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
v.	COMMANDANT
	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO.(REDACTED) Issued to: Richard Smallwood	NO. 2538
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 19 June 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 proved the charge of the use of a dangerous drug. The single specification supporting the charge alleged that, on or about 2 July 1990, in the city of Brooklyn, New York, Appellant was tested and found to be a user of a dangerous drug, namely, marijuana. Appellant's use of the drug was discovered through a pre-employment urinalysis which revealed the presence of Tetrahydrocannabinol (THC), a marijuana metabolite.

The hearing was held at New York, New York, on 19 February 1991 and 4 March 1991. Appellant was represented by professional

counsel. Appellant entered a response of deny to the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer introduced eight exhibits into evidence and three witnesses testified at his request. Appellant introduced three exhibits into evidence and one witness testified on his behalf. Appellant also testified under oath on his own behalf.

The final order of the Administrative Law Judge, revoking the document issued to Appellant, was entered on 19 June 1991.

On 11 July 1991, the Appellant petitioned the Administrative Law Judge to reopen the hearing pursuant to 46 C.F.R. 5.601. The Administrative Law Judge denied the petition of the Appellant on 29 July 1991.

Appellant filed a timely notice of appeal on 5 August 1991, pursuant to 46 C.F.R. 5.703 and 46 C.F.R. 5.601(b). On 23 September 1991, Appellant requested an extension of the deadline within which to file his brief, which the Commandant granted. Appellant timely filed his brief with the Commandant on 3 October 1991, perfecting his appeal pursuant to 46 C.F.R. 5.703(c).

On 10 January 1992, Appellant submitted an affidavit, dated 2 January 1992, to the Commandant in support of his appeal and application to reopen his case. Appellant also submitted a duplicate original affidavit dated 2 January 1992 to the Administrative Law Judge, which was then forwarded to the Commandant.

Appearance: Bernard Rolnick, Esq., Counsellor at Law, 299 Broadway, New York, New York 10007.

FINDINGS OF FACT

1. At all times relevant herein, Appellant was the holder of Merchant Mariner's Document Number [redacted], issued to him by the United States Coast Guard.

2. Appellant has been sailing on American flag vessels for approximately twenty years, the last two or three years as a qualified member of the engine department (QMED).

3. On 2 July 1990, Appellant appeared at the Seafarer's International Union (SIU) Clinic in Brooklyn, New York, to give a specimen of his urine for preemployment drug testing.

4. Mr. Roland Darbonne was the urine specimen collector for

the SIU Clinic on 2 July 1990. Mr. Darbonne remembered seeing Appellant at the clinic that day and identified him at the hearing of 19 February 1991.

5. Mr. Darbonne gave Appellant a fresh, unused and open plastic specimen bottle which he had taken from a presealed box and uncapped in Appellant's presence. He directed Appellant to an area behind a curtain and told him to place a specimen of his urine in the bottle.

6. Appellant did not recall seeing Mr. Darbonne take the specimen bottle from a presealed box or from any box. He only remembers being given an open specimen bottle.

7. Appellant returned with the specimen bottle containing a specimen of his urine. He gave the bottle to Mr. Darbonne. Mr. Darbonne in Appellant's presence capped and sealed the bottle with a tamper-proof seal bearing the Department of Transportation (DOT) Identification Number 008236.

8. After washing his hands Appellant signed the Medical Review Officer part of the Drug Testing Custody and Control form (DTCC) and initialed the specimen bottle's tamper-proof seal.

9. Mr. Darbonne properly packed the specimen bottle with Appellant's urine for delivery to the Nichols Institute, a certified laboratory in San Diego, California.

10. Appellant signed and certified in step 3 of the DTCC form that he had provided the urine specimen contained in the collection bottle identified with DOT identification number 008236 to the collector, which number is identical to the number in block 1(a) of the DTCC form.

11. On 3 July 1991, Nichols Institute, a certified laboratory, received Appellant's urine specimen.

12. Appellant's urine specimen was chemically tested at Nichols Institute's laboratory and was found to test positive for THC, a marijuana metabolite.

