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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	NO. 2720
MERCHANT MARINER CREDENTIAL	:	
	:	
Issued to: DANIEL JAMES ARGAST	:	

APPEARANCES

For the Government:
LT Miah A. Brown, USCG
Coast Guard Sector Hampton Roads

CDR Christopher F. Coutu, USCG
Ms. Lineka Quijano, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent:
Mr. Owen Duffy, 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 July 7, 2016, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard issued a Decision and Order (hereinafter "D&O") finding proved the Coast Guard's

Complaint against the Merchant Mariner Credential of Respondent, Mr. Daniel James Argast, and ordering the revocation of his Merchant Mariner Credential.

The Coast Guard Complaint charged use of or addiction to the use of dangerous drugs, specifically alleging that Respondent submitted to a drug test, and that the specimen he provided tested positive for the presence of cocaine metabolites.

Respondent appeals.

FACTS

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 6]

Respondent has been employed as a "Civilian Mariner" employee of Military Sealift Command (hereinafter "MSC"), an agency of the United States Navy, since August 3, 2012. [D&O at 6] MSC has a Memorandum of Agreement with the United States Coast Guard whereby the Coast Guard recognizes that Civilian Mariners are subject to the Navy's Drug Free Workplace Program. [*Id.*] The chemical drug testing procedures used by MSC differ from the requirements of 46 C.F.R. Part 16 and the procedures set forth at 49 C.F.R. Part 40, which apply to civilian merchant mariners in general. [*Id.*] Under the Memorandum of Agreement, MSC is authorized to use alternative testing procedures. [*Id.*] Consistent with this agreement, MSC conducts its drug testing program under the technical guidelines for drug testing provided by the Department of Health and Human Services (hereinafter "HHS"). [*Id.*]

On May 27, 2015, Respondent was serving as the Second Engineer and throttleman aboard the hospital ship USNS MERCY. [D&O at 6] While departing from the Port of Pearl Harbor, Hawaii, on May 27, 2015, the USNS MERCY allided with the USS ARIZONA Memorial's boat landing platform. [D&O at 7]

The Master of the USNS MERCY reported the incident to his command, and reported that the allision potentially caused $10,000.00 or more in damage to the USS ARIZONA's

landing platform. He determined that, as the Master of the vessel and the person responsible for the overall command of its operation, he should be subject to drug and alcohol testing. [D&O at 7] He provided a urine sample for drug testing, with the vessel's Chief Mate serving as specimen collector. [*Id.*]

Upon being informed of the allision and after engaging in discussions with his staff, the Director of MSC and Commander, Military Sealift Support Command, determined that post-accident drug testing should be conducted for all involved personnel and crewmembers. [D&O at 7] Personnel were to be subjected to drug and alcohol testing based on the positions they were occupying at the time of the allision. [*Id.*] As the throttleman at the time of the allision, Respondent was among the crewmembers to be tested, along with other individuals in the Engine Control Room and those on the vessel's bridge. [*Id.*]

The Master served as the collector for a drug test specimen from the Chief Mate, who was required to provide a specimen because he was on the bridge during the allision. [D&O at 7] The Chief Mate, who was the drug workforce coordinator for the USNS MERCY, was directed by the Master to collect urine specimens for the remainder of the drug testing. [*Id.*]

On May 28, 2015, Respondent submitted a urine sample to the Chief Mate in the Chief Mate's office/stateroom. [D&O at 7] Respondent and the Chief Mate signed the Navy Urine Specimen Collection Checklist and initialed beside each of the collection procedures set forth in the document. [D&O at 8] During the collection of Respondent's urine sample, most but not all of the procedures set forth in the checklist were followed, even though both Respondent and the Chief Mate initialed each procedure. [*Id.*]

