

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

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v.

MERCHANT MARINER CREDENTIAL

Issued to: KEVIN GEROD LEWIS

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL

NO. , 2718

**APPEARANCES**

For Government:  
Ms. Lineka Quijano, Esq.  
LCDR Damian Yemma, USCG

For Respondent:  
Mr. Shawn M. Cline, Esq.

Administrative Law Judge: Michael J. Devine

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On April 11, 2016, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked Merchant Mariner Credential of Respondent, Mr. Kevin Gerod Lewis, upon finding proved a charge of use of or addiction to the use of dangerous drugs.

The ALJ's bench decision was followed by the issuance of a Decision and Order (hereinafter "D&O") dated April 14, 2016.

The Coast Guard Complaint alleged that Respondent submitted to a non-DOT drug test on June 26, 2015, and that the specimen he provided subsequently tested positive for the presence of cocaine metabolites.

Respondent appeals.

### FACTS AND PROCEDURAL HISTORY

At all relevant times, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 3]

On June 26, 2015, Respondent consented to a voluntary random drug test. [D&O at 3] A hair specimen was collected from Respondent's beard. [Id.] The test was conducted in accordance with company policy. [Id.] Department of Transportation procedures were not followed by the specimen collector because hair samples are not covered by DOT regulations. [Id.]

After collection, Respondent's specimen was forwarded for drug testing at the Psychomedics Corporation, an accredited laboratory. [D&O at 3] When the laboratory received Respondent's specimen for testing, the seals for the specimen were intact and the specimen's chain of custody had been properly maintained. [D&O at 3] Respondent's hair sample tested positive for cocaine metabolites. [Id.]

A Medical Review Officer reviewed the results of Respondent's drug test and determined that there was no valid excuse or medical explanation for the positive drug test result. [D&O at 4] Respondent's positive drug test result was verified by evidence. [D&O at 4]

On July 3, 2015, Respondent submitted a hair sample to Omega Laboratories for drug testing. [Respondent's Ex. B] The hair sample was taken from the same location as that collected on June 26, 2015. [Tr. Vol. II p. 122, lines 7-16] Respondent's sample tested negative for the presence of drugs. [D&O at 4; Respondent's Ex. B] This negative result did not mean

that drugs were not present within Respondent's sample, but that any drugs present were detected at a concentration less than cutoff levels. [Respondent's Ex. B]

On October 27, 2015, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential. On November 4, 2015, Respondent filed his Answer to the Complaint, wherein he denied all jurisdictional and factual allegations. At this time and throughout the proceedings, Respondent was represented by counsel.

Pursuant to a Prehearing Conference held on November 24, 2015, and by mutual agreement of the parties, the ALJ initially scheduled the hearing for January 28, 2016.

On January 5, 2016, Respondent filed a motion for continuance to February 11, 2016. The ALJ denied this motion via an order dated January 6, 2016.

On January 23, 2016, a Saturday five days before the hearing was scheduled to commence, Respondent filed a second motion for continuance seeking to continue the matter until a "mutually agreeable date" sometime after January 28, 2016. Due to the Saturday filing and a blizzard that caused the closure of federal government offices in the Washington, D.C., area, the ALJ did not receive Respondent's motion until the day before the hearing, while he was traveling to the hearing site. [Tr. Vol. I p. 8, lines 10-16] As a result, the ALJ elected to consider the motion when the hearing commenced. [Tr. Vol. I p. 8, lines 20-22]

When the hearing commenced on January 28, 2016, the ALJ entertained Respondent's motion for continuance. [Tr. Vol. I pp. 8-9] Upon the parties' agreement, the Coast Guard presented evidence concerning company policies and the collection of Respondent's specimen, and then the matter was continued until February 24 and 25, 2016. [Tr. Vol. I pp. 15-16; Order Memorializing Ruling Re-Scheduling Hearing, dated February 3, 2016]

Respondent filed a subsequent motion for continuance on February 3, 2016, seeking to continue the matter to a date beyond March 30, 2016. The ALJ denied this motion via an order dated February 17, 2016.

On February 19, 2016, the Coast Guard filed a motion for continuance. The ALJ granted the Coast Guard's request; the hearing ultimately reconvened on April 11, 2016. [Order Memorializing Conference and Rescheduling Hearing, dated February 29, 2016]

During the hearing sessions of January 28 and April 11, 2016, the Coast Guard offered the testimony of four witnesses and entered eleven exhibits into the record. Respondent testified on his own behalf and offered his own testimony and that of one other witness; he entered seven exhibits into the record.