13. The Nichols Institute forwarded its laboratory report on Appellant's urinalysis to the Greystone Health Sciences Corporation at La Mesa, California, for medical review officer services.

14. Greystone received Nichols Institute's laboratory report on Appellant's urinalysis along with the chain of custody

documentation. Appellant's file was assigned to Dr. Steven Oppenheim, a medical doctor.

15. Dr. Steven Oppenheim, after a telephone interview with Appellant and an examination of his file, determined that Appellant's urine had tested positive for a marijuana metabolite.

16. On 11 July 1990, Greystone reported its medical review officer's determination to the U.S. Coast Guard.

17. A portion of Appellant's urine specimen of 2 July 1990, was sent by Nichols Institute to the Roche Biomedical Laboratories, Inc., Raritan, New Jersey, a certified laboratory for drug testing.

18. On 14 February 1991, Roche Biomedical chemically tested Appellant's urine specimen and found it tested positive for marijuana.

19. A portion of Appellant's urine specimen of 2 July 1990, was sent by Roche Biomedical to Joseph Balken, Ph.D., Huntington, New York, a forensic toxicologist, for further drug testing at Dr. Balken's laboratory. This was done at Appellant's request.

20. Dr. Balken determined from his testing of Appellant's urine specimen of 2 July 1990, that it tested positive for marijuana.

21. Appellant admits that he pleaded guilty to a charge of possession of marijuana in 1981, before a New Jersey Court.

22. Appellant admits that he used marijuana from 1965-1966 while in Vietnam.

23. Appellant admits that he lied about his previous use of marijuana on prior seaman certificate applications.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The collection procedure required by 49 C.F.R. 40.23(b)(1) was violated by the SIU collection agent, thereby tainting the entire testing procedure.

a. The Administrative Law Judge's findings of fact with respect to the collection procedure required by 49 C.F.R.

40.23(b)(1) were clearly erroneous.

2. The Administrative Law Judge's denial of Appellant's petition to reopen the hearing to hear further testimony regarding the collection procedure was error and an abuse of discretion.

3. The failure of the U.S. Coast Guard to designate the location of the laboratory used by Appellant's employer for drug urinalysis resulted in violation of Appellant's constitutional rights of due process and confrontation of witnesses against him.

a. The use by SIU of a laboratory in California to conduct Appellant's urinalysis deprived Appellant of the ability to conduct an independent investigation into the charge.

b. The use of telephonic testimony during the hearing pursuant to 46 C.F.R. 5.553(e) deprived Appellant of his right to confront witnesses against him.

4. The Investigating Officer committed prosecutorial misconduct by using admissions of uncharged misconduct by the Appellant to prejudice the Administrative Law Judge, and to intimidate and confuse the Appellant.

OPINION

I.

Appellant first contends that the SIU collection agent did not follow the proper urine collection procedure as set out in 49 C.F.R. 40.23(b)(1), thereby tainting the entire testing process. I do not agree.

49 C.F.R. 40.23(b)(1) provides in part that if urination is made directly into a specimen bottle, "[t]he specimen bottle shall be ... unwrapped in the employee's presence immediately prior to its being provided." Appellant's specific contention is that the specimen bottle was not unwrapped in his presence. Whether the SIU collection agent unwrapped the specimen bottle in the presence of the Appellant is a question of fact.

Sitting as the trier of fact, the Administrative Law Judge has the discretion to find the ultimate facts pertaining to each specification. Appeal Decision (COLON). Findings need not be consistent with all evidentiary material contained in the record so long as sufficient evidentiary material exists in the record to justify

such a finding. Appeal Decisions 2282 (LITTLEFIELD) and 2395 (LAMBERT). There is sufficient evidentiary material in the record to affirm the Administrative Law Judge's findings concerning the collection procedure.

