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.	:	VICE COMMANDANT
	:	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO. REDACTED and LICENSE NO. 645588 Issued to: Michael J. SWEENEY	:	NO. 2546

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

By an order dated 21 June 1991, an Administrative Law Judge of the United States Coast Guard at Alameda, California suspended Appellant's License and Merchant Mariner's Document outright for six months with six additional months suspension remitted on twelve months probation, upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 27 December 1990, Appellant wrongfully used marijuana as evidenced in a drug test administered and the urine specimen collected on that date.

The hearing was held at Alameda, California on 31 January 1991 and on 12 and 13 March 1991. Appellant was represented by professional counsel. Appellant entered a response denying the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer introduced nine exhibits into evidence and

introduced the testimony of three witnesses, two of whom testified telephonically pursuant to 46 C.F.R. 5.535(f). Appellant introduced 8 exhibits into evidence and introduced the testimony of two witnesses. In addition, Appellant testified under oath in his own behalf.

The Administrative Law Judge's final order suspending all licenses and documents issued to Appellant was entered on 21 June 1991. Service of the Decision and Order was made on 28 June 1991. Subsequently, Appellant filed a notice of appeal on 2 July 1991, perfecting his appeal by filing an appellate brief on 1 August 1991.

Following a review of Appellant's appeal, on 18 February 1992, the Vice Commandant, in Appeal Decision 2535 (SWEENEY), remanded the case to the Administrative Law Judge on the basis that the Administrative Law Judge had issued a sanction inconsistent with 46 U.S.C. 7704. The Vice Commandant did not address Appellant's bases of appeal.

Appellant subsequently submitted an interlocutory appeal to The National Transportation Safety Board (Board); the Board reversing Appeal Decision 2535 (SWEENEY) in NTSB Order No. EM-165. The Board further ordered the Vice Commandant to issue a decisionon the merits of Appellant's original appeal.

Accordingly, this appeal is properly before the Vice Commandant for review.

Appearance: John E. Droeger, Esq., World Trade Center, Suite 261, San Francisco, CA 94111.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned License and Document issued by the U. S. Coast Guard. Appellant's license authorizes him to serve as a master of inland steam or motor vessels of any gross tons; third mate, ocean steam or motor vessels of any gross tons; first class pilotage, San Francisco Bay from sea to and between the Dumbarton Bridge, Stockton, and Sacramento, including all tributaries therein; radar observer - unlimited.

Appellant has been employed as a pilot for the San Francisco Bar Pilot Association (hereinafter "Association") for

approximately six years and is commissioned by the State Board of Pilot Commissioners.

On 27 December 1990, Appellant appeared at St. Francis Memorial Hospital Laboratory, San Francisco, California to submit to a urinalysis, as required by the Association. The laboratory was designated as a collection site by the Association.

The urinalysis collection coordinator, Ms. Hamlin, had received three months orientation and had collected approximately 500 urine specimens for the program.

Ms. Hamlin provided Appellant with a specimen collection container, initiated the chain of custody form and documentation and instructed Appellant to enter a bathroom and provide a urine specimen. Appellant complied, producing the required urine specimen. Ms. Hamlin then affixed an identification label with a preprinted specimen identification number on the side of the container.

In Appellant's presence, Ms. Hamlin typed Appellant's initials "MJS" onto the tamperproof seal, placing the seal over the cap of the specimen container. The chain of custody form and other documentation were completed and verified by Appellant. Appellant acknowledged that the specimen container was sealed in his presence with a tamperproof seal and that the information provided on the Drug Testing Custody and Control Form and specimen container was correct. This acknowledgment is reflected by Appellant's signature on the donor certification on the Drug Testing Custody and Control Form.

Subsequently, the urine specimen was placed in a shipping box and given to a courier. The courier delivered the specimen to the Nichols Institute Substance Abuse Testing Lab (NISAT), certified by the National Institute on Drug Abuse (NIDA), San Diego, California. Appellant's urine specimen tested positive for the presence of marijuana metabolite in both the screening and confirmation tests.

