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.	DECISION OF THE
MERCHANT MARINER'S DOCUMENT NO.(REDACTED):	COMMANDANT ON APPEAL
	NO. 2560
Issued to: Richard W. CLIFTON, Appellant	

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

By order dated April 21, 1993, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's Merchant Mariner's Document upon finding proved the charge of "USE OF A DANGEROUS DRUG." The supporting specification found proved alleges that Appellant, "being the holder of the above captioned document, did, on or about 11 September 1992, at Anacortes, Washington, wrongfully have Cocaine metabolite present in your body as revealed through a drug screening test."

The hearing was held at Seattle, Washington, on March 2, 1993, and April 13, 1993. Appellant was represented at the hearing by professional counsel. At the hearing, Appellant entered an answer of "denied" to the specification and charge of use of a dangerous drug. The Investigating Officer introduced in evidence six exhibits and the testimony of four witnesses. In defense, Appellant offered in evidence two exhibits and the testimony of three witnesses. Appellant was fully advised by

the Administrative Law Judge that if the charge was found proved, an order of revocation would be required unless Appellant provided satisfactory evidence of cure. After the hearing, the Administrative Law Judge rendered a written decision and order in which he concluded that the charge and specification had been found proved and that Appellant did not provide satisfactory evidence of cure. His order, dated April 21, 1993, revoked the above captioned documents issued to Appellant by the Coast Guard.

On May 21, 1993, Appellant timely submitted a completed appeal in accordance with 46 C.F.R. 5.703(c). Therefore, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant Richard W. Clifton was the holder of Merchant Mariner's Document [redacted].

On September 11, 1992, Appellant, was employed by Crowley Maritime Services as a deckhand aboard the M/V HUNTER, O.N. 578655. On September 11, 1992, he was directed by Mr. Craig Tornga, Dispatch Manager for Crowley Maritime, to provide a urine specimen pursuant to a random drug test for the crew of the M/V HUNTER while it was moored to the City Dock at Anacortes, Washington.

On September 11, 1992, at approximately 9:10 p.m., Mr. Hubert Thornton of Drug Screen Collection Services provided Appellant with a specimen bottle for collection of the urine. Appellant was unable to produce the required 60 milliliters necessary for testing. Ultimately, Appellant produced the requisite specimen amount past midnight on September 12, 1993. The urine specimen was sealed in the presence of the Appellant, who signed the appropriate section of the Drug Testing Custody and Control Form in Mr. Thorton's presence. At that time, the Appellant acknowledged that the specimen contained in the bottle was his and the information on the control form and the label affixed to the specimen bottle was correct. Mr. Thornton then personally drove the specimen to Smith Klein Beecham Clinical Laboratories in Seattle, Washington, for shipment to the Smith Klein facility in Van Nuys, California, which is a NIDA certified laboratory.

Smith Klein Beecham Clinical Laboratories in Van Nuys received Appellant's urine specimen intact and properly identified, and conducted the prescribed tests. The specimen tested positive for the cocaine metabolite. Smith Klein then forwarded its laboratory report and its findings to Dr. Kevin M. O'Keefe, the Medical Review Officer (MRO) assigned to the case, who reviewed the results. The MRO subsequently reviewed the laboratory results, interviewed the Appellant via telephone and

determined that Appellant's urine specimen tested positive for cocaine metabolite.

An additional urine specimen was collected on September 13, 1992, by Crowley Maritime, the Appellant's employer, acting on behalf of Exxon Corporation. Exxon requires personnel of companies that they subcontract with to be tested for drug use if the subcontractor's employees handle Exxon equipment. Tr. 167-68. In this case, after having the specimen collected for the random urinalysis conducted by Crowley Maritime on September 12, 1992, which was the basis for the charge and specification in this case, another specimen was collected from the Appellant on September 13, 1992, for the testing required by Exxon. Tr. 163. This specimen also tested positive for the presence of the cocaine metabolite.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's Merchant Mariners' document. Appellant sets forth the following bases for appeal:
(1) The Finding of the Administrative Law Judge that proper procedures were followed in the collection of Appellant's urine specimen is not supported by the evidence and, consequently, the results of the drug test should not be allowed into evidence.
(2) The Administrative Law Judge should not have considered evidence that the Appellant tested positive for cocaine in a test given by his employer that did not comply with Coast Guard procedures.
(3) The Appellant was denied his constitutional right to be free from unreasonable searches and seizures as the result of the random nature of the drug test.
(4) The Appellant was denied his right of due process by the presumption that an individual who tests positive for drug use is a drug user.
(5) The Coast Guard did not have jurisdiction in this case.

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OPINION

I.