Respondent's urine sample, and others that had been collected, remained in the Chief Mate's office/stateroom until the vessel reached its next available mailing port in Fiji. [D&O at 8] The Chief Mate verified that the urine samples had not been tampered with and the samples were shipped from Fiji to a certified testing laboratory via Federal Express on June 11, 2015. [*Id.*] The samples were scheduled to arrive at the testing laboratory on June 16, 2015. [*Id.*] The

Master reviewed all of the documentation for the urinalysis testing before the samples left the vessel. [*Id.*]

The testing of Respondent's urine sample was conducted on June 18-19, 2015. [D&O at 8] Respondent's sample tested for cocaine metabolites at a level of 253 ng/ml. [*Id.*] This was a positive test result because it was above the confirmation cutoff level of 100 ng/ml established for cocaine metabolites. [*Id.*] Prolonged delays between urine sample collection and urinalysis testing typically result in a lower concentration of cocaine metabolites than testing closer in time to sample collection. [*Id.*]

Respondent's positive laboratory results were confirmed by Dr. Cooper, a Medical Review Officer. [D&O at 8] Dr. Fierro, a Medical Review Officer from the same company as Dr. Cooper, reconfirmed Respondent's positive test results. [*Id.*]

On August 6, 2015, seventy days after providing a urine sample aboard the USNS MERCY, Respondent voluntarily provided a hair specimen to LabCorp for a hair drug test. [D&O at 8] One and one-half inches of hair can provide information concerning drug use for approximately ninety days prior to the collection of the hair sample. [D&O at 8]

Respondent's August 6 hair specimen was submitted to LabCorp as a "first time collection" rather than a "confirmation screen" or a "follow-up test." [D&O at 9] Psychemedics Corporation conducts hair testing analysis for LabCorp and conducted the testing of Respondent's hair sample. [*Id.*] When reviewed as a "first time collection," the result of Respondent's hair test was "negative" for cocaine. [*Id.*] However, the test did indicate the presence of cocaine metabolites within Respondent's specimen, but at a level below the cutoff level for an initial test. [*Id.*]

PROCEDURAL HISTORY

On or before August 12, 2015, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential alleging use of or addiction to the use of dangerous drugs, and alleging that the drug test leading to the charge was administered pursuant to 46 C.F.R. Part 16

and conducted in accordance with 49 C.F.R. Part 40. The Coast Guard amended its Complaint on October 14, 2015. The Amended Complaint, though still based upon the same drug test results as alleged in the initial Complaint, alleged that the drug test supporting the charge was a non-46 C.F.R. Part 16 test, and omitted any mention of 49 C.F.R. Part 40.

On October 21, 2015, Respondent filed an Answer to the Amended Complaint wherein he admitted to all jurisdictional allegations but denied most of the factual allegations supporting the Complaint.

On October 30, 2015, Respondent filed a Motion to Dismiss the Amended Complaint, contending that the undisputed evidence showed his specimen was not properly collected. The Coast Guard opposed this motion. On November 18, 2015, upon finding that there remained facts in dispute, the ALJ issued an Order denying Respondent's Motion without prejudice.

The hearing in the matter convened on December 3-4, 2015. At the hearing, the Coast Guard offered the testimony of seven witnesses and entered twenty-four exhibits into the record. Respondent offered the testimony of six witnesses and entered ten exhibits into the record.

The parties filed post-hearing briefs on February 5 and 6, 2016. The ALJ issued his D&O on July 7, 2016.

Respondent filed a Notice of Appeal on August 1, 2016, and perfected his appeal by filing an Appeal Brief on September 23, 2016. The Coast Guard filed a Reply Brief on November 10, 2016. Accordingly, 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's findings of fact with respect to the sufficiency of the collection process and the chain of custody are not supported by substantial evidence;*

II. The ALJ erred when he concluded that the technical infractions argued by Respondent were insufficient to invalidate the test where they do not cast doubt on the chain of custody or the specimen's integrity; and

III. The ALJ abused his discretion by accepting the testimony of Dr. Cairns as corroborating the allegation that Respondent had ingested cocaine.