At the hearing of 19 February 1991, Mr. Darbonne testified on direct examination that "I break off the seal and I open the box and take this bottle to give to the person who came in for the drug screening." Transcript (TR), 19 February 1991, at 20-21. This statement was in reference to the procedure he used on 2 July 1990, when collecting the urine sample in question from the Appellant. On cross examination concerning the same point, Mr. Darbonne stated that he unsealed the box containing the specimen bottle in front of the Appellant. Id., at 47, 48.

The Appellant, in his direct testimony, testified that he did not recall seeing Mr. Darbonne open the box containing the specimen bottle and unseal the bottle before giving it to him. Id., at 112. Appellant also testified that he did recall being handed an open specimen bottle by Mr. Darbonne, into which he provided a urine sample. Id., at 110.

On cross examination, Appellant admitted to lying about prior drug use on applications for his mariner's documents. Appellant's application forms were admitted into evidence for the purpose of impeaching Appellant's testimony. Id., at 124, 126.

Appellant's testimony generally contradicted Mr. Darbonne's testimony with respect to the opening of a sealed specimen bottle in the presence of the Appellant. It is not clear from the record whether Appellant did not recall Mr. Darbonne's actions because Appellant was not paying attention, or because Mr. Darbonne did not do that which he said he did. Appellant's credibility was called into question on cross examination. Conversely, Mr. Darbonne's credibility was not impeached.

Appellant also offered the testimony of Mr. Mark Field. Mr. Field testified that he was the next person in line after the Appellant for pre-employment urinalysis on 2 July 1990. Id., at 129. Mr. Field observed that Mr. Darbonne opened a cardboard box, took out a specimen bottle and handed it to him. He did not see any type of plastic sealing around the box that contained the specimen bottle. Id., at 131-133.

Mr. Field's testimony contradicted Mr. Darbonne's testimony

to the extent that he did not observe any plastic wrapping on the box from which Mr. Darbonne removed the specimen bottle that he gave to Mr. Field. Mr. Darbonne had made statements that he always unseals the specimen bottle in front of the individual being tested. Id., at 47. However, Mr. Field's observation was for his own urinalysis, not the Appellant's drug test. At best, this testimony shows that Mr. Darbonne may have acted inconsistently with respect to Mr. Field's urinalysis as compared to Appellant's urinalysis.

The Administrative Law Judge also heard the testimony of Mr. George Ellis, an expert on urinalysis. Mr. Ellis testified that the collection process which Appellant went through did not, in his opinion, present any issue as to the validity of the urinalysis result. Id., at 103. Mr. Ellis based his opinion upon the Appellant's prior statement describing the collection procedure. Id.

From the testimony of these witnesses, the Administrative Law Judge made a finding that Mr. Darbonne gave the Appellant a fresh unused specimen bottle which had been unsealed in Appellant's presence. Decision and Order Finding of Fact No. 5, 19 June 1991. As previously stated, findings need not be consistent with all evidentiary material contained in the record so long as sufficient evidentiary material exists in the record to justify such a finding. Appeal Decisions 2282 (LITTLEFIELD) and 2395 (LAMBERT).

The Administrative Law Judge's findings with respect to the collection procedure are supported by sufficient evidence to justify them. It is true that there was testimony contradictory to Mr. Darbonne's testimony. However, Appellant's credibility, and therefore, his contradictory testimony, was impeached.

Because I concur with the Administrative Law Judge's finding that the collection procedure was proper, I will not address the separate issue of whether an improper collection procedure as alleged by the Appellant taints the entire urinalysis.

II.

Appellant next contends that the Administrative Law Judge's denial of Appellant's petition to reopen the hearing to receive further testimony regarding the collection procedure was error and an abuse of discretion. Appellant based his petition to reopen the hearing on the discovery of new evidence, described as the testimony of Mr. Hugh S. Woods, who allegedly witnessed the collection of Appellant's urine on 2 July 1990. Under 46 C.F.R.

5.603(a)(iii), the petition to reopen a hearing based on newly discovered evidence must contain "[a] statement as to whether or not this additional evidence was known to the petitioner at the time of the hearing, and reasons why the petitioner, with due diligence, could not have discovered such new evidence prior to the completion of the hearing."

