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 DOCUMENT No.(REDACTED): Issued to: Philip Tyler LINTON, Appellant	ON APPEAL NO. 2556

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

By order dated August 10, 1992, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri revoked Appellant's merchant mariner's document upon finding a *use of dangerous drugs* charge proved. The single specification supporting the charge alleged that Appellant, while being the holder of a merchant mariner's document, was tested on or about December 14, 1989, and found to have marijuana cannabinoids present in his body.

At the hearing held at Portland, Oregon on September 27, 1990, Appellant appeared with counsel. On counsel's advice, Appellant denied the charge and its supporting specification.

During the hearing, the Coast Guard Investigating Officer (hereinafter "Investigating Officer") introduced into evidence

10 exhibits, and the testimony of four witnesses. In defense, Appellant offered into evidence five exhibits, and his own sworn testimony.

After the hearing, the Administrative Law Judge rendered a decision in which she concluded that the charge and specification had been found proved. On August 10, 1992, the Administrative Law Judge issued a written order revoking Appellant's Coast Guard issued Merchant Mariner's Document No.(REDACTED).

Appellant timely filed an appeal on August 21, 1992, and, after receiving an extension, timely completed his appeal on June 18, 1993. Therefore, this appeal is properly before the Commandant for review.

FINDINGS OF FACT

At all relevant times, Philip T. Linton (Appellant) was the holder of Merchant Mariner's Document No. [redacted]. On December 13, 1989, Appellant suffered a leg injury while on the job requiring medical treatment and the issuance of prescription hydrocodone, a pain medication. On December 14, 1989, Appellant's employer, Knappton Incorporated (subsequently Brix Maritime) directed Appellant to provide a urine specimen for post-accident drug testing purposes. Appellant provided the specimen at Good Samaritan Convenience Care (Good Samaritan) in Portland, Oregon.

Ms. Helen Farrenkoph, a Registered Nurse and urine specimen collector at Good Samaritan, collected Appellant's urine specimen in a sample bottle. During the process, Appellant signed the Drugs of Abuse Order Entry/Chain of Custody Form (chain of custody form), certifying that he provided the urine specimen (as well as a blood specimen) for drug and alcohol testing. Ms. Farrenkoph sealed the urine specimen bottle with a tamper proof label which Appellant initialed. Ms. Farrenkoph then packed the specimens for shipment to Compuchem Laboratories, Western Division (Compuchem), a testing laboratory in California certified by the National Institute on Drug Abuse (NIDA). Compuchem received Appellant's urine and blood specimens intact and properly identified, and conducted the prescribed tests. The urine specimen tested positive for cannabinoids. Compuchem then forwarded its laboratory report to Dr. Philip Unger, the Medical Review Officer ("MRO") assigned to the case, to review the results. The MRO subsequently interviewed the Appellant and concluded that Appellant's urine specimen tested positive for cannabinoids.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Administrative Law Judge revoking Appellant's merchant mariner's document. Appellant first asserts a denial of constitutional substantive due process rights when: 1) he was denied "the opportunity to have his urine sample r**et**ested;" 2) "Compuchem failed to process any blind samples" in violation of NIDA guidelines; 3) the Administrative Law Judge failed to consider Appellant's testimony which was contradictory to Ms. Farrenkoph's testimony regarding urine collection procedures; 4) the Administrative Law Judge failed to consider the negative results of Appellant's own urinalysis test done one month after the post-accident urinalysis test; and 5) the Administrative Law Judge failed to consider two newspaper articles "criticizing the unreliability of drug testing procedures and also describing how cannabinoids can remain in a subject's urine for over a month after marijuana use." Appellant next asserts denial of constitutional procedural due process rights, and other procedural rights under the Administrative Procedures Act (APA), 5 U.S.C. 551 et **seq**., and Federal Rule of Evidence 301, when the Administrative Law Judge "improperly shifted the burden of proof as to the reliability of Compuchem's drug test to Appellant, when the burden should have remained with the Coast Guard."

Appearance: Christopher G. Cournoyer, Esq.
COURNOYER & SUSSMAN
135 S.W. Ash, Suite 600
Portland, Oregon 97204

OPINION

I.