BASES OF APPEAL

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

1. The laboratories involved in the collection and testing ofAppellant's urine specimen failed to take minimum precautions to ensure that an unadulterated specimen was obtained and identified;

2. The record fails to establish the minimum professional and regulatory requirements of the personnel involved in the collection and testing of Appellant's specimen;

3. The Administrative Law Judge improperly rejected Appellant's explanation for his specimen's positive test result;

4. The Administrative Law Judge improperly rejected polygraph evidence and improperly allowed telephonic testimony;

5. The Administrative Law Judge's findings are either unsupported or directly contrary to unrebutted evidence.

OPINION

I

Appellant asserts that the specimen collection site violated a number of applicable regulations and consequently failed to maintain minimum security precautions. Specifically, Appellant asserts: (a) That the failure of Ms. Hamlin, the specimen collector, to obtain Appellant's written initials on the specimen label breached the regulations and constituted a fatal error; (b) The collection site personnel were not properly trained to carry out their duties; (c) The security at the collection site was deficient, and; (d) The collection site breached requirements set by the NISAT laboratory.

I concur with Appellant that the applicable guidelines state that "[a]n individual whose urine was collected must initial the label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her." NIDA URINALYSIS COLLECTION HANDBOOK FOR FEDERAL DRUG TESTING PROGRAMS at 17. In the instant case, the specimen collector typed Appellant's initials on the label rather than requiring Appellant to sign his initials.

While this technically constitutes a violation of the guidelines, because of the substantial evidence in the record corroborating the authenticity of the specimen, the error is not fatal and will not vitiate an otherwise proper chain of custody. Appeal Decisions 2522 (JENKINS); 2537 (CHATHAM). Significantly, the record reflects that the specimen container labels utilized contain a unique bar code and accession number which corresponds to the bar code and accession number on the Drug Testing Custody

and Control Form, making tampering at the collection site virtually impossible. [Respondent Exhibit E; TR 48]. The record further reflects that Appellant witnessed the sealing of the specimen container, the application of the label containing the unique bar code and accession number. [TR 57-65].

Finally Appellant attested to the foregoing by signing his name to the following certification on copy three of the Drug Testing Custody and Control Form on 27 December 1990:

> DONOR CERTIFICATION; I certify that I provided my urine specimen to the collector; that the specimen bottle was sealed with a tamper proof seal in my presence; and that the information provided on this form and on the label affixed to the specimen bottle is correct. [I.O. Exhibit 5].

Accordingly, notwithstanding the failure of Appellant to affix his written initials to the specimen container, the record reflects that sufficient safeguards and procedures were employed to ensure a proper chain of custody and an unadulterated specimen.

Appellant asserts inter alia that, contrary to regulatory guidelines in 49 C.F.R. 40.23(d), Ms. Hamlin, the specimen collector, was not properly trained to carry out the regulatory requirements. I do not agree.

The record reflects that Ms. Hamlin had received three months of training/orientation when first hired. [TR 68-69]. Furthermore, she had obtained substantial on-the-job experience, having collected approximately 500 specimens prior to collecting Appellant's specimen. [TR Vol 1, 33; Vol 2, 137]. Accordingly, I find that the record effectively demonstrates that Ms. Hamlin was sufficiently trained to meet the regulatory requirements.

I concur with Appellant's assertion that he was not provided with any standard written instructions as the specimen donor. The regulations, 49 C.F.R. 40.23(d)(2)(ii) provide that donor personnel will be given written instructions "setting forth their responsibilities." However, notwithstanding this technical omission, the record reflects that the procedures were explained to Appellant. [TR Vol 1, 130]. The specimen collection procedures were discreet, orderly and in no way adversely effected the chain of custody or integrity of the specimen collected. [TR Vol 1, 56-67; 86-97].

Appellant also asserts inter alia that a theft of a purse occurred at the time when Appellant was providing his

urine specimen. Appellant contends that this theft demonstrates lax security at the collection site. Appellant also urges that the Administrative Law Judge erred in not accepting Appellant's proposed finding that the theft occurred during the time that Appellant was present.

The issue of whether a physical theft of a purse occurred during Appellant's specimen collection is merely peripheral to the relevant issue of the collection and security of Appellant's urine specimen. There is no evidence in the record indicating that the alleged theft affected Appellant's urine specimen collection or chain of custody in any manner whatsoever. Appellant's assertion that the alleged theft reflects lax security regarding the urine specimens is purely speculative and inconclusive.

