U N I T E D S T A T E S 0 F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:
vs.	: DECISION OF THE :
LICENSE NO. 611189 and MERCHANT MARINER'S DOCUMENT NO.(REDACTED): NO. 2562	: COMMANDANT : ON APPEAL :
Issued to: Frederick J. BEAR, III Appellant.	:

This appeal has been taken in accordance with 46 U.S.C. # 7702 and 46 C.F.R. # 5.701.

By an order dated December 5, 1992, an Administrative Law Judge of the United States Coast Guard at Honolulu, Hawaii, revoked Appellant's Merchant Mariner's Document and License upon finding proved a charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about November 18, 1991, Appellant wrongfully used cocaine as evidenced by a urine specimen collected on that date pursuant to a pre-employment drug test program by his prospective employer, Hawaiian Tug and Barge Corporation. .

The hearing was convened in Honolulu, Hawaii, on June 3, 1992, and then reconvened on December 5, 1992, after a continuance requested by Appellant. Appellant was represented by professional counsel. Appellant entered a response denying the charge and specification. The Investigating Officer

offered 13 exhibits into evidence, nine of which were admitted. One of these exhibits [I.O. Ex. 13] was a "Litigation Package" from Nichols Institute that contained 11 documents concerning the testing and re-testing of Appellant's urine sample. The Investigating Officer also introduced the testimony of one witness. Appellant introduced 5 exhibits into evidence and introduced the testimony of two witnesses, one of whom testified by a written stipulation entered into between the Investigating Officer and Appellant. In addition, Appellant testified under oath in his own behalf.

The Administrative Law Judge's final order revoking all licenses and documents issued to Appellant was entered on December 5, 1992. Service of the Decision and Order was made on Appellant's counsel, by stipulation, on January 13, 1993. Subsequently, Appellant timely filed a Notice of Appeal dated February 10 1993, which was received by the Administrative Law Judge on March 1, 1993. After being granted two extensions, Appellant timely filed his Appeal Brief on December 22, 1993. Accordingly, this appeal is properly before the Commandant for review.

Appearance: Mark R. Thomason, Esq., Haseko Center, Suite 615, 820 Mililani Street, Honolulu, Hawaii 96813.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above-captioned license, issued to him by the United States Coast Guard.

On November 18, 1991, Appellant, at the direction of his prospective employer, Hawaiian Tug and Barge Company, provided a pre-employment urine specimen for drug testing purposes, pursuant to 46 C.F.R. # 16.210, at Airport Urgent Care, Honolulu, Hawaii. The specimen collector was Renee Kuamoo-Chew. Ms. Kuamoo-Chew received on-the-job training to be a specimen collector and was designated a specimen collector by Airport Urgent Care.

Ms. Kuamoo-Chew positively identified Appellant from his driver's license before collecting the specimen. Appellant was then given a specimen bottle which he filled in the bathroom and

returned to the collector. In the presence of Appellant, Ms. Kuamoo-Chew sealed the specimen bottle with a tamper-proof seal, identifying it with control number 1000282166, and logged the required information on a Drug Testing Custody and Control form. Appellant then signed the appropriate copies of the form, certifying that he provided his urine specimen to the collector; that the specimen bottle was sealed with a tamper proof seal in his presence; and that the information on the form and on the label affixed to the specimen bottle was correct. Ms. Kuamoo-

Chew also signed the requisite portions of the form and other documents.

The specimen bottle was then shipped by courier to Nichols Institute, a NIDA certified testing laboratory, for analysis. Appellant's urine specimen tested positive for the presence of cocaine metabolite, showing a concentration of approximately 2311 nanograms per milliliter. A re-test of the urine specimen also tested positive and showed a concentration of approximately 2329 nanograms per milliliter. There is no dispute that Nichols Institute followed proper chain.of-custody and testing procedures.

Nichols Institute's report regarding Appellant's urine sample was forwarded to Dr. Ronald H. Kienitz, Airport Urgent Care, who was the contracted Medical Review Officer for Hawaiian Tug and Barge Corporation. Dr. Kienitz, a specialist in occupational medicine reviewed the case and, after interviewing Appellant, determined that Appellant's urine specimen tested positive for cocaine.

