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
LICENSE NO. 655316	:	ON APPEAL
	:	NO. 2542
Issued to: Timothy F. DEFORGE	:	

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

By an order dated 15 November 1991, an Administrative Law Judge of the United States Coast Guard at Miami, Florida, revoked Appellant's License upon finding proved charges of misconduct, negligence, and use of a dangerous drug. The charge of misconduct was supported by seven specifications; the charge of negligence was supported by a single specification. The single specification supporting the charge of drug use alleged that, on or about 21 April 1991, Appellant used marijuana, as evidenced in a urine specimen collected on or about that date, which subsequently tested positive for the presence of marijuana metabolites.

The hearing was held at Naples, Florida on 27 and 28 August 1991. Appellant appeared at the hearing with professional counsel by whom he was represented throughout the proceedings.

Appellant responded to all charges and specifications by denial as provided in 46 C.F.R. 5.527. The Investigating Officer introduced 35 exhibits into evidence and 17 witnesses testified at her request. Appellant testified on his own behalf, called two other witnesses, and participated fully in the cross-examination of the Government's witnesses.

The Administrative Law Judge's final order revoking all Licenses issued to Appellant was entered on 15 November 1991, and was served on Appellant's counsel by certified mail on 18 November 1991. Appellant filed a notice of appeal on 10 December 1991, and filed his completed brief on 16 January 1992, within the filing requirements of 46 C.F.R. 5.703. Accordingly, this matter is properly before the Commandant for review.

Appearance: E. Raymond Shope, Attorney for Appellant, 2664 Airport Road South, Naples, Florida, 33962.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above captioned License, issued to him by the United States Coast Guard.

On 21 April 1991, Appellant, at the direction of his employer, Mr. Ervin Stokes, provided a post-accident urine specimen for drug testing purposes at Naples Community Hospital, 350 7th St. N, Naples, Florida. The specimen collector, Alena Kalina, was a supervisor at the hospital. She collected a urine specimen following the hospital's established procedures.

Appellant filled the specimen bottle in the bathroom, capped the bottle and returned it to the collector. Miss Kalina sealed the bottle with a tamper-proof seal, identifying it with the donor's signature and a Social Security Number volunteered by the Appellant, who was present throughout this procedure. Appellant then signed a Chain of Custody form used at the hospital and provided by Diagnostic Testing Services, Inc.

This Chain of Custody form indicated that Appellant had provided the urine specimen to Miss Kalina. The bottle was sealed with a tamper-proof seal in Appellant's presence.

Appellant signed the requisite portions of the documentation. The specimen bottle was sealed in a shipping bag and stored in a locked refrigerator until picked up by a courier for the testing laboratory, Diagnostic Services, Inc. (DSI). DSI is not

certified by the National Institutes on Drug Abuse (NIDA), but is certified for forensic urine drug testing by the College of American Pathologists.

At DSI, Appellant's urine specimen tested positive for marijuana metabolite. At the request of the Investigating Officer, who had discovered that DSI was not a NIDA-certified laboratory, the remainder of the urine sample was resealed and sent to Doctors & Physicians Laboratory, 801 East Dixie Avenue, Leesburg, Florida (D&ampP). D&ampP is certified by NIDA as an approved testing facility under guidelines promulgated by the Department of Health and Human Services. D&ampP received the sample and tested it; the results indicated marijuana metabolite. A certified copy of the test report was forwarded to Dr. Grieter, who functioned as Medical Review Officer (MRO) for DSI. The MRO verified the report and the chain of custody of the specimen and interviewed Appellant by telephone on 6 May 1991.

Appellant did not report any medical condition which might account for the evidence of marijuana use. Based on the report and his conversation with Appellant, the MRO reported the test as positive for marijuana use by executing the requisite portion of the Drug Testing Custody and Control (DTCC) form.

BASES OF APPEAL

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

1. The Administrative Law Judge erred in admitting and considering evidence of urinalyses indicating drug use where the urinalyses did not strictly adhere to the drug testing regulations set forth in 46 C.F.R. 16 and 49 C.F.R. 40. In particular, Appellant urges the following shortcomings in the procedures:

a. No identification by photograph was demanded of the donor of the urine specimen when it was collected;

b. The chain of custody for Appellant's urine specimen was broken because the specimen was unsealed, tested, and then resealed at a non-NIDA laboratory.

c. The Medical Review Officer did not comport with the guidelines of 49 C.F.R. 40.33(b)(3).

2. The Coast Guard was barred from proceeding with its case

against Appellant because any evidence of drug use was obtained as a result of the Coast Guard violating its own regulations at 46 C.F.R. 16, 49 C.F.R. 40, and 53 FR 11970.

OPINION

I

Appellant effectively asserts that the Administrative Law Judge may only consider evidence of drug use, based upon urinalysis, where the urinalysis was performed in strict adherence to the procedures of 46 C.F.R. 16 and 49 C.F.R. 40. I do not agree.

The Administrative Law Judge may properly consider any fact which sheds light on the proof or falsity of a charge. Appeal Decision 2252 (BOYCE). Any relevant and material evidence may be considered. 46 C.F.R. 5.501 (a).