I note at the outset that Appellant has asserted certain errors in the proceedings below, and has characterized those errors as having constitutional dimensions. These proceedings are governed by statute and regulations and are intended to maintain standards for competence and conduct essential to the promotion of safety at sea. Title 46 U.S.C. 7701; 46 C.F.R. 5.5. Those regulations specifically detail the authority of the Administrative Law Judge at the hearing level and the Commandant of the Coast Guard at the appellate level. Neither the Administrative Law Judge nor I, as the Commandant, are vested with the authority to decide constitutional issues; that is exclusively within the purview of the federal courts. **See** 4 Davis, **Administrative Law Treatise** 26.6 (1983); **Appeal** Decisions Nos. 2433 (BARNABY) and 2202 (VAIL).

The urinalysis collection and testing programs are conducted in accordance with regulations set forth in 46 C.F.R. part 16.

I note that the U.S. Supreme Court in **Skinner v. Railway Labor Executives' Association**, 109 S. Ct. 1402 (1989), and the U.S. District Court for the District of Columbia in **Transportation Institute, et al. v. United States Coast Guard**, 727 F.Supp. 648 (D.D.C. 1989), found that the procedures governing mandatory drug testing of transportation employees (like Appellant) are constitutionally sound.

Therefore, to the extent Appellant challenges the constitutionality of the regulatory procedures themselves, he does so inappropriately in this forum, and those assertions of error will not be addressed here. However, I will address Appellant's appeal to the extent he asserts that the aforesaid procedures were not followed or were carried out improperly.

II.

A.

The Appellant asserts that he was denied the opportunity to have his urine sample retested because it was destroyed approximately two weeks after it was collected. I disagree.

The regulations contained at 49 C.F.R. 40.29(h) state, in pertinent part,

> *Long-term storage*. . . . Drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive, in their original labelled specimen bottles.

Appellant's allegation apparently stems from the final entry on the chain of custody form dated December 27, 1989, which states that a sample belonging to Appellant was delivered from temporary storage to a Mr. Richard S. Puckett and was then disposed (Investigating Officer's Exhibit No. 6, p. 4).

This entry does not, however, reveal whether the sample disposed was the blood sample or the urine sample taken from Appellant on December 14, 1989. Page 4 of Investigating Officer's Exhibit No. 6 shows two other entries also dated December 27, 1989, which indicate that a sample belonging to the Appellant was transferred from Compuchem's temporary storage to Mr. Puckett, and was then transferred by Mr. Puckett to "long-term storage." A handwritten notation in the "Purpose/Remarks" column of the chain of custody form identifies this latter sample with the accession number 11085321. Page 1 of Investigating Officer's Exhibit No. 6 identifies this accession number with the Appellant's urine sample. Neither the chain of custody form nor any other exhibits in the record reveal any subsequent transfers (from long term storage) of the sample with

accession number 11085321.
Accordingly, I find that the final entry on the chain of custody form indicating disposal of a sample refers to the blood sample (accession number 11085339) which was placed in temporary storage by a "Lis Walkin" on December 19, 1989, and remained there until December 27, 1989.

The long term storage requirements apply only to urine samples. 49 C.F.R. 40.1. At the hearing, the Investigating Officer initially agreed with Appellant's counsel that the urine sample was destroyed on December 27, 1989 (Tr. at 24). However, during a subsequent recess, the Investigating Officer called a Compuchem employee who confirmed that Compuchem "still [had] the sample" (Tr. at 35-36). While not crediting this statement by the Investigating Officer as testimony or evidence, I note the following testimony of Dr. Michael Peat, Vice President of Toxicology, Compuchem Laboratories, elicited by the Investigating Officer at the hearing,

> Q: We had an earlier question on the chain of custody sheet about whether that sample was kept by your lab. Could you please address that issue?
>
> A: Yes. This sample was received by Compuchem Labs, Western Division, on December 18th of 1989. Upon receipt, it was given an access number. That access number was 11085321. At the same time it was given an access number, a home tray custody was begun. That's an internal chain of custody. This document which I have forwarded to Lieutenant Bourgeault reflects December 27th of 1989. That access number 11085321 was transferred to long-term storage on the same date. All other specimens received and located under that home tray or that batch were dispos[ed].

