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: Christopher M. DEVONISH, Appellant	ON APPEAL NO. 2554

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

By order dated November 6, 1991, an Administrative Law Judge of the United States Coast Guard at New York, New York 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 28, 1990, and found to be a user of cocaine.

The hearing was held at New York, New York on May 20 and 31, 1991. At the hearing, Appellant, after being advised of the right to have counsel represent him, chose to represent himself. Appellant then denied the charge and its supporting specification.

During the hearing, the Investigating Officer introduced in evidence seven exhibits, and the testimony of three witnesses. In defense, Appellant offered in evidence sixteen exhibits, and his own sworn testimony.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved. On November 6, 1991, he issued a written order revoking Appellant's Coast Guard issued Merchant Mariner's Document No.(REDACTED).

Appellant timely filed an appeal on December 5, 1991 and, after receiving an extension, timely completed his appeal on March 23, 1992. Therefore, this appeal is properly before the Commandant for review.

FINDINGS OF FACT

At all relevant times, Christopher Devonish (Appellant) was the holder of Merchant Mariner's Document [redacted] D3. On December 28, 1990, Appellant, for periodic drug testing purposes, provided a urine specimen at Brooklyn's Methodist Hospital in New York, New York. Ms. Irene Reyes, a medical assistant and urine specimen collector at Methodist Hospital, collected Appellant's urine specimen in a plastic sample bottle. She then sealed, labeled and identified the bottle with identification number 1000086693. During the process, Appellant signed the appropriate section, VII, of the Drug Testing Custody and Control Form ("DTCCF") certifying that he provided the urine specimen contained in the bottle identified with number 1000086693, and the bottle was sealed in his presence with a tamper proof seal. Ms. Reyes then packed the specimen for shipment to Nichols Institute Substance Abuse Testing, a certified testing laboratory in California.

Nichols Institute received Appellant's urine specimen intact and properly identified, and conducted the prescribed tests. The specimen tested positive for cocaine. Nichols Institute then forwarded its laboratory report and one copy of the DTCCF, the laboratory part, to Greystone Health Sciences Corporation, La Mesa, California, where Dr. David M. Katsuyama, the Medical Review Officer ("MRO") assigned to the case, reviewed the results. The MRO subsequently interviewed the Appellant via telephone and concluded that Appellant's urine specimen tested positive for cocaine in accordance with applicable regulations.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's merchant mariner's

document. Appellant asserts that the specimen collector did not follow proper procedures and the results should be nullified.

Appearance: **Pro se**.

OPINION

I.

Appellant asserts that the Administrative Law Judge erred in finding that the specimen collector followed the required handling and collection procedures. He alleges that because she was new, she was, thus, unable to follow standard procedures correctly. I disagree.

At the hearing, Appellant testified that he signed the donor certification section prior to being tested, had urinated into a paper container, that the specimen collector then poured the sample from the paper container into a plastic container that she obtained from a drawer full of empty bottles, and walked out of the clinic without witnessing the specimen bottle being sealed. Tr. at 82, 93. Even though, on appeal, Appellant does not raise all of the above issues, I will address each one to the extent they bear on his overall assertion of error that the specimen collector was unable to follow proper procedures.

A.

Appellant alleged that it was error for him to have to urinate into a paper cup and then have the specimen poured into a specimen bottle. I disagree.

The Administrative Law Judge found that the Appellant's urine specimen was collected by Ms. Reyes in a plastic specimen bottle which she properly labeled and sealed. His findings will not be disturbed unless they are found to be arbitrary and capricious, or clearly erroneous. Appeal Decision 2427 (JEFFRIES).

The regulations contained at 49 C.F.R. 40.23 specify the procedures for collecting urine specimens. Two methods are authorized for actually obtaining the specimen. One involves urinating directly into the sample bottle. The other involves urination into a "single-use container", i.e., a disposable cup, with subsequent transfer into the specimen bottle. Appellant testified that the specimen collector used the second method. The specimen collector testified that she used the first method. The conflicting testimony need not be resolved, however, since either method was acceptable. Thus, Appellant's allegation of error here is without merit.

Under either method, the specimen bottle must be a clean, single use bottle securely wrapped until filled with the specimen. 49 C.F.R. 40(b)(1). Appellant testified at the hearing that the

specimen collector took one bottle out of a drawer that was full of bottles, but gave no further description of that bottle. Tr. at 93.
Ms. Reyes testified that she did not specifically recall Appellant, but she described her customary and usual collection procedure,

First, I ask them for identification, picture ID, ... I rip the plastic off in front of the patient. I open it up. I said this is [a] drug screen. You use this room. You take this container and you fill it up to the top [line] or a little more, it really doesn't matter. You put the lid on it. Bring it back.
Tr. at 19-20.

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 believed that Ms. Reyes collected Appellant's specimen in her customary and usual way. His finding that the specimen bottle produced for Appellant was properly wrapped prior to its use was neither clear error nor arbitrary and capricious. Thus, Appellant's assertion here is without merit.

B.

