. Trojan, as inadmissible based on the fact that Ms. Trojan testified at the hearing via telephone and, because her testimony is inadmissible, argues this breaks the chain of custody. At the hearing, Appellant objected to the testimony of Ms. Trojan, arguing that telephonic testimony would prevent Appellant from conducting an adequate cross examination because the purely auditory nature of the testimony would create confusion regarding the exhibits and because this type of testimony would render it impossible to evaluate the demeanor of the witness. [TR at 16-22]. I disagree.

I have previously held that personal confrontation of a witness is not a right at a Suspension and Revocation Proceeding and that the procedures used for telephonic testimony are sufficient to protect the legitimate interests of the Appellant and the constitutional concept of due process. Appeal Decisions 2252 (BOYCE) and 2476 (BLAKE); aff'd sub nom., Commandant v. Blake , NTSB Order EM-156 (1989); aff'd sub nom., Blake v. Dep't of Transportation, NTSB No. 90-70013 (9th Cir. 1991). 46 C.F.R. § 5.535(f) allows telephonic testimony when the testimony "would otherwise be by deposition" and details the procedural safeguards to be taken by the Administrative Law Judge during such testimony:

> The telephone conference will be arranged so that all participants can listen to and speak to each other in the hearing of the Administrative Law Judge. The Administrative Law Judge insures that all participants in the telephone conference are properly identified to allow a proper record to be made by the reporter.
>
> ...Telephone conferences are governed by the procedural rules and decorum observed during in-person proceedings. 46 C.F.R. § 5.535(f).

Appellant also contends that the telephonic testimony of Ms. Trojan was improper due to a lack of notice. According to Appellant's argument, since telephonic testimony may only be utilized when the testimony "would otherwise be by deposition," the use of such testimony must follow the same procedural requirements as testimony by deposition, including the requirement in 46 C. F.R. § 5.553(a) that testimony may only be taken by deposition upon written application. Thus, Appellant argues that because no such application to take the testimony of Ms. Trojan by telephone was filed, the testimony violated Coast Guard regulations and, therefore, the testimony should be struck as inadmissible.

In making this argument, Appellant misconstrues the meaning of the phrase describing the circumstances of the testimony as testimony that "would otherwise be by deposition." This descriptive phrase concerns the circumstances in which telephonic testimony would be appropriate rather than the procedures required to accomplish testimony by phone. The purpose of allowing testimony by telephone is to preserve judicial economy and to facilitate testimony when it would otherwise be inconvenient for the witness to travel because of long distances.

Appeal Decisions 2503(MOULDS); 2492(RATH); 2476 (BLAKE); 2252 (BOYCE). This is generally the same rationale for providing testimony by deposition.

In the instant case, the procedures used by Investigating Officer and the Administrative Law Judge adequately ensured the identity of the witness, permitted adequate cross examination under oath, and was governed by decorum and sufficient formality. [TR at 85-118]. Thus, I do not find the testimony of Ms. Trojan inadmissible because her testimony was taken telephonically.

Although more complete testimony on the adequacy of the chain of custody would have been helpful, I do not find that the decision of the Administrative Law Judge that the chain of custody was intact from the time of the collection of the sample from Appellant through the laboratory testing was erroneous, arbitrary, capricious, or based on inherently incredible evidence. Thus, I uphold the decision of the Administrative Law Judge regarding the chain of custody.

CONCLUSIONS

The findings of the Administrative Law Judge are supported on the record by substantial evidence of a reliable and probative nature.

ORDER

The decision of the Administrative Law Judge dated June 10, 1996, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

Signed at Washington, D.C., this __23_____ day of __March_____, 1998.