At his own expense and initiative, Appellant submitted an additional urine sample for analysis on November 21, 1991, through his private physician, to SmithKline Beecham Clinical Laboratories.
The test report on this urine sample states that no drugs were detected in the Appellant's urine.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant sets forth the following basis of appeal:

1. The Administrative Law Judge erred in considering the results of the urinalysis as evidence of drug use because the collection procedure did not strictly adhere to the mandatory, minimum drug testing regulations set forth in 46 C.F.R. Part 16 and 49 C.F.R. Part 40. Specifically, Appellant urges that the Administrative Law Judge's finding that the collection was proper is plain error because of the following shortcomings in the procedure:

a. Appellant's urine specimen was tainted because Ms. Kuamoo-Chew's minor daughter was permitted in the collection area and handled Appellant's urine sample, in violation of 49 C.F.R. # 40.25.

b. The Government did not present sufficient evidence that Ms. Kuamoo-Chew had received proper training to collect urine specimens, as required by 49 C.F.R. # 40.23(d) (2).

c. The Government presented no proof that Appellant was provided with a "Statement to Donor" and "Standard Written Instructions Setting Forth Their Responsibilities," as required by 49 C.F.R. # 40.23(a) (5) and # 40.23(d) (2), respectively.

OPINION

I.

I disagree with Appellant's contention that his urinespecimen was tainted because Ms. Kuamoo-Chew's minor daughter was permitted in the collection area and handled Appellant's urine sample, in violation of 49 C.F.R. # 40.25.
I agree with Appellant that the regulation permits only authorized persons in the collection area.
I also agree with Appellant that the record does not support the Administrative Law Judge's finding that Ms. Kuamoo-Chew "testified. . . that her daughter was in fact in school on that

date." [Decision and Order, p. 9]. Ms. Kuamoo-Chew testified that she could not specifically remember whether her daughter was in school that day. [Tr. Vol. II, pp. 104-106]. There is no dispute that November 18, 1991, was a school day and that Ms. Kuamoo-Chew's daughter is of school age.

However, whether the daughter was at Airport Urgent Care on November 18, 1991, is not the dispositive issue. The important issue is whether the daughter in some way tainted Appellant's sample. Ms. Kuamoo-Chew further testified that her daughter was never permitted in the laboratory area of Airport Urgent Care. She testified that if her daughter was out of school on that day and at Airport Urgent Care, the daughter would have remained in a

separate, waiting room area of Airport Urgent Care. She also testified that her daughter had never helped her with the collection of urine specimens or the movement of supplies, as alleged by Appellant. [Tr. Vol. II, p. 109].

As proof that the daughter was in the collection area and handled the urine sample, Appellant points to the fact that he specifically described the physical characteristics of Ms. Kuamoo-Chew's daughter. However, a close reading of the record indicates a discrepancy in the descriptions given by Appellant and Ms. Kuamoo-Chew. Appellant described the daughter as having brown hair that was "very straight until it hit on her shoulder and then it seemed to flip underneath." [Tr. Vol. II, p. 72]. Appellant also stated that the daughter had a "very skinny" build. [Tr. Vol. II, p. 72]. Ms. Kuamoo-Chew described her daughter as having black, wavy hair. [Tr. Vol. II, p. 108]. Ms. Kuamoo-Chew also testified that her daughter had a medium build. [Tr. Vol. II, p. 107]. The Administrative Law Judge found that Ms. Kuamoo-Chew's testimony rebutted Appellant's assertions that the daughter was present in the collection area and handled Appellant's urine sample.