In his petition to reopen, Appellant properly asserted that this evidence was not known to him until late June 1991, some four months after the hearing. However, Appellant failed to articulate the reasons why, with due diligence, he could not have discovered this evidence prior to the completion of the hearing. The reason Appellant gave for the failure to discover this evidence was that Mr. Woods was assigned to a sealift vessel that was involved in Persian Gulf operations from 24 January 1991, until his return to New York on 26 June 1991. Under the circumstances of this case, Appellant has not shown that he exercised due diligence in trying to discover this evidence.

Appellant was served with a Notice of Hearing on 9 August 1990, some 5 1/2 months before the hearing took place. Appellant was aware that there was one other person besides Mr. Field present at the SIU laboratory on the day of his urinalysis. TR, 2 February 1991, at 111. This person is alleged to be Mr. Hugh Woods.

As was pointed out in the Administrative Law Judge's order of 29 July 1991, denying Appellant's petition to reopen the hearing, this case was originally set for hearing on 16 October 1990. There were at least seven extensions of time granted by the Administrative Law Judge for the Appellant and his counsel to prepare for the hearing, which commenced on 19 February 1991. Order of 29 July 1991, at 2. Mr. Hugh Woods was listed as a witness in a letter from Appellant's counsel to the Administrative Law Judge dated 14 February 1991. Copies of Mr. Woods' discharge certificates document that he was discharged in Norfolk, VA on 15 February 1991, and subsequently shipped out on 16 February1991, from Norfolk. Appellant made no mention of any efforts on his part to contact Mr. Woods or his ship throughout the entire period of time from 9 August 1990 until 4 March 1991, when the hearing was closed, despite ample time to do so.

Mr. Woods returned to New York in late June 1991, about a week after the Administrative Law Judge issued his Decision and Order on the merits of the case. It appears that it was not until this time that Appellant or his counsel made any genuine attempt to evaluate Mr. Woods' testimony. Appellant has not shown that he exercised due diligence with respect to discovering

this evidence.

Evidence offered in support of a petition to reopen a hearing must also be "new." The Administrative Law Judge should deny a petition to reopen a hearing "[u]nless the new evidence is shown to have a direct, material, and noncumulative bearing upon the issues presented ...0Appeal Decision 797 (WEINER). Prior to the Appellant taking an appeal to the Commandant, the Administrative Law Judge may exercise his sound legal discretion with respect to reopening the hearing after his decision has been announced. Id. The exercise of such discretion by an Administrative Law Judge will not be interfered with unless there is a clear abuse of discretion. Id.

The Administrative Law Judge found that Mr. Woods' proposed testimony was cumulative to that of Appellant and Mr. Field. Order of 29 July 1991, at 2. Mr. Woods' testimony was offered to support Appellant's contention that Mr. Darbonne did not follow proper collection procedures. Id., at 1. Mr. Woods would have testified that he saw Mr. Darbonne hand Appellant a small, open, unsealed empty bottle and that Mr. Darbonne similarly handed him an open, unsealed bottle in turn.

This testimony is plainly cumulative to both Appellant's testimony and Mr. Field's testimony. I agree with the Administrative Law Judge's finding that Mr. Woods' proposed testimony was cumulative. It is essentially the same as that of the Appellant and Mr. Field.

As previously discussed, Appellant did not show due diligence in pursuing this evidence, nor was the evidence shown to have a direct, material and noncumulative bearing on the issues presented. This is what is required to be shown under 46 C.F.R. 5.603(a). The Administrative Law Judge considered the petition, the answer of the Coast Guard to the petition and the record of hearing. Order of 29 July 1991, at 1. Accordingly, I find that the Administrative Law Judge did not abuse his discretion in denying Appellant's petition to reopen the hearing.

III.

