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
LICENSE NO. 613702 and MERCHANT MARINER'S DOCUMENT NO.(REDACTED): Issued to: George W. RAYMOND	:	ON APPEAL NO. 2541

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

By an order dated 13 August 1991, an Administrative Law Judge of the United States Coast Guard revoked Appellant's License and Merchant Mariner's Document upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 18 June 1990, Appellant wrongfully used marijuana as evidenced in a urine specimen collected on that date, which subsequently tested positive for the presence of marijuana metabolite.

The hearing was held at Seattle, Washington on 29 and 30 November 1990. Appellant appeared at the hearing and 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 four exhibits into evidence and two witnesses testified at his request. Appellant introduced 16 exhibits into evidence and

testified in his own behalf. Appellant also called six witnesses who testified in his defense.

The Administrative Law Judge's final order revoking all licenses and documents issued to Appellant was entered on 13 August 1991, and was served on Appellant on 16 August 1991. Appellant filed his notice of appeal on 10 September 1991, and subsequently filed his appellate brief on 15 November 1991, after receiving a 30 day filing extension. Accordingly, this matter is properly before the Commandant for review.

Appearance: Thomas Geisness, Esq., John Merriam, Esq., Market Place One, Suite 200, 2001 Western Avenue, Seattle, Washington, 98121-2114.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above captioned License and Document, issued to him by the United States Coast Guard. Appellant's license authorized him to serve as Second Assistant Engineer of motor vessels of any horsepower and Third Assistant Engineer of steam vessels of any horsepower and was issued on 9 March 1988.

On 18 June 1990, pursuant to employment requirements, Appellant provided a urine specimen for drug testing at the Virginia Mason Occupational Medical Clinic, Tukwila, Washington. The specimen collection supervisor was Ms. Pamela Corey.

The collection and chain of custody procedures required by 49 C.F.R. 40.23 et seq. were substantially followed. Appellant was not required to wash his hands before avoiding into the collection container, and the collection supervisor failed to record the specimen temperature. Additionally, Appellant was handed a specimen container by Ms. Corey rather than being allowed to personally select one.

Appellant's specimen was packaged and sent to Nichols Institute Substance Abuse Testing Laboratory (NISAT), a laboratory approved by the National Institute on Drug Abuse (NIDA). The NISAT test reflected a positive test result for the presence of marijuana metabolite.

After receiving the test results, the Medical Review Officer (MRO), representing Greystone Health Sciences Corporation, Dr. Katsuyama and Mr. George Ellis, Jr., President of Greystone spoke with Appellant regarding the positive test results.

Based on Appellant's denial of drug use, Mr. Ellis ordered a second test performed on Appellant's specimen by NISAT. This second test also tested positive for the presence of marijuana metabolite. In September, 1990, at Appellant's request, NISAT sent an aliquot of Appellant's specimen to a testing laboratory of his choice - the Lab of Pathology, Seattle, Washington, also NIDA certified. This third analysis also tested positive for the presence of marijuana metabolite.

In November, 1990, after receiving the positive result of the third test, Appellant requested yet another aliquot from his original specimen to perform yet a fourth test for nicotine and alcohol metabolite. NISAT did not send any further aliquots of Appellant's original specimen, responding that the reason for the additional aliquot was not within the regulations. Appellant did not attempt to obtain an additional aliquot by subpoena.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's license and document. Appellant sets forth the following bases of appeal:

1. The Administrative Law Judge erred in not granting Appellant's motion to dismiss following the presentation of the Investigating Officer's evidence;

2. Appellant was denied due process when he was denied an additional urine specimen from the MRO for testing to determine if the specimen could have come from another individual;

3. The collection procedures utilized did not follow the required guidelines and regulations and did not ensure proper chain of custody and accurate sampling.

OPINION

I

Appellant asserts that the Administrative Law Judge erred in denying Appellant's motion to dismiss. Appellant urges that the Investigating Officer failed to meet the requisite burden of proof to support the charge of drug use. [TR Vol I, at 86]. I do not agree.

Appellant bases his assertion on the fact that Appellant did not wash his hands prior to voiding into the specimen container, did not choose his own test kit, and the collection supervisor

failed to record the urine temperature. Accordingly, Appellant contends that insufficient facts existed to meet the burden of proof.

The proper standard of proof applicable in Suspension and Revocation Proceedings is set forth in 46 C.F.R. 5.63, which states that "findings must be supported by and in accordance with the reliable, probative, and substantial evidence." See also, Appeal Decisions 2477 (TOMBARI); 2474 (CARMIENKE); 2468 (LEWIN).

In Suspension and Revocation proceedings, great deference is given to the Administrative Law Judge in evaluating and weighing the evidence. The Administrative Law Judge's determinations in this regard will not be disturbed and will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence. Appeal Decisions 2522 (JENKINS); 2492 (RATH); 2333 (ALAYA).