Appellant's first basis of appeal is that the Administrative Law Judge's finding "that the credible evidence and testimony adduced at the hearing fully supports the integrity of the chain of custody and provides [the Administrative Law Judge] with

sufficient proof that the collection and scientific procedures utilized to test Respondent's urine specimen comport with and were performed in the manner prescribed in the applicable regulations . . ." is not supported by the evidence and the results of the test should therefore be suppressed. I disagree.

Appellant argues that proper procedures under Coast Guard regulations were not followed in the collection of the respondent's urine specimen, which tested positive for the presence of cocaine metabolite. Specifically, Appellant argues that the specimen was not kept in view at all times prior to being sealed and labeled and that the specimen was not secured at all times when the collector left the collection site. Additionally, Appellant argues that he signed the Drug Testing and Control Form prior to providing the specimen rather than at the time the specimen was completed. For all these reasons, Appellant states that the specimen was not in the proper custody of the collector at all times and, therefore, should not have been accepted into evidence.

Mr. Thornton, the individual who was responsible for collection of the Appellant's urine specimen, testified that he initially received a partial specimen from the Appellant that was not sufficient for testing purposes. He indicated that he discarded the partial specimen and, after several hours during which the Appellant was asked to drink fluids, the Appellant finally produced a full specimen after midnight. Tr. 21-30. Mr. Thornton stated that, upon Appellant providing a full specimen, the Appellant signed the Drug Testing and Control Form indicating that his urine specimen was provided to the collector, the specimen bottle was sealed with a tamper-proof seal in his presence and that the information provided on the form and on the label attached to the specimen bottle was correct. Tr. 26, 48.

Appellant contradicted this version of the collection process. He stated that Mr. Thornton collected partial specimens until he had enough to get the full specimen amount. Tr. 140-43.

Appellant also testified that his partial specimens were placed unsealed in a specimen box with specimens from other crewmembers, Tr. 140, that this box was unattended at certain times and that there was access to the area where the specimen box was left. Tr. 143-49. The Appellant testified that his employer was upset with him over his union activities, implying that his specimen was tainted on purpose. Tr. 153-56. However, Appellant could provide no evidence that anyone was in the collection area unescorted or that anyone tainted the specimen. Tr. 166. Finally, he testified that he had signed the Drug Testing and Control Form when he first had attempted to provide the specimen and not upon providing the full specimen. Tr. 141.

It is apparent from the Findings that the Administrative Law

Judge was not convinced by Appellant's testimony regarding the facts, or his completely unsupported theory of corporate conspiracy. Instead, the Administrative Law Judge found that the collection of the urine was conducted in accordance with applicable regulations. Decision and Order p. 14. The Administrative Law Judge is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. **Appeal Decision** Nos. 2522 (JENKINS); 2519 (JEPSON); 2516 (ESTRADA); 2503 (MOULDS) and 2492 (RATH). 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 Nos. 2522 (JENKINS); 2519 (JEPSON); 2506 (SYVERSTEN); 2424 (CAVANAUGH) and 2282 (LITTLEFIELD). Ultimately, the findings of the Administrative Law Judge will not be disturbed unless they are inherently incredible. Appeal Decision Nos. 2522 (JENKINS); 2506 (SYVERSTEN); 2424 (CAVANAUGH); and 2282 (LITTLEFIELD).

In the case herein, there is substantial evidence upon which the Administrative Law Judge based his finding that the collection procedures used to obtain Appellant's specimen and the security provided to the specimen once it was obtained met the applicable standards. Accordingly, that finding, based on such evidence, will not be disturbed.

II

The Appellant next challenges the Administrative Law Judge's admission and consideration of evidence regarding the results of testing of the urine specimen collected on September 13, 1992, by Crowley Maritime, the Appellant's employer, acting on behalf of Exxon Corporation, which also tested positive for cocaine metabolite.

The information at issue was elicited from the Appellant by the Coast Guard Investigating Officer on cross-examination and was admitted into evidence by the Administrative Law Judge over the objection of the Appellant's counsel. The Administrative Law Judge states in his opinion that this positive result in the later test lent a strong inference and added further credibility to the initial test that formed the basis of the charge and specification in this case. Decision and Order, pp. 22-23.

Appellant appeals the reliance by the Administrative Law Judge on the Exxon test by asserting there is no evidence regarding the procedures followed in conducting the test or in the analysis of the specimen. Additionally, Appellant asserts that reliance on the test for any reason is contrary to Coast Guard regulations because the specimen was not a Coast Guard approved or recognized test.