Appellant next argues that the failure of the Coast Guard to designate the location of the laboratory used by SIU for drug urinalysis resulted in violation of Appellant's constitutional right of due process and the right to confront witnesses against him. Specifically, Appellant contends; 1) that allowing the SIU to choose a laboratory in California to conduct Appellant's

urinalysis deprived Appellant of the ability to conduct an independent investigation into the charge; and 2) that the use of telephonic testimony during the hearing pursuant to 46 C.F.R. 5.553(e) deprived Appellant of his right to confront witnesses against him.

The Coast Guard has statutory authority to ensure that holders of merchant mariner's documents do not use illegal drugs. 46 U.S.C. 7503, 7704. The U.S. Supreme Court has upheld as constitutional federally mandated drug testing of private sector employees by their employers when those employees participate in an industry that is regulated pervasively to ensure safety. Skinner v. Railway Labor Executives Ass'n, 109 S.Ct. 1402 (1989). I cannot agree with Appellant's assertion that the Coast Guard's requirement of marine employers and sponsoring organizations to conduct preemployment urinalysis of merchant mariners is an improper delegation of governmental responsibility.

The Coast Guard requires that employer drug testing programs of merchant mariners under 46 C.F.R. 16 be in accordance with 49 C.F.R. 40, the Department of Transportation (DOT) Workplace Drug Testing Procedures. The DOT Workplace Drug Testing Procedures are based upon the Department of Health and Human Services (DHHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11970 (1988).

When formulating guidelines for drug testing, the DHHS contemplated that there would emerge a pool of qualified laboratories to bid on contracts to provide drug testing services. 53 Fed. Reg. 11976 (1988). The DOT regulations also support the reasoning that the employers would contract with DHHS certified laboratories. 49 C.F.R. 40.35. The rationale behind this was to provide uniformly accurate testing at a competitive price. 53 Fed. Reg. 11976 (1988). Any employee tested under these regulations may have access to records relating to that test or the certification of the laboratory conducting the test. 49 C.F.R. 40.37, 46 C.F.R. 16.380.

The Coast Guard regulations that mandate preemployment drug testing for merchant mariners do not require that the laboratory used by the employer to conduct the urinalysis be located in any particular place, only that employers conducting drug testing use a laboratory certified by DHHS. 46 C.F.R. 16.340. Given the Appellant's right under the regulations to access any relevant records concerning his urinalysis, I cannot find that allowing the SIU to use a laboratory in California violated Appellant's due process rights. The justification for allowing the SIU to

choose a laboratory at that location is sound and rational, especially when tested employees have a specific right to access records of the test and the integrity of the testing process is overseen by certification.

Although not specifically stated in his appellate brief, Appellant seems to indicate that the act of shipping his urine specimen to a distant laboratory violated his due process rights because, in this case, there was some difficulty in releasing the specimen from the California laboratory to the laboratories near New York for independent testing at the bequest of Appellant. I do not agree. The Administrative Law Judge was fully aware of Appellant's efforts to retrieve the specimen from the Nichols Institute in California, and delayed the hearing until the independent test was performed. TR, 31 January 1991, at 4-6, 15-18. The specimen was in fact tested by Appellant's experts. Respondent's Exh. B. The only prejudice to the Appellant in this instance was the fact that the specimen again tested positive for THC.

In suspension and revocation hearings, the taking of telephonic testimony is consistent with the constitutional concept of due process and is sufficient to protect the legitimate interests of the Appellant. Appeal Decision 2476 (BLAKE); aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989); aff'd sub nom., Blake v. Dept. of Transportation, NTSB, No. 90-70013 (9th Cir. 1991). Personal confrontation of the witness is not a right of the Appellant at suspension and revocation hearings. Appeal Decision 2476 (BLAKE). 46 C.F.R. 5.535(f) permits the Administrative Law Judge to take testimony by telephone. Such procedures are designed to expedite the hearing when long distances must be travelled by the prospective witness. Appeal Decision 2476 (BLAKE).