At the close of the hearing, the ALJ delivered his decision from the bench, finding proved the Complaint's jurisdictional and factual allegations and ordering the revocation of Respondent's Merchant Mariner Credential.

Respondent filed a Notice of Appeal and perfected that appeal by filing an Appeal Brief. The Coast Guard filed a Reply Brief. This appeal is properly before me.

### **BASES OF APPEAL**

Respondent appeals from the ALJ's D&O, which found proved a charge of use of or addiction to the use of dangerous drugs, and ordered the revocation of Respondent's Merchant Mariner Credential. Respondent raises the following issues:

- I. The ALJ abused his discretion by denying Respondent's multiple requests for continuance;*
- II. ALJ Finding of Fact and Conclusion of Law Number 13 is not supported by substantial evidence; and*
- III. The ALJ's allowance of rebuttal testimony regarding a subsequent negative drug test result was inconsistent with law, precedent, and public policy.*



**OPINION**

## I.

*The ALJ abused his discretion by denying Respondent's multiple requests for continuance*

On appeal, Respondent argues that the ALJ abused his discretion in denying all of Respondent's requests for continuance. In so arguing, he asserts:

The ALJ's summary denial of every Appellant motion for continuance materially prejudiced him and prevented counsel from presenting an effective defense. This is aggravated by the fact that in most cases, the government either agreed with Appellant's request for continuance, or at a minimum did not oppose. Based on these facts, the ALJ denied Respondent the opportunity of a fair hearing by denying his counsel's repeated motions for continuance. The ALJ's simultaneous willingness to grant the government's lone request for continuance only strengthens the argument that these rulings were arbitrary and capricious, and thus amounted to an abuse of discretion.

[Respondent's Appeal Brief at 8] I do not agree.

"[T]he decision to continue a hearing is within the sound discretion of the Administrative Law Judge." *Appeal Decision 2624 (DOWNS)* (2001) at 12. See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

In this case, Respondent filed three motions for continuance, each of which was denied at least in part. I review the ALJ's denials of these requests for abuse of discretion.

Respondent filed his first motion for continuance on January 5, 2016, stating only that the continuance was necessary due to Respondent's sea-going schedule and counsel's need for "additional time to prepare" for the hearing. The ALJ had a conflict on the requested date and found Respondent's motion to be lacking in the clarity and basis that would justify a rescheduling of the matter. [Order dated January 6, 2016] The ALJ did not abuse his discretion in denying Respondent's request on this basis.

Respondent filed a second motion for continuance on January 23, 2016, seeking to continue the matter to an unspecified date beyond January 28, 2016. Respondent filed this

motion just five days before the hearing was scheduled to commence. At the hearing, the ALJ entertained argument on Respondent's second motion for continuance. During this argument, "as a sort of concession," Respondent agreed that he could "handle it" if the Coast Guard commenced its case on that date, provided he was afforded additional time to prepare thereafter. [Tr. Vol. I pp. 15-16]

Accordingly, the ALJ granted, in part, Respondent's second motion for continuance. [Order Memorializing Ruling Re-Scheduling Hearing, dated February 3, 2016] The ALJ did so after balancing the party's concerns as to time to prepare with considerations of efficiency, judicial economy, and the ALJ's schedule. Although the Coast Guard was allowed to present two witnesses before the matter was continued, there is nothing to indicate that Respondent suffered any prejudice from the timing of these witnesses' testimony, notwithstanding his assertion that he was unprepared to effectively cross-examination them. The ALJ did not abuse his discretion, and in any event I see no prejudice.

Respondent filed a third motion for continuance on February 3, 2016. Respondent requested that the matter be postponed to a date beyond March 30, 2016, so he would have adequate time to secure a scientist to review the Government's Laboratory Data Package.

The ALJ denied this motion, but granted a subsequent Coast Guard request for continuance. Due to the granting of the Coast Guard's request, the hearing ultimately reconvened on April 11, 2016, a date fully accommodating Respondent's final motion for continuance. Thus, Respondent suffered no harm from the denial of his final motion for continuance.

Respondent's first basis of appeal is rejected.

## II.

*ALJ Finding of Fact and Conclusion of Law Number 13 is not supported by substantial evidence*

ALJ Finding of Fact and Conclusion of Law Number 13 states:

The evidence of later-in-time negative urinalysis and drug tests do not provide sufficient evidence to counter the evidence of a positive test result for cocaine.

[D&O at 4] Respondent argues:

It is wholly inconsistent that on the one hand, the government's case relies upon the theory that the positive result presented on June 26<sup>th</sup>, 2015 was the result of ingestion of cocaine over an extended period on multiple days, producing a result ten times higher than the cutoff, yet just ten days later, the same individual produces a sample that is reported as negative. . . .