In general, the evidence competent to support findings need

not fulfill the prerequisites of admissibility necessary in jury trials. Appeal Decision Nos. 2183 (FAIRALL) and 2404 (MCALLISTER). "The standard for admission of evidence in an agency proceeding is found in the Administrative Procedures Act and allows '[a]ny oral or documentary evidence' except 'irrelevant, immaterial, or unduly repetitious evidence.'" **Gallagher v. National Transp. Safety Bd.**, 953 F.2d 1214, 1218 (10th Cir. 1992) (quoting 5 U.S.C. 556(d). **See also Appeal** Decision No. 2419 (MURPHY) (Relevant and material evidence is admissable in suspension and revocation proceedings); Appeal Decision No. 2183 (FAIRALL) (All relevant and material evidence is to be available for consideration). Strict adherence to the rules of evidence observed in courts is not required. 46 C.F.R. 5.20-95(a); Appeal Decision Nos. 2443 (BRUCE) and 2382 (NILSEN). However, the Federal Rules of Evidence provide guidance in determining what evidence is admissable and may be considered reliable and probative. Appeal Decision No. 2382 (BRUCE). The question as to how much weight to assign to particular evidence is for the Administrative Law Judge to determine. Appeal Decision Nos. 2382 (NILSEN) and 2302 (FRAPPIER). Unless the evidence relied on is inherently incredible, the factual findings of an Administrative Law Judge will not be overturned on appeal. Appeal Decision Nos. 2522 (JENKINS); 2506 (SYVERSTEN); 2424 (CAVANAUGH) and 2282 (LITTLEFIELD).

In this case, the Appellant stated on direct examination that he had never used cocaine. Tr. 150. Additionally, he stated that, upon being notified on September 18 of the results of the random drug test that was the basis of this hearing, he attempted to arrange for another drug test to discount the prior test. He was unable to have such a test done until September 21. He then introduced the results of the September 21 test, which was negative for the cocaine metabolite, into evidence at the hearing. Tr. 150-52.

The evidence that Appellant had provided a specimen for drug testing purposes on September 13 and that it was positive for cocaine is clearly relevant and material evidence, particularly in regard to the facts of this case. The Appellant himself testified that he immediately wanted to have another drug test conducted upon learning that the urine specimen provided on September 12 had tested positive in order to discount the results of the testing done on the specimen provided on September 12. If Appellant believed that the results of the test of his "rebuttal" specimen provided on September 21 was relevant and probative, then the results of the test on a specimen collected on September 13 would also be relevant and probative. Earlier testimony by Doctor O'Keefe, the Medical Review Officer, indicated that

subsequent tests to confirm the presence of the cocaine metabolite in one test could be valid as confirmatory of the original test only if they were conducted within a brief interval of the original test since the cocaine metabolite remains in the system for one to three days. Tr. 73.

The evidence of the results of the Exxon test could also be regarded as impeachment evidence. Appellant opened the door to impeachment based on this Exxon test during his direct examination by submitting evidence of testing of a urine specimen provided on September 21 that showed negative for the presence of the cocaine metabolite to rebut the positive results of the testing of the initial specimen provided on September 12. Even if one assumes that the presence of the cocaine metabolite in the Appellant's system on September 12 could not be confirmed by the results of the testing on the specimen provided by the Appellant on September 13, the results of the testing on the September 13 specimen contradicts the Appellant's assertion that he never used cocaine.

While there was no evidence presented regarding the procedures followed in the collection and testing of Appellant's September 13 specimen, neither was there evidence presented by the Appellant indicating that the results were not reliable. It was Appellant who was in the best position to challenge the results. No evidence was presented by the Appellant that indicated that the results were untrustworthy. In an administrative hearing, the Administrative Law Judge is not required to infer any deliberate acts of tampering or gross negligence in handling of a specimen when none has been shown. **Gallagher, supra**, at 1218. Additionally, there was some testimony provided by the Appellant that lent credibility to the collection of the September 13 specimen. Appellant indicated that he had authorized the specimen to be taken on September 13, knew the purpose for the specimen, and indicated that the specimen was taken in the same manner and by the same people as the September 12 test. Tr. 168-75.

The mere fact that the specimen collection was for a purpose other than one authorized and subject to Coast Guard regulations is not reason to exclude the evidence. Once again, as long as the evidence is relevant and material, and not inherently incredible, it can be considered in a suspension and revocation hearing. It is the province of the Administrative Law Judge to determine whether it is reliable and probative and to determine the weight that the evidence will be accorded. Appeal Decision Nos. 2382 (NILSEN) and 2302 (FRAPPIER).

