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DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | DECISION OF THE |
| vs. | : | COMMANDANT |
| MERCHANT MARINER'S DOCUMENT<br>NO(REDACTED) | : | ON APPEAL<br>NO. 2545 |
| Issued to: Mark A. JARDIN | : | |

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

By an order dated 27 February 1992, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's document upon finding proved a charge of use of a dangerous drug. The single specification supporting the charge alleged that Appellant used dangerous drugs as evidenced in a urine specimen collected on or about 21 June 1991, which subsequently tested positive for the presence of dangerous drugs.

The hearing was held at Providence, Rhode Island on 31 October 1991. Appellant appeared at the hearing with professional counsel by whom he was represented throughout the proceedings.

Appellant responded to the charge and specification by denial as provided in 46 C.F.R. 5.527. The Investigating Officer

introduced seven exhibits into evidence and two witnesses testified at his request. Appellant did not testify on his own behalf, nor did he call any witnesses. He introduced one exhibit into evidence and actively cross-examined the Government's witnesses.

The Administrative Law Judge's final order revoking all documents issued to Appellant was entered on 27 February 1992, and was served on Appellant's counsel on 4 March 1992. Appellant filed a notice of appeal on 30 March 1992, requested a 14-day extension on 28 April 1992, and filed his completed brief on 18 May 1992, within the filing requirements of 46 C.F.R. 5.703. Accordingly, this matter is properly before the Commandant for review.

Appearance: J. Drew Segadelli, Attorney for Appellant, P.O. Box 432, Buzzard's Bay, Massachusetts, 02532.

FINDINGS OF FACT

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

On 21 June 1991, Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority ("SSA"), Appellant's employer, sought to test Appellant because of information they had received, to the effect that Appellant might have used illicit drugs the evening before. The information came from a Coast Guard investigator who had in turn received a report from the Oak Bluffs police. Appellant was called to SSA's administrative offices at Wood's Hole, Massachusetts. Upon questioning by Port Captain Canha and the Personnel Manager, Mr. Parent, Appellant denied any drug use and volunteered to take a drug test.

SSA normally sends employees to a facility at Stoughton, Massachusetts, an hour away from Wood's Hole, for urinalysis testing. In exceptional situations, Mr. Parent's duties extend to specimen collection. Because Appellant declined the trip to Stoughton, a specimen was collected at the SSA offices by Mr. Parent, Personnel Manager for SSA. Mr. Parent had observed about 50 specimen collections but had never before taken a specimen. Mr. Parent collected a urine specimen from Appellant using a collection kit and procedures provided by Goddard Occupational Health Services Center, which provides Medical Review Officer (MRO) services for SSA.

Appellant was escorted to the office restroom by Mr. Parent

and Captain Canha, where he filled the specimen bottle and returned it to the collector. A tamper-proof seal was applied and identified with Appellant's and the collector's initials. Appellant signed the Drug Testing Custody and Control form (DTCC) to authenticate the specimen. The sealed bottle was then sealed into a box in similar fashion.

The specimen box was in the hands of Mr. Parent until a courier picked it up for the testing laboratory, Goddard Occupational Health Services Center (Goddard). Goddard is certified by the National Institutes on Drug Abuse (NIDA) as an approved testing facility under guidelines promulgated by the Department of Health and Human Services.

At Goddard, Appellant's urine specimen tested positive for cocaine metabolite. A certified copy of the test report was forwarded to Dr. Eisen, who functioned as Medical Review Officer (MRO) for SSA. The MRO verified the report and the chain of custody of the specimen and interviewed Appellant by telephone on 1 July 1991.

Appellant did not report any medical condition which might account for the evidence of cocaine use. Based on the report and her conversation with Appellant, the MRO reported the test as positive for cocaine use by executing the requisite portion of the Drug Testing Custody and Control (DTCC) form. The instant charge and specification are based upon the MRO's finding.

## BASES OF APPEAL

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

1. The Administrative Law Judge erred in finding that Appellant voluntarily took the drug test. Appellant urges that he was threatened with the loss of his job if he did not provide a specimen.

2. The Administrative Law Judge erred by not excluding the drug test results where the guidelines for "reasonable cause" testing, 46 C.F.R. 16.250, were not met.

## OPINION

I

Although not raised by Appellant, the sufficiency of the charge and specification presents an issue. The specification, even as modified by the Investigating Officer, is defective in that no particular date of drug use is specified and that no particular drug is named. As written, the specification does not "enable the respondent to identify the act or offense so that a defense can be prepared." 46 C.F.R. 5.25.

Even so, Appellant raised no objection to the charge or the specification [TR 10] and all issues were fully litigated. On the record, Appellant and his counsel were aware of the nature of the Government's case and were prepared to defend against it. Id.

The defects in the specification do not demand reversal of the decision below. Findings to support revocation of a seaman's document need not depend upon the original specification, so long as Appellant had actual notice and the appropriate questions were litigated. Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir.1950); Appeal Decisions 2422 (GIBBONS); 2416 (MOORE); 2166 (REGISTER); 1792 (PHILLIPS). Where the record makes clear that the parties understand exactly what the issues are, the parties cannot afterward claim surprise or lack of notice or other due process shortcoming. Kuhn, supra; see also Commandant v. Buffington, NTSB Order EM-57 (1977); Appeal Decision 2416 (MOORE). Since there was no prejudice to Appellant and he raised no objection to the adequacy of the specification, the Decision need not be set aside at this point. Appeal Decision (2386 (LOUVIERE)).

II.

Appellant effectively asserts that, because he might have been discharged had he refused to provide a urine specimen, it cannot have been provided voluntarily. I disagree.

As the Administrative Law Judge determined, Mr. Parent's testimony was uncontradicted and unimpeached. [Decision & Order 9] Despite the conjectures and suggestions of Appellant's counsel in vigorous cross-examination, Mr. Parent's testimony remained unshaken that Appellant voluntarily gave a specimen. [TR 83]. Moreover, Appellant volunteered to be tested before being told he might lose his job. Id. Appellant was subsequently told he might refuse the test, yet he continued to cooperate. [TR 90]. No other evidence was brought. Appellant neither testified himself nor called Captain Canha, who

had been present throughout the collection process. While no inference to Appellant's detriment will be drawn from Appellant's decision not to testify, neither may his silence refute the uncontroverted evidence of other witnesses (i.e., Mr. Parent).

The conclusions and findings of the Administrative Law Judge 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).
Mr. Parent's testimony was not only unimpeached; it was undisputed. [TR 108]. Accordingly, I agree with the Administrative Law Judge's finding that Appellant voluntarily provided the urine specimen.

III.

Appellant's argument that the test was not voluntary, supra, seems to have been intended as foundation to support the assertion that the requirements for "reasonable cause" testing were violated. 46 C.F.R. 16.250. Because Appellant's first argument is without merit, I decline to explore the bounds of reasonable cause testing.

## 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 11th day of June, 1992.

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