Additionally, I find no error in the Administrative Law Judge's rejection of Appellant's proposed finding that the alleged purse theft occurred while Appellant was present at the collection site. The evidence on this issue is conflicting. The police report, Respondent Exhibit A, supports Appellant's contention. However, the testimony of the specimen collector, Ms. Hamlin, clearly disputes that evidence. [Vol 1, TR 82].

The Administrative Law Judge is the final arbiter in determining the weight to be attributed to particular evidence and in cases where evidence conflicts. His determinations will not be reversed or modified unless they are not supported by the record and are inherently incredible. Appeal Decisions
2183 (FAIRALL), aff'd.
sub nom. Hayes v. Fairall, NTSB Order No. EM-89 (1981);
2116 (BAGGETT); 2282 (LITTLEFIELD);
2386 (LOUVIERE); 2302(FRAPPIER);
2492 (RATH); 2506 (SYLVERSTEN);
2522 (JENKINS).

Additionally, it is noted that findings of the Administrative Law Judge need not be completely consistent with all evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decisions
2492 (RATH);
2503 (MOULDS).

In the instant case, I find that sufficient evidence exists in the record to support the decision of the Administrative Law Judge to reject Appellant's proposed finding.

Finally, Appellant asserts, inter alia, that the

collection site violated a NISAT requirement that the specimen donor be permitted to select his/her own specimen kit, including the specimen container.

I concur with this assertion, however, as with those minor technical errors previously discussed herein, the record fails to demonstrate that this oversight affected the integrity of Appellant's specimen in any manner. On the contrary, the record clearly reflects that the specimen kit was sealed in a protective cellophane envelope and was opened in Appellant's presence. [TR Vol 1, 57-59, 90, Vol 2, 130]. No additional security could have been gained even if Appellant would have personally selected a sealed specimen kit and opened it himself. Accordingly, this assertion is without merit.

II

Appellant asserts that the Government failed to prove the qualifications of the Medical Review Officer and NISAT laboratory personnel at the hearing. Appellant asserts that this omission constitutes error. I do not agree.

Absent any challenge or objection raised by Appellant, there is a presumption of regularity of the procedures utilized by the NIDA approved testing facility once a documented chain of custody of the specimen and documented verification of the test results are admitted into evidence. Concomitantly, unless challenged and disproven by Appellant, there is a presumption that those personnel employed by the NIDA approved testing facility (NISAT in the case herein) are qualified unless Appellant challenges the qualifications of such personnel at the hearing.

In the instant case, Appellant raised no objection(s) or challenges to the qualifications of any of the personnel involved in the collection or testing of Appellant's urine specimen. See, Decision & Order, Rulings 24-26, at 48. It is well established that, absent clear error, in order to preserve such an issue on appeal, Appellant was required to raise an objection at the hearing. 46 C.F.R. 5.701(b)(1); Appeal Decisions 2458 (GERMAN);
2376 (FRANK);
2400 (WIDMAN);
2384 (WILLIAMS);
2463 (DAVIS);
2504 (GRACE);
2524 (TAYLOR).

Accordingly, having failed to challenge the qualifications ofthe personnel at the hearing, I find that Appellant's assertion is improperly raised on appeal.

III

Appellant asserts that the Administrative Law Judge erred in not accepting Appellant's theory of accidental ingestion of marijuana. He urges that his contention that he unknowingly consumed marijuana-laced brownies at a party overcame the presumption of drug use. I do not agree.

The Administrative Law Judge weighed the testimony of Appellant, his expert witness and the Government's witness regarding the plausibility of accidental marijuana ingestion as well as the possible effect of such ingestion upon a subsequent urinalysis. The Administrative Law Judge found that the evidence demonstrated that if Appellant had in fact ingested such brownies, he did so knowingly.

As stated in Opinion II, supra, such evidentiary determinations are within the exclusive province of the Administrative Law Judge. It is his duty to consider all factual evidence and make appropriate findings and orders. My review of the record reflects that the finding of the Administrative Law Judge on this issue is reasonable, factually supported and not inherently incredible. Accordingly, the Administrative Law Judge's determination not to accept the laced brownie defense will not be disturbed.

IV

Appellant asserts that the Administrative Law Judge improperly rejected polygraph evidence offered by Appellant. I do not agree.