Appellant further argues that Ms. Kuamoo-Chew's testimony was not credible because another employee of Airport Urgent Care was in the audience and she admitted that there would "probably" be negative consequences for her at her job if she admitted that her daughter had been playing with samples. [Tr. Vol. II,

pp. 109-110]. Issues of credibility and the weight to be given certain testimony are clearly the province of the Administrative Law Judge. It is the function of the Administrative Law Judge, as fact-finder, to evaluate the credibility of the witnesses and resolve inconsistencies in the evidence. The findings and determinations of the Administrative Law Judge will not be disturbed unless they are not supported by the record and are inherently incredible. Appeal Decisions 2003 (PEREIRA): 2052 (NELSON): 2116 (BAGGETT): 2183 (FAIRALL): 2193 (WATSON): 2254 (YOUNG): 2270 (HEBERT): 2253 (KIELY): 2290 (DUGGINS): 2296 (SABOWSKI): 2522 (JENKINS).

There is nothing in the record to suggest that Ms. Kuamoo. Chew's testimony was inherently incredible. Furthermore, as I have previously held, the findings of the Administrative Law Judge need not be consistent with all the evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decisions 2422 (GIBBONS): 2424 (CAVANAUGH): 2546 (SWEENEY). aff'd NTSB Order No. EM-176: 2492 (RATH): 2503 (MOULDS). Despite Appellant's testimony to the contrary, there is sufficient evidence in the record, of a reliable and probative nature, that Ms. Kuamoo-Chew's daughter was not in the collection area of Airport Urgent Care on November 18, 1991, and that the daughter did not handle Appellant's urine sample. Accordingly, the Administrative Law Judge's erroneous finding that Ms. Kuamoo-Chew testified that her

daughter was in fact in school constitutes harmless error.

Even assuming, arguendo, that Ms. Kuamoo-Chew's daughter was in the collection area and handled Appellant's urine sample, there is no evidence that the sample was tampered with or tainted. By Appellant's own testimony, the sample was closed and sealed and had already been labeled when the daughter purportedly handled the specimen.[Tr. Vol. II, pp. 90-91].

II.

I also disagree with Appellant's next contention that the Government failed to sufficiently prove that the specimen collector, Ms. Kuamoo-Chew, successfully completed training. I agree with Appellant that the pertinent regulation, 49 C.F.R. # 40.23(d) (2), requires collection site personnel to successfully complete training to carry out the functions of a specimen collector. However, absent a **particularized** challenge at the

hearing, the Government has no obligation to establish the qualifications of personnel involved in the collection and testing of a urine sample as part of proving its prima facie case of drug use. Appeal Decision 2546 (SWEENEY), **aff'd NTSB Order No. EM-176** (emphasis added). Once the Government establishes its prima facie case, there is a presumption that Appellant is a user of a dangerous drugs. 46 C.F.R. # 16.201. The burden then shifts to Appellant to prove that the positive test was not the

result of his use of a dangerous drug. Id.

I do not find that Appellant made any particularized challenge to Ms. Kuamoo-Chew's qualifications or training at the hearing. Appellant had an opportunity to question Ms. Kuamoo-Chew but asked only one question on cross-examination related to her qualifications and training, as indicated on page 108 of Volume II of the transcript:

Q: How long after July '91 did you get on-the-job training?
A: How long was the training or how long did I start?
JUDGE GARDNER: How long after. You testified that you came on --
came in employment in July '91. What counsel is asking you is how
long after that did you get the on-the-job training that you testified you had?

A: About a month.

This is clearly insufficient to establish a particularized challenge to Ms. Kuamoo-Chew's qualifications and training.

Again, even assuming, arguendo, that Appellant had raised a particularized challenge to Ms. Kuamoo-Chew's qualifications and training, I find that the record establishes that she was adequately trained. 49 C.F.R. # 40.23(d) (2) does not specify what type or course of training is required, nor does it define what constitutes sufficient evidence of successful completion of training. It is uncontroverted in the record that Ms. Kuamoo-Chew received on-the-job training from a medical assistant in

specimen collection procedures and was officially designated as a specimen collector by Airport Urgent Care. . [Tr. Vol. II, pp. 95-96]. Ms. Kuamoo-Chew testified in detail about the collection process she goes through when a donor comes to Airport Urgent Care to provide a sample and the precautions that she takes. [Tr. Vol. II, pp. 98-100]. For these reasons, together with the lack of impeachment of her qualifications, I find that the record sufficiently establishes that Ms. Kuamoo-Chew was adequately trained, in accordance with applicable regulations, to be a specimen collector.