The evidence of the positive nature of the test of another urine specimen provided by the Appellant so close in time to the specimen that was the basis of the specification in this case, especially as impeachment of the Appellant's testimony, is

relevant and material. Additionally, the evidence, in the light of the manner it was received at the hearing, is not inherently incredible and, therefore, the decision of the Administrative Law Judge to consider such evidence will not be overturned on appeal.

Finally, even if the evidence of the positive nature of the September 13 test is excluded, there is still sufficient evidence of a reliable, probative nature on the record to support the Administrative Law Judge's determiniation that the charge and specification were proved. Therefore, even assuming, arguendo, that it was error to admit this evidence, the error would be harmless.

III

Appellant next challenges the random drug test that was the basis of the charge and specification in this case as violative of the Appellant's Fourth Amendment right to be free from unreasonable searches and seizures.

Appellant raises this issue inappropriately in this forum. The purpose of these proceedings is remedial in nature and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 U.S.C. 7701; 46 C.F.R. 5.5. The urinalysis collection and testing programs are conducted in accordance with regulations promulgated in accordance with the Administrative Procedures Act (5 U.S.C. 552 et seq.) set forth in 46 C.F.R. Part 5. Those regulations specifically detail the authority of the Administrative Law Judge at the hearing level and the Commandant at the appellate level.

That which Appellant requests is clearly beyond the purview and authority of Suspension and Revocation Proceedings. Neither the Administrative Law Judge nor the Commandant are vested with authority to decide constitutional issues; that is exclusively within the purview of the federal courts. Appeal Decision No. 2546 (SWEENEY).

IV

Appellant next argues that the presumption that an individual who tests positive in a drug test is a drug user allows the Coast Guard to avoid the burden of proof and is essentially an irrebutable presumption, thereby being a violation of Appellant's right to due process.

The presumption is established by 46 C.F.R. 16.201 (b), which states "If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." In order to establish this presumption, the Coast Guard must prove (1) that the respondent was the individual who 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. This proof establishes a prima facie case of use of a dangerous drug (i.e. a

presumption of use of a dangerous drug), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. 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. Appeal Decision Nos. 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).

The presumption established by evidence of failure of a urine test for dangerous drugs is not, as Appellant alleges on appeal, an irrebuttable presumption. For instance, the respondent at a hearing faced with overcoming the presumption of use of a dangerous drug may rebut the presumption by producing evidence (1) that calls into question any of the elements of the prima facie case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or not knowing. If this evidence is sufficient to rebut the original presumption, then the burden of presenting evidence returns to the Coast Guard. 4 **J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW** 24.01 (1994). Thus, the Coast Guard at all times retains the burden of proof. Appeal Decision Nos. 2556 (LINTON) and 2167 (JONES); Fed. R. Evid. 301.

"Presumptions are permissible [in administrative hearings] unless they are unreasonable, arbitrary, or invidiously discriminatory." **Lavine v. Milne**, 424 U.S. 577, 582 (1975). If this standard is met, then due process is satisfied. **Chung v. Park**, 514 F.2d 382, 387 (3rd Cir.), **cert. denied**, 423 U.S. 948 (1975); **Dawson v. Myers**, 622 F.2d 1304, 1314 (9th Cir. 1980). To the extent that use of a dangerous drug is presumed from the presence of the drug established subsequent to reliable, probative and substantial evidence of valid collection and testing procedures of an individual's urine, I find that such presumption is reasonable, not arbitrary and not invidiously discriminatory, and, therefore, such presumption satisfies due process. Additionally, I find that due process was satisfied by the use of the presumption in this case.

V

Finally, Appellant challenges the jurisdiction of the Coast Guard in this case because, at the time Appellant was requested to provide the specimen, he was off duty and was not operating the vessel. Appellant's argument is without merit.

Appellant was a member of the crew of the M/V HUNTER at the time he provided the urine specimen. He happened to be between watches. Testimony indicated that, in the event of an emergency, he would have responsibilities whether on duty or off. Tr. 115-16. In any event, Appellant's status aboard the vessel does not matter as it is his status as the holder of a merchant mariner's

document that establishes jurisdiction for purposes of suspension or revocation when use of dangerous drugs is charged. 46 U.S.C. 7704(c) states "If it is shown that a holder [of a license, certificate of registry, or merchant mariner's document] has been a user of . . . a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked . . . ." **NTSB Order No. EM-31 (STUART)**, Appeal Decision No. 2135 (FOSSANI) (both interpret predecessor statute, 46 U.S.C. 239b).

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The decision of the Administrative Law Judge dated April 21, 1993 is AFFIRMED.

____Robert E. KRAMEK_____

____Admiral, U.S. Coast Guard_____

____Commandant

Signed at Washington, D.C. this **27th** day of **January**, 1995.

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