Appellant next asserts that it was reversible error for him to have signed the donor certification before he gave his specimen. I disagree.
In accordance with the regulations contained at 40 C.F.R. 40.23(a)(4), the urine donor is required to sign the following certification,

> I provided my urine specimen to the collector; ... the specimen bottle was sealed with a tamper proof seal in my presence; and ... the information provided on this form and on the label affixed to the specimen bottle is correct.

Investigating Officer Exhibit 2 is copy 4 of the DTCCF with the donor certification signed by the Appellant. Appellant alleges that he was required to sign the form before he gave his urine sample. Tr. at 82. Ms. Reyes corroborated this by testifying that on the date Appellant's sample was taken, it was standard procedure to have donors complete the paperwork first, including signing the donor certification, before sampling took place. Tr. at 52.
The Administrative Law Judge found that the DTCCF was signed by the Appellant certifying that he provided the urine sample in specimen bottle identified as 1000086693, but without specifying if this occurred before or after the sample had been collected.

Decision and Order at 3. He further found that, on the day the specimen was collected, it was Ms. Reyes' usual and customary practice to have the DTCCF signed prior to having the donor provide the specimen. (Decision and Order at 6). Thus, although the Administrative Law Judge correctly stated that the above practice was customary on the date the specimen was provided, he failed to note that such a practice is improper.

In spite of this administrative error, I do not believe it constitutes reversible error. The purpose of the donor certification is to establish that at the time the chain of custody is established, the integrity of the specimen is intact. 54 Fed. Reg. 49854. Therefore, donors should not be required to sign the certification until all of the identified procedures have been completed. As discussed below, however, even though Appellant signed the donor certification before providing his specimen, the record contains substantial evidence that the required procedures were correctly completed in the presence of the donor. Therefore, the error in prematurely signing the DTCCF is of little consequence.

C.

Appellant urges that he did not witness the sealing of the specimen bottle. Normally, the signed donor certification would be substantial evidence to the contrary. However, given the improper method of obtaining Appellant's signature, I must look to the record to see if the Administrative Law Judge's finding that the specimen bottle was sealed in the Appellant's presence can be sustained. The regulations require that,

> (19) The collection site personnel shall place securely on the bottle an identification label which contains the date, the individual's specimen number . . . If separate from the label, the tamperproof seal shall also be applied.
>
> (20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

49 C.F.R. 40.25(f).

The Administrative Law Judge found that the physical handling, labeling, and sealing of the Appellant's urine specimen bottle was done in the presence of Appellant. Decision and Order at 6. The Administrative Law Judge has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record. Appeal Decision No. 2492 (RATH).

The only evidence that Appellant's specimen was not sealed in Appellant's presence was his own testimony. Tr. at 82. However, there was substantial evidence in the record to the contrary.

While not specifically recalling Appellant, Ms. Reyes gave the following testimony concerning her usual and customary procedure,

> THE COURT: Initials where, on what? On the seal?
>
> THE WITNESS: Yes, there is another label that we take off [of the the DTCCF].
> THE COURT: There is another label?
>
> THE WITNESS: Yes.
>
> . . .
>
> THE COURT: You are talking about what appears to be a security seal?
>
> THE WITNESS: This goes over the bottle.
>
> . . .
>
> THE WITNESS: I remove this label. I've already checked the temperature mind you, and I place it over.
>
> THE COURT: You have initialed that or signed it.
>
> THE WITNESS: Right, and he puts his name and initials on it, too. Then after the label is on, I place it in the plastic bag.

Tr. at 30-31. Ms. Reyes further testified that even though she prematurely obtained Appellant's signature under the donor certification, she could not recall ever deviating from that usual and customary procedure. Tr. at 53.

Furthermore, Nichols Institute noted no discrepancies upon receipt of the specimen bottle. Nichols certified, on copy 2 of the DTCCF, that the specimen was examined upon receipt, handled and analyzed in accordance with applicable Federal requirements. Investigating Officer Exhibit 3. Similarly, the Greystone Services Health Corporation letter of March 1, 1991, states that Greystone received Appellant's specimen with the chain of custody intact. Investigating Officer Exhibit 2.

The Administrative Law Judge opined that the Appellant's sworn testimony as to the collection process did not weaken the credibility of Ms. Reyes account of her usual and customary procedures on December 28, 1990, which, even though meant having the donor certification signed first, also included having the donor witness the handling, labeling and sealing of the specimen.

(Decision and Order at 6). Thus, I find no clear error in the Administrative Law Judge's findings that the integrity of the

specimen remained intact and the actual chain of custody had not been broken. *See* **Gallagher v. National Transportation Safety Board**, 953 F.2d 1214 (10th Cir. 1992) (Board could find that positive test result of airman's urine was substantial evidence of drug use even though specimen collector failed to properly apply tamperproof seal. In spite of the procedural error, no "actual" break in the chain of custody occurred).

CONCLUSION

The Administrative Law Judge's findings that the specimen collector followed proper procedures concerning the chain of custody and integrity of the specimen were based on his 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 in New York, New York on November 6, 1991 is AFFIRMED.

J. W. Kime

Admiral, U.S. Coast Guard

Commandant

Signed at Washington, D.C., this **4th** day of **January** 1994.

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