(Tr. at 102-103).

From the foregoing, and in the absence of any other information in the record bearing on this issue, I conclude that the Appellant's urine sample had not been destroyed as alleged by the Appellant. The testimony of Dr. Peat at the hearing on September 27, 1990, put Appellant on notice regarding the continued existence of his sample at Compuchem's lab. Appellant apparently chose to disregard this testimony and the Investigating Officer's clarification. Accordingly, I find no merit in this assignment of error.

B.

Appellant next asserts that "Compuchem failed to process any blind samples", a violation of NIDA guidelines. This allegation is simply not supported by the record and is rejected.

I first note that the NIDA guidelines are not generally applicable in these proceedings. The drug testing process at issue here is governed by Coast Guard regulations contained at 46 C.F.R. part 16. 46 C.F.R. 16.301 requires marine employers to establish and utilize drug testing programs which comply with the Department of Transportation (DOT) requirements contained in 49 C.F.R. part 40. It is true, however, that the DOT requirements are patterned after the Department of Health and Human Services (DHHS) "Mandatory Guidelines for Federal Workplace Drug Testing Programs" contained at 53 Fed. Reg. 11970, **et seq**. *See*, 53 Fed. Reg. 47067. Therefore, the applicable regulation alleged to have been violated must be grounded in 49 C.F.R. part 40 or 46 C.F.R. part 16, and not the NIDA guidelines.

49 C.F.R. 40.31(a) requires certified laboratories to maintain quality assurance programs. The unrebutted testimony of Dr. Peat attesting to Compuchem's quality control procedures as a prerequisite for maintaining its NIDA certification throughout the relevant time frame is dispositive of this issue (Tr. at 126).

The regulations also require employers subject to Department of Transportation agency drug testing regulations, for quality control purposes, to submit three blind performance test specimens for each 100 employee specimens it submits. 49 C.F.R. 40.31(d).

The only evidence in the record on this issue was presented by Ms. Faye Westenhofer, the insurance coordinator for the Appellant's employer, Knappton Incorporated (Knappton).

Ms. Westenhofer testified that it was her understanding that the blind sample submission need not take place until 100 random samples had been submitted for testing. She further testified that Knappton had not submitted to Compuchem any blind samples because Knappton stopped using Compuchem before reaching the 100 mark (Tr. at 78). Based on Ms. Westenhofer's testimony, Knappton was not, at the time of Appellant's testing, in violation of the "3 per 100" regulatory requirement for blind sample submissions. Accordingly, this alleged error is rejected.

C.

Appellant next asserts that the Administrative Law Judge failed to consider his testimony which was contradictory to that of Ms. Farrenkoph regarding urine collection procedures followed in his case. There is no suggestion in the record that the Administrative Law Judge failed to consider Appellant's testimony regarding this issue. In fact, the Administrative Law Judge's pointed questioning of Ms. Farrenkoph sufficiently indicates the

contrary (Tr. at 157-163). Accordingly, Appellant's allegation must rest solely on the premise that the Administrative Law Judge chose to discount his testimony and to credit the testimony of Ms. Farrenkoph. Conflicting evidence will not be reweighed on appeal if the findings of the Administrative Law Judge can be reasonably supported. Appeal Decision No. 2390 (PURSER). The Administrative Law Judge found there "were no significant irregularities in the collection procedures followed by [Ms.] Farrenkoph" (Finding of Fact No. 8). The Administrative Law Judge's finding in this regard is supported by the record and was neither clear error nor arbitrary and capricious nor inherently incredible. Thus, Appellant's assignment of error here is without merit.

D.

Appellant next alleges that the Administrative Law Judge failed to consider, (1) the negative results of Appellant's own urinalysis test done approximately one month after the post-accident urinalysis test, and (2) two newspaper articles "criticizing the unreliability of drug testing procedures and also describing how cannabinoids can remain in a subject's urine for over a month after marijuana use."