In this case, the witnesses that testified telephonically against Appellant were in California, while the hearing was in New York. This was exactly the situation contemplated by the regulation. Both Mr. Callies, the laboratory director, and Mr. Ellis, the medical review officer were identified in the record and not objected to by Appellant. TR 19 February 1991, at 68, 86. The telephone procedures employed by the Investigating Officer and the Administrative Law Judge credibly ensured the identity of the witnesses, permitted adequate questioning and cross-examination under oath and were governed by decorum and sufficient formality normally used at in-person proceedings. TR 19 February 1991, at 54-108. The telephone procedures used by

the Investigating Officer and the Administrative Law Judge were consonant with the provisions of 46 C.F.R. 5.535(f). Therefore, I do not find that Appellant's right to confront witnesses against him was in any way violated.

IV.

In his final basis for appeal, Appellant argues that the Investigating Officer committed prosecutorial misconduct by using admissions of uncharged misconduct by the Appellant to prejudice the Administrative Law Judge, and to intimidate and confuse the Appellant. I see no basis for such a finding.

On direct examination, Appellant's own counsel asked Appellant about his prior possession of drugs, to which Appellant replied that he had been charged with possession of marijuana some years ago. TR 19 February 1991, at 109. The Administrative Law Judge then asked the Appellant whether he had been convicted of that charge, which Appellant denied. Id., at 112. Counsel for Appellant then asked the disposition of the charge, which Appellant said had been dismissed. Id., at 113. During this exchange, the Investigating Officer did not interject or comment to the Administrative Law Judge at all.

The Investigating Officer opened his cross-examination of Appellant by further questioning Appellant concerning his admitted drug possession charge. Id., at 113. This questioning was well within the scope of the direct examination of Appellant, and consistent with Federal Rule of Evidence 611. The Investigating Officer continued to question Appellant about prior drug use without objection from opposing counsel or from the Administrative Law Judge. Id., at 115-118.

I do not find that any of this questioning was improper. Questioning in these proceedings is not even limited by the "scope of direct examination" limitation. Appeal Decision 2114 (HULTZ). The Administrative Law Judge is given a wide discretion as to how the hearing will be conducted and has a duty to bring out all relevant and material facts. Appeal Decisions 2321 (HARRIS), 2284 (BRAHN).

The admissions of prior drug use by the Appellant cannot be considered to be the type not allowed in evidence by 46 C.F.R. 5.551. Appellant's admissions were originally elicited on direct examination by his own counsel. TR 19 February 1991, at 109, 112. All further questioning was an expansion upon those

admissions, and was conducted in the presence of Appellant's counsel. There were no admissions of Appellant testified to by persons other than the Appellant.

I also find as proper the use by the Investigating Officer of Appellant's prior applications for his mariner's document as impeachment evidence. During his cross-examination of Appellant, the Investigating Officer realized that Appellant had not revealed his prior use of marijuana on his document applications. The Investigating Officer then requested that the Administrative Law Judge allow him to take possession of the document immediately. Id., at 118-121. The Administrative Law Judge did not allow this, as this issue was beyond the scope of the charge. The Administrative Law Judge properly limited the use of the document applications as evidence of impeachment of the witness. Id., at 123-124.

There must be a substantial showing of personal bias to disqualify a hearing officer. Roberts v. Morton, 549 F.2d 158 (10th Cir., 1976), cert. denied, 434 U.S. 834 (1977). I see no such showing of bias on the part of the Administrative Law Judge. His refusal to reopen the hearing was based soundly on the facts and arguments presented to him. See section II of this opinion. The Investigating Officer's cross-examination was within the scope of the direct questioning. There was nothing improper with the use of Appellant's admissions and the documents relevant to them for purposes of impeaching Appellant's credibility. Accordingly, I do not find any basis in the record that the Investigating Officer committed prosecutorial misconduct or caused the Administrative Law Judge to become biased against the Appellant.

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 the requirements of applicable law and regulations.

ORDER

The decisions and orders of the Administrative Law Judge dated 19 June 1991 and 29 July 1991, are hereby AFFIRMED.

//S// MARTIN H. DANIELL

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 12th day of May , 1992.

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