. . . Hair analysis provides a window into their conduct in the preceding forty days. As such, it is impossible to reconcile with the evidence presented how one would test positive at ten times the cutoff on a particular date and then test negative just ten days later. For this reason, the ALJ's finding of fact in paragraph 13 is not supported by substantial evidence.

[Respondent's Appeal Brief at 9-10]

Contrary to Respondent's argument, it is not impossible to reconcile the Psychomedics test and the Omega test. The Coast Guard presented testimony of Dr. Michael Shaffer, an expert witness on the subject of drug testing of hair. Dr. Schaffer explained that "we can look back and take a hair sample and it's actually like a tape recording over time, exactly what chemicals, drugs, phenobiotics an individual has been exposed to or has ingested over that period of time. Approximately a half an inch equals approximately one month." [Tr. Vol. II p. 26, at 10-15] Dr. Schaffer also testified that if a drug user stopped using cocaine, after approximately forty days, the drug would no longer be present within a hair sample of, as in this case, a centimeter or less in length. [Tr. Vol. II p. 70, lines 4-17]

Dr. Shaffer ultimately testified that the Omega test, although reported as negative, actually showed that cocaine was present in Respondent's sample, but it was not at a level high



enough to reach the cutoff that would lead to a report of a positive result. [Tr. Vol. II pp. 177-180] Thus, what Respondent portrays as an unlikely steep drop of cocaine in his sample (impliedly to zero) is not actually so steep (not actually to zero).

In short, Dr. Schaffer's un rebutted testimony supports the ALJ's conclusion that evidence of Respondent's later-in-time negative urinalysis and drug tests did not provide sufficient evidence to counter the evidence of drug use established through Respondent's initial hair drug test result. Accordingly, the ALJ did not err in reaching Finding of Fact and Conclusion of Law Number 13. Respondent's second basis of appeal is rejected.

### III.

*The ALJ's allowance of rebuttal testimony regarding a subsequent negative drug test result was inconsistent with law, precedent, and public policy*

Respondent asserts that the ALJ erred in allowing the Coast Guard's rebuttal witness to testify, over his objection, "that despite screening negative for cocaine or any other controlled substance, the [Omega] sample would likely have tested positive had it been sent to mass spectrometry." [Respondent's Appeal Brief at 10] Respondent argues that this testimony is "utterly speculative" and is "inconsistent with the science and protocol as presented in the Omega Laboratory report." [*Id.*]

Respondent entered into the record Exhibit B, the document that reported the negative Omega test result, to counter the positive Psychomedics test result. In rebuttal, the Coast Guard offered the testimony of Dr. Schaffer and Exhibit 11, the full laboratory data package for the Omega test result, which showed that although the Omega test yielded a negative result, cocaine was, in fact, detected in Respondent's hair sample, as stated in section II of this decision. The admission of this evidence was proper.

Next, the Coast Guard Investigating Officer asked Dr. Schaffer if the test would likely have produced a positive result if it had been subjected to mass spectrometry testing. [Tr. Vol. II p. 180, lines 12-14] Dr. Schaeffer answered that the result was "very close to the low positive control, so very likely it would have given you a result very similar to the low positive control."



[Tr. Vol. II, p. 180, lines 15-17] Respondent's following objection was overruled. The ALJ clearly seized upon this portion of Dr. Schaffer's testimony in reaching Finding of Fact and Conclusion of Law Number 9: "Rebuttal testimony demonstrated the Omega Lab subsequent test results could have been positive if treated as a confirmatory test, but GC/MS testing was not done so this evidence is of limited value." [D&O at 4]

When a hair sample yields a result showing the presence of drugs at levels below established cutoff levels, the associated test result can only be viewed as being negative; likening it to a positive test is improper. Further, it was improper for the Investigating Officer to elicit testimony from Dr. Shaffer as to the likely result of further testing of Respondent's hair sample.

Because the ALJ concluded that the objected-to testimony was "of limited value," [D&O at 4] it is clear that he did not consider it beyond its appropriate rebuttal value. I see no prejudice from the improper testimony. Respondent's final basis of appeal is rejected.

### CONCLUSION

The ALJ's decision was lawful, based on correct interpretation of the law, and supported by the evidence.

### ORDER

The ALJ's Decision and Order dated April 11, 2016 is AFFIRMED.

 ADM, USCG

Signed at Washington, D.C., this 6<sup>th</sup> day of April, 2018.