The Administrative Law Judge did admit polygraph evidence submitted by Appellant at the hearing. [TR, Vol 1, 153-155]. The Administrative Law Judge was subsequently free to attribute appropriate weight to such evidence, considering the status and reliability of polygraph evidence in judicial proceedings in general. The record indicates no abuse of discretion by the Administrative Law Judge in weighing and considering this evidence. Accordingly, I find Appellant's assertion without merit. Appellant also asserts inter alia that the Administrative Law Judge improperly permitted the use of telephonic testimony in the proceedings. I do not agree.

It is firmly established by regulation and precedent that telephonic testimony is fully acceptable in these proceedings. Title 46 C.F.R. 5.535(f); Appeal Decision 2476 (BLAKE), aff. sub nom. Yost v. Blake, NTSB Order No. EM-156 (1989), aff. sub nom. Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. C.A. 1991). Accordingly, Appellant's assertion of error is without merit.

V

Appellant asserts that the Administrative Law Judge erred in his rulings to the Government's proposed findings regarding the tests conducted on Appellant's urine specimen. (Decision & Order, Rulings 35-53 to Government's proposed findings at 28-33).

Specifically, Appellant contends that the Government did not call any of the personnel who conducted the tests and that the Administrative Law Judge prohibited Appellant from calling these witnesses. I do not agree.

While the lab personnel did not testify, the director of the laboratory, Mr. Callies, did testify extensively by telephone. [TR Vol 2, 12-115]. Through his testimony, Mr. Callies succinctly explained the chain of custody and test procedures as well as clarifying other issues.

Contrary to Appellant's contention, the Administrative Law Judge did not prohibit Appellant from calling the lab personnel as witnesses. In fact, the Administrative Law Judge clearly advised Appellant and his counsel that they could call any witness if they so wished. [TR Vol 2, 27]. Moreover, the Administrative Law Judge advised Appellant that, at the proper time, he could request a continuance to call necessary witnesses. [TR Vol 2, 28].

Based on the foregoing, I find Appellant's assertions without merit.

VI

Appellant asserts that the compelled collection of urine for drug testing is an illegal "search and seizure", within the protection of the Fourth Amendment to the U.S. Constitution.

Appellant raises this issue inappropriately in this forum. The purpose of these proceedings is remedial in nature and intended to maintain standards for competence and conduct

essential to the promotion of safety at sea. Title 46 U.S.C. 57701; 46 C.F.R. 5.5. The urinalysis collection and testing programs are conducted in accordance with regulations promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 552 et seq.) set forth in 46 C.F.R. Part 5. Those regulations specifically detail the authority of the Administrative Law Judge at the hearing level and the Commandant at the appellate level.

That which Appellant requests is clearly beyond the purview and authority of Suspension and Revocation Proceedings. Neither the Administrative Law Judge nor the Commandant are vested with authority to decide constitutional issues; that is exclusively within the purview of the federal courts.

VII

This case was previously remanded to the Administrative Law Judge in Appeal Decision 2535 (SWEENEY) on the basis that the Administrative Law Judge failed to comply with 46 U.S.C. 7704 by not issuing a sanction of revocation for proven drug use. In SWEENEY, supra, the Vice Commandant defined "cure" for the purposes of 46 U.S.C. 7704. See, SWEENEY, 7-9.

Notwithstanding the Board's reversal of SWEENEY, supra in NTSB Order No. EM-165O, the definition of "cure" stated in that Appeal Decision is not vitiated and will remain in effect for future cases. The Board's decision, while prohibiting the application of the definition of "cure" retroactively to Appellant, specifically did not prohibit the prospective application of the definition to future cases.

> We intimate no view on the validity of the Vice Commandant's proposed definition of cure under the statute in other cases, and we fully recognize that rulemaking through adjudication is an acceptable method of interpreting legislation.
>
> EM-165, supra, footnote 10 at 5.

It is anticipated that future amendments to 46 C.F.R. Part 5 will further refine the issue of "cure". However, until such time, the definition of "cure" stated in SWEENEY, supra will remain in effect for all future drug related cases.

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 21 June 1991, is hereby AFFIRMED.

//S// R.T. NELSON

ROBERT T. NELSON
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this_____day of 30 June , 1992.

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