The record does not indicate that the Administrative Law Judge failed to consider Appellant's evidence. However, to the extent that Appellant alleges the Administrative Law Judge chose to discount the weight of this evidence, the following rule applies,

> [t]he question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. **O'Kon v. Roland**, 247 F.Supp. 743 (S.D.N.Y. **1965).**

Appeal Decision No. 2116 (BAGGETT), cited with approval in Appeal Decisions Nos. 2422 (GIBBONS); 2333 (AYALA). See also Appeal Decision No. 2302 (FRAPPIER).

A review of the entire record indicates that there is substantial evidence to support the Administrative Law Judge's finding of drug use in this case. Accordingly, any discounting of the results of Appellant's second urinalysis test performed by a non-NIDA certified lab approximately 30 days after the post-accident test at issue, is not clear error. Therefore, these assertions of error are rejected.

III.

Appellant's second Assignment of Error alleges a denial of procedural rights under the APA and Federal Rule of Evidence 301, by asserting that the Administrative Law Judge "improperly shifted the burden of proof as to the reliability of Compuchem's drug test to Appellant, when the burden should have remained with the Coast Guard." I agree with the Appellant that the burden of proof on this issue, as a matter of law, remains with the Coast Guard. 46 C.F.R. 5.539. I disagree, however, that the Administrative Law Judge shifted this burden onto Appellant.

Appellant argues that,

> In this case, the Coast Guard introduced evidence of a drug test positive for cannabinoids. Appellant successfully rebutted the Coast Guard's evidence by stating that since the drug test did not detect the opiates he was prescribed for his industrial injury, the drug test could not have been reliable. Appellant testified that he ingested 10 milligrams of hydrocodone (Vicodin), an opiate, at 2:00 A.M. on December 14, 1989, several hours before he gave his urine sample. Hydrocodone contains codeine, which will cause a urine test to be positive for controlled substances such as morphine, according to a filing of the Syva Company with the Government Accounting Office. As required before Appellant's urine test, he gave Good Samaritan a list of medications he had taken within 24 hours of the test. This list, included as Exhibit C, p. 1, includes hydrocodone. The Coast Guard failed to explain how the quantity of hydrocodone ingested by Appellant on December 14, 1989, did not show up in the urine sample, and therefore failed to carry its burden of proof under the APA and Federal Rules of Evidence.

Appellant's Brief on Appeal, at 23.

Appellant's argument is fatally flawed. Nothing in the record supports his assertion that he successfully rebutted the Coast Guard's evidence by showing that the amount of hydrocodone he allegedly ingested hours before he gave a urine sample would have likely caused his initial test results to indicate positive for the presence of opiates. As the Administrative Law Judge opined at page 7 of the Decision

and Order,

> Respondent's position is that since he told the MRO he was taking hydrocodone and it did not show up as an opiate on the test results,the urine sample was not his. Based on the testimony of Dr. Pete [sic], I do not come to the same conclusion as Respondent. The test results would indicate positive for opiates only if a sufficient amount of hydrocodone was used within a specific time before the test to reach a level of 300 nanograms per milliliter. Assuming Respondent took 10 milligrams of hydrocodone, there is insufficient credible proof to show that Respondent took hydrocodone in an amount sufficient to show positive on the test.

A review of the record, and particularly Dr. Peat's testimony at pages 131-135 of the Transcript of Hearing, supports this determination by the Administrative Law Judge. Accordingly, I find that Appellant did not successfully rebut the Coast Guard's prima facie case in this matter.

CONCLUSION

The Administrative Law Judge's findings of dangerous drug use were based on her evaluation of the evidence and are not considered clear error. The Administrative Law Judge's findings are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the provisions of applicable laws and regulations.

ORDER

The order of the Administrative Law Judge dated August 10, 1992, at St. Louis, Missouri, is AFFIRMED.

Robert T. Nelson

Vice Admiral, U.S. Coast Guard

Acting Commandant

Signed at Washington, D.C., this **29th** day of **March,** 1994.

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