In the instant case, the record supports the decision of the Administrative Law Judge's denial of Appellant's motion to dismiss. The fact that Appellant did not wash his hands or did not personally select his own urine specimen container does not vitiate the testing procedures or the chain of custody. Notwithstanding that these are technical infractions of the regulations set forth in 49 C.F.R. 40.23 et seq., substantial compliance with the required procedures was maintained.

As stated in Appeal Decision 2522 (JENKINS), the mere omission of handwashing is not a violation of due process. The purpose of the requirement is not to protect the individual, but to "ensure that the urine sample is not surreptitiously adulterated by the individual providing the sample." JENKINS, supra, at 12; [TR Vol I, at 77].

Furthermore, the specimen container, even though not personally selected by Appellant, was sealed in plastic and opened by the collector in Appellant's presence. The container was then immediately handed to Appellant. [TR Vol I, at 37]. Accordingly, the technical violation was harmless error since the integrity of the specimen and the chain of custody were not adversely affected.

Finally, even though the temperature was not recorded on the specimen container, the collector did specifically recall taking the temperature and testified that the temperature was within the permitted range. [TR Vol I, at 34, 41]. As with the handwashing

requirement, the purpose of taking and recording the temperature of the specimen is not to protect the individual providing the specimen, but to ensure that the urine specimen has not been adulterated by previously voided urine or by water.

The record further reflects that Appellant executed all of the required certifications and that the chain of custody was intact. [TR Vol I, at 40, 62; Vol II, at 24].

Based on the foregoing, sufficient facts exist to meet the required burden of proof. The Administrative Law Judge's denial of Appellant's motion to dismiss was neither arbitrary nor capricious and is fully supported by the record.

II

Appellant asserts that his due process rights were violated because he was denied further urine specimen aliquots for testing, to determine if the urine was that of another individual. I do not agree.

The record reflects that after the initial specimen tested positive, the MRO ordered a retest, which also tested positive for marijuana metabolite. Subsequently, at Appellant's request, a third aliquot of his urine was sent to a NIDA Certified laboratory of his choice. The result of the third test was also positive for marijuana metabolite. [TR Vol I, at 102]. The regulations restrict the release of specimens except for reasons approved in the regulation. [TR Vol I, at 84].

Specifically, 49 C.F.R. 40.33(e) and 40.21(c) and (d) restrict the tests and re-analyses that may be conducted of the original specimen.

> [U]rine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations. 49 C.F.R. 40.21(c)
>
> [T]his section does not prohibit procedures reasonably incident to analysis of the specimen for controlled substances (e.g. deter-

mination of pH or tests for specific gravity, creatinine concentration or presence of adulterants). 49 C.F.R. 40.21(d)

Appellant's request for aliquots for retesting was granted where the retesting was within the above-cited regulatory guidelines (i.e., to determine the presence of controlled substances). [TR Vol II, at 22]. However, where Appellant sought an aliquot for the purpose of human typing, i.e., "narrow[ing] the identity of the donor of the urine sample" [Respondent Exhibit D], the denial by the laboratory comported with regulations. [Respondent Exhibit C].

It is also noted that Appellant did not attempt to subpoena the additional aliquot, pursuant to 46 U.S.C. 7705.

I find that the MRO and NISAT fully complied with the letter and spirit of the regulations and gave Appellant every reasonable access to his urine specimen in order to determine the presence or absence of controlled substances.

Appellant asserts, inter alia, that the conduct of the specimen collector and the general collection procedures exhibited a "definite laxness." I have reviewed the record in detail and find that, notwithstanding minor deviations from the applicable regulations, the testing procedures employed in the instant case substantially complied with the regulations.

Accordingly, the determination of the Administrative Law Judge will not be disturbed.

III

Appellant asserts that the collection procedures employed did not follow the required regulations, denying Appellant his right to due process. I do not agree.

Appellant, in essence, reiterates those issues contained in his first basis of appeal, discussed, supra, in OPINION I. Appellant urges that since the regulatory infractions are multiple, they "invalidate the whole testing procedure." I disagree.

Even where multiple, technical infractions of the regulations occur, the testing procedure, as a whole, is not vitiated where the infractions do not breach the chain of custody or violate the specimen's integrity. Appeal Decision 2537 (CHATHAM). In the instant case, as in CHATHAM,

the multiple infractions do not adversely affect the specimen integrity or chain of custody. They are mere technical oversights. Appellant's due process rights were fully protected.

Accordingly, Appellant's assertion is without merit.

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 decision and order of the Administrative Law Judge dated 13 August 1991, is hereby AFFIRMED.

//S// J. W. KIME

J. W. KIME
Admiral, U. S.Coast Guard
COMMANDANT

Signed at Washington, D.C., this 9th day of June, 1992.

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