UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)LICENSE NO. 614822
Issued to: William N. Williams

DECISION OF THE COMMANDANT ON APPEAL NO. 2529
UNITED STATES COAST GUARD

2529

William N. Williams

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

By an order dated 7 November 1990, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington 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 8 February 1990, Appellant had marijuana metabolites present in his body in the City of Seattle at, or in the vicinity of, Ballard Hospital, as was revealed through a drug screening test.

The hearing was held at Seattle, Washington, on 10 August 1990. Appellant was represented by professional counsel. Appellant entered a response of denying the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer introduced three exhibits into evidence and two witnesses testified at his request. One exhibit was introduced by the Administrative Law Judge. Appellant introduced three exhibits into evidence and four witnesses testified on his behalf. Appellant also testified on his own behalf. The Administrative Law Judge's final order revoking all licenses and documents issued to Appellant

was entered on 7 November 1990.

The Appellant filed a notice of appeal on 11 December 1990, pursuant to 46 C.F.R. 5.703. At Appellant's request, a transcript was prepared. Appellant filed his brief with the Commandant on 16 April 1991, perfecting his appeal pursuant to 46 C.F.R. 5.703(c).

Appearance: Norman Brown Binns, Esq., Attorney at Law, 6605 Fourth Ave. N.E., Seattle, Washington 98115.

FINDINGS OF FACT

The Administrative Law Judge made the following Findings of Fact, which are not challenged on appeal and are incorporated by reference, with modification only as to the status of Mr. Williams as Appellant.

1. At all times relevant herein, Appellant was the holder and possessor of License Number 614822 and Merchant Mariner's Document Number [redacted]D1, issued to him by the United States Coast Guard.

2. On February 9 1990, Appellant appeared at the Ballard Community Hospital in Seattle, Washington, to give a pre-employment sample of his urine for drug testing purposes.

3. The specimen of Appellant's urine was collected by Nancy Patton, a specimen collector, at Ballard Community Hospital.

4. Nancy Patton certified that the collected urine specimen was from Appellant; that it bore identification number 680-28-8117, and that she properly labeled and sealed the specimen.

5. Appellant signed and certified, in Step 5 of the urine Custody and Control Form (Copy No. 2), that he provided the urine specimen to the collector and that it was identified with number 680-28-8117.

6. On 12 February 1990, Respondent's properly sealed and packed urine specimen was picked up by a courier for the Laboratory of Pathology in Seattle, Washington, and delivered to and received intact by the Laboratory on 12 February 1990.

7. Appellant's urine sample was chemically tested at the Laboratory of Pathology and found to test positive for marijuana - 52 nanograms per milliliter.

8. Appellant does not challenge the testing methodology of his urine specimen or the test results.

8. Appellant does not challenge the determination made by the medical review officer that his urine specimen tested positive for marijuana.

10. Appellant stated that he did not and does not use or smoke marijuana.

11. Appellant claims he unknowingly and inadvertently ate 2 or 3 brownies at a party on 4 February 1990, which he believes contained marijuana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's license and document. Appellant's base of appeal is that the Administrative Law Judge erred in finding Appellant's evidence of inadvertent ingestion of marijuana to be insufficient and not credible.

OPINION

Title 46 U.S.C. 7704(c) provides for license or document revocation if it is shown the holder has been a "user" of a dangerous drug unless the holder provides satisfactory proof that he or she is cured. Marijuana is a dangerous drug. 46 U.S.C. 2101(8a); 21 U.S.C. 802(15); 21 U.S.C. 812. An individual is presumed to be a user of dangerous drugs upon failure of a chemical test. 46 C.F.R. 16.201(b).

Here, Appellant seeks to rebut the presumption by claiming that he inadvertently and mistakenly ingested marijuana-laced brownies while attending a housewarming party held by witnesses Travis Cave and Shirley Koehmen several days before his drug test. The people attending the party had each brought food and drink,

including cookies, brownies, hamburgers, gin, beer, coke and chips, among other things. Appellant attended with a friend and did not know the others well. Travis Cave and Shirley Koehmen testified that several days later they received a phone call from one of the other guests, Charles Robinson, in which he asked how they had enjoyed the brownies. He said he had baked marijuana into them.

Appellant's wife testified that, a month later, after Appellant's urine tested positive, she called Koehman to find out if drugs had been used at the party. Koehman told her about the call from Robinson, and they concluded that the brownies accounted for the positive test result. Appellant testified that he had eaten two or three brownies at the party and, although he did not perceive himself at the time to be under the influence of marijuana, he did feel somewhat lightheaded when leaving the party, as if he had a hangover. Appellant and his wife testified that he was not a user of marijuana.

Mr. Robinson did not testify at the trial.

The Administrative Law Judge ruled that Appellant's defense did not rebut the presumption of drug use arising from 46 C.F.R. 16.201(b). He ruled first that Cave's testimony of the alleged telephone conversation with Robinson, in which the latter purportedly said he had laced the brownies with marijuana, was "weak uncorroborated hearsay."

I see no error in this ruling. Rule 801(c) of the Federal Rules of Evidence notes that hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The alleged statement by Robinson, made outside the administrative hearing by one not available to testify, or to subject himself to cross-examination under oath, is classic hearsay. It was within the Administrative Law Judge's discretion to give such statement little weight or to discount it entirely. Here, the Judge ruled that its weight was insufficient to overcome the presumption of use provided by 46 C.F.R. 16.201. Determinations regarding the credibility of witnesses and weight to be attributed to particular evidence are within the discretion of the trier of fact and will not be disturbed on appeal unless shown to be arbitrary and capricious. Appeal Decision 2522 (JENKINS); Appeal Decision 2503 (MOULDS); Appeal Decision 2492, (RATH).

The Administrative Law Judge noted that the hearsay testimony attributable to Robinson, even if believed, is weakened by the attenuated inferences to be drawn from it: that Robinson in fact exists; that Appellant in fact ate Robinson's brownies rather than unadulterated brownies brought by another guest; and that Appellant's ingestion was inadvertent rather than knowing.

It is Appellant's argument on appeal that Robinson was the *only* person who brought brownies to the party and, therefore, Appellant must have eaten Robinson's adulterated brownies.

However, the record citations offered by Appellant to support this argument are, in fact, ambiguous. In addition, Cave clearly testified that "A lot of my friends brought cookies, some of them brought brownies. . ." [Tr. 70]. This testimony is sufficient to support the Administrative Law Judge's finding that Appellant could just as easily have eaten unadulterated brownies as the allegedly adulterated ones. More to the point, it indicates, as the Administrative Law Judge found, that the inferences of fact one could draw from Cave's hearsay evidence are weak at best.

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 7 November 1990, is hereby AFFIRMED.

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

Signed at Washington, D.C., this 10th day of September., 1991.

***** END OF DECISION NO. 2529 *****

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