III.

Appellant's final contention is that the results of the urinalysis should be discarded because the Government did not prove that Appellant was provided with a "Statement to Donor" and "Standard Written Instructions Setting Forth Their Responsibilities." I disagree.

Appellant raised no objections or challenges at the hearing regarding this issue. Appellant did not mention this issue in either his opening statement [Resp. Ex. D] or closing statement [Tr. Vol. II, pp. 112-116]. Appellant also did not question Ms. Kuamoo-Chew, or any other witness, about whether Appellant was provided the required written statement and instructions to Appellant. Appellant does make a quick, vague reference in his

testimony of not being advised by Ms. Kuamoo-Chew of the "process and stuff." [Tr. Vol. II, p. 78]. However, this reference lacks specificity and content. It is not at all clear from the context of this response that Appellant is making an objection or challenge to not being provided with the required statement and instructions.

Appellant was required to raise an appropriate objection or challenge at the hearing. By failing to do so, Appellant waived this issue and cannot now raise it for the first time on appeal. 46 C.F.R. # 5.701(b) (1); Appeal Decision 2546 (SWEENEY). **aff'd NTSB Qrder No. EM.176**. citing Appeal Decisions 2376 (FRANKS); 2384 (WILLIAMS): 2400 (WIDMAN): 2458 (GERMAN): 2463 (DAVIS):

2504 (GRACE): 2524 (TAYLOR).

Once again, even assuming Appellant's vague reference was an objection or challenge on the record, I disagree that the failure to prove that Appellant received the required statement and instructions requires reversal of the Administrative Law Judge's Decision and Order. I agree with Appellant that 49 C.F.R. #40.23(a) (5) and # 40.23(d) (2). required that Appellant be given a "Statement to Donor" and "Standard Written Instructions Setting Forth Their Responsibilities," respectively. I further agree with Appellant that there is no evidence in the record to suggest that Appellant received these required notices. However, the Government is not required to prove that Appellant received the statement and instructions as part of its prima facie. As previously pointed out, once the Government establishes its prima

facie case, the burden shifts to Appellant to show that the positive test result was not the result of his use of a dangerous drug. Appeal Decision 2546 (SWEENEY), aff'd NTSB Order No. EM-176. In the instant case, Appellant does not identify how such an oversight may have affected the integrity of the urine specimen or chain of custody or tainted the results of the drug test. Accordingly, Appellant's assertion is without merit.

IV.

Appellant's basis of appeal is that the urinalysis results should not have been considered by the Administrative Judge because the collection of the urine specimen did not meet all the technical requirements of the regulations. Upon a thorough review of the record, I find the above-cited discrepancies to be minor and technical in nature. I have previously held that the failure to meet a technical requirement of the regulations does not vitiate an otherwise proper chain-of-custody. Appeal Decisions 2542 (DEFORGE); 2522 (JENKINS); 2537 (CHATHAM). Here, the record establishes that the collection, chain-of custody, and the testing and re-testing of Appellant's urine specimen were all in substantial compliance with the drug testing regulations. Appellant was identified by his driver's license at the collection site. Appellant then urinated into a specimen bottle.

The bottle was sealed in his presence with a tamper-proof seal and a unique control number was assigned to that bottle. Moreover, Appellant's personal information and the unique control number were recorded on a Drug Testing Custody and Control Form. Appellant signed this form and certified that he provided his urine to the collector; that the specimen bottle was sealed with a tamper-proof seal in his presence; and that the label and control number affixed to the specimen bottle were correct. The specimen was delivered by courier to the laboratory the same day it was collected. There is no evidence that the specimen was ever opened prior to being received by the laboratory and there is no contention that the handling of the specimen at the laboratory and its testing and re-testing were improper. Therefore, I find that any deviation from the strict requirements of the regulations in this case constituted harmless error.

CONCLUSION

Accordingly, having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated December 5, 1992, is hereby AFFIRMED.

A. E. HENN
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, DC this 1st day of March 1995.

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