Whether Appellant was adequately identified as the donor of the urine sample which showed drug use, is a question of fact for the Administrative Law Judge. The Administrative Law Judge found there was sufficient evidence to so conclude. [TR 381]. His conclusions will not be overturned unless they are without support in the record and inherently incredible; that is not the case here. Appeal Decisions 2424(CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS). The record indicates several means by which Appellant was identified as the donor, including signature, name, and Social Security Number. [TR 371, 381, 505].

Counsel's reliance on the Department of Health and Human Services Guidelines at 53 FR 11970 (1988) is misplaced. The analogue to Section 2.2(f)(2) of the guidelines which Appellant cites, Brief for Appellant, p. 6, is 49 C.F.R. 40.25 (f)(2). Photographic identification is not required, but is merely offered exempli gratia as one possible means of identification.

Appellant's second contention appears to be that the integrity of Appellant's specimen was defeated because it had been opened and resealed at DSI before being sent to D&P, the NIDA-certified laboratory. I disagree.

It is certainly true that Appellant's specimen was opened and later resealed at the DSI laboratory. [TR 411]. The question is therefore whether the likelihood of adulteration at the DSI laboratory is such as to vitiate any later findings concerning

that specimen.

Any assertion that DSI laboratory is operated in a slipshod or unprofessional manner is broadly refuted by the record. The laboratory director holds various qualifications, including two State certifications as laboratory director and Board certifications as toxicologist and clinical chemist. [TR 414-15]. DSI performs 40 to 90 urinalyses a day. [TR 415]. The laboratory has been in operation for about 6 years. Id. The College of American Pathologists, which certified DSI for forensic urine drug testing, requires that they test blind samples to establish the laboratory's accuracy. [TR 416]. Furthermore, Dr. White initiates blind sampling on his own every day. Id.

The record similarly offers both documentary and testimonial evidence of the precautions taken by DSI to maintain the chain of custody and the integrity of urine specimens. [TR 394-400, 416]. Any specimen showing signs of seal tampering is rejected. [TR 416]. No scintilla of evidence suggests any carelessness or other impropriety while the specimen was in DSI's custody.

The evidence points to the specimen having been carefully and professionally tested by a state-certified laboratory, using procedures similar to those of NIDA-certified laboratories. The sufficiency of a chain of custody goes to the weight to be accorded the evidence, not to its admissibility. Appeal Decision 2476 (BLAKE); U.S. v. Shackleford, 738 F.2d 776 (11th Cir. 1984). There is evidence in the record to support the finding of the Administrative Law Judge that the chain-of-custody procedures of 49 C.F.R 40 were satisfactorily complied with. His conclusions will not be overturned unless they are without support in the record and inherently incredible. Appeal Decisions 2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS).

Appellant next contends that the Medical Review Officer's conclusion, that Appellant illicitly used drugs, must be ignored because the MRO's conclusions were based in part on the results of the testing performed by DSI, a laboratory that was not an approved testing facility under guidelines promulgated by the Department of Health and Human Services. I disagree.

The MRO testified unequivocally that his finding of drug use was based on the test performed by D&ampP, a NIDA-certified laboratory. [TR 502]. On the basis of the record, it appears that his consideration of the other laboratory was for the

purpose of evaluating the chain of custody and other indicia of sample security and test reliability. [TR 503-505]. Such considerations are explicitly part of the duties of the Medical Review Officer. 46 C.F.R. 16.370 (b); 49 C.F.R. 40.27 (b).

Upon a comprehensive review of the evidence and the regulations, I find the discrepancies discussed above to be minor and technical in nature. The record reflects that the procedures employed, the chain of custody, and the documentation all substantially comply with the drug testing regulations.

This determination is consonant with Appeal Decisions 2522 (JENKINS); 2537 (CHATHAM), in which the failure to meet a technical requirement of the regulations that did not vitiate the chain of custody or the integrity of the specimen was deemed to be non-fatal. Accordingly, I find no infringement of Appellant's due process rights.

II.

Appellant separately argues that the Coast Guard violated its own drug testing regulations and is thereby barred from using the fruits of the testing to revoke Appellant's license. I disagree.

Appellant misunderstands the nature of the regulations involved. The drug testing regulations codified at 46 C.F.R. 16 require "marine employers," not the Coast Guard, to test employees for drugs. See, e.g., 46 C.F.R. 210, 220, 230, 240, 250. The drug testing regulations are preventive in nature, intended to promote a drug-free and safe work environment. 46 C.F.R 16.101 (a).

In contrast, the regulations at 46 C.F.R 5 are remedial in nature. 46 C.F.R. 5.3. The Coast Guard, following the procedures of 46 C.F.R. 5, may offer evidence from any source, not only a drug test carried out pursuant to Part 16, to establish drug use in violation of 46 U.S.C. 7704.

Notwithstanding technical deviations from the regulations, in the instant case, the collection process, chain of custody, integrity of the urine specimen and reliability of the drug testing procedures employed were neither hampered nor invalidated. Accordingly, any technical violations constituted harmless error. CHATHAM, supra.

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 15 November 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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