IV. The collection process did not comply with 46 C.F.R. Part 16 and 49 C.F.R. Part 40, as required by Appeal Decision 2704 (FRANKS).

OPINION

I.

The ALJ's findings of fact with respect to the sufficiency of the collection process and the chain of custody are not supported by substantial evidence

On appeal, Respondent takes issue with the following conclusion by the ALJ:

> Although there were some technical errors in this matter, the facts are sufficient to indicate the collection of specimens was sufficient and the custody of the samples was sufficiently maintained.

[D&O at 21] Respondent contends that many of the ALJ's findings of fact that form the foundation of this overall finding are not supported by substantial evidence. Respondent's argument centers on the qualifications of Respondent's urine sample collector, the Chief Mate, and whether the errors he committed during the collection of Respondent's urine sample required the ALJ to find Respondent's drug test result unreliable and hence insufficient to constitute substantial evidence of drug use.

Respondent specifically argues that the ALJ erred in finding that, even if the Chief Mate and Respondent were in the same testing pool, that was only a procedural error that did not warrant exclusion of Respondent's drug test; erred in several findings to the effect that the Chief Mate was a qualified and competent urinalysis collector at the time of his collection duties on May 28, 2015; and erred in finding that the Chief Mate followed most but not all of the applicable procedures set out in the checklist.

In these proceedings, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. *See* 46 C.F.R. § 5.701 and 33 C.F.R. § 20.1001. The ALJ's findings of fact will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence. *Appeal Decision 2687 (HANSEN)*, 2010 WL 8500125 (citing *Appeal Decision 2541 (RAYMOND)*, 1992 WL 12008774).

As discussed below, Respondent's attacks on the ALJ's findings of fact and determinations concerning the collection process are rejected.

A. The ALJ's determination concerning whether Respondent and the Chief Mate were in the same testing pool

The DHHS Urine Specimen Collection Handbook, Respondent's Exhibit A, provides at page 1, "A co-worker who is in the same testing pool or who works with an employee on a daily basis must not serve as a collector when that employee is tested."

Respondent argues that the ALJ erred in finding that, even if Respondent and the Chief Mate were in the same testing pool, that fact would only amount to a procedural error which would not render Respondent's drug test results unreliable.

The ALJ's finding was not exactly as Respondent claims, although Respondent's version is not far off. The ALJ found that Respondent and the Chief Mate clearly were not co-workers and were not in daily contact, but noted uncertainty about whether Respondent and the Chief Mate were in the same testing pool. [D&O at 23] He observed that the restrictions on who could serve as a collector found in Exhibit A "are apparently designed to avoid collusion among co-workers to circumvent the validity of the testing scheme and to prevent an individual from collecting their own specimen," citing regulatory history. [*Id.*] He found that there was "no evidence of collusion or attempt to circumvent the validity of the testing scheme." [D&O at 24] He further noted that the Chief Mate's specimen was separately collected by the Master [*id.*], implying that Respondent and the Chief Mate were not in the same testing pool, but he never

explicitly stated whether or not he believed that Respondent and the Chief Mate were in the same testing pool within the meaning of the Handbook. He considered other features of the situation and found nothing of concern, and returned twice to the integrity of the specimens: that they were found to be intact when received at the testing lab, and that there was no evidence of any tampering with the bags or seals for the specimens. [*Id.*] He ultimately concluded that "the Coast Guard's evidence was sufficient to avoid summary decision or dismissal at the close of the Coast Guard's case." [D&O at 25] He thus implicitly rejected Respondent's contention that the Chief Mate should have been disqualified as collector, or at least rejected the idea that the Chief Mate as collector was a fatal flaw in the evidence of the test results. In short, it is fair to say the ALJ found that, even if Respondent and the Chief Mate were technically in the same testing pool, that fact did not render Respondent's drug test results unreliable.

Respondent points out that the Handbook mandates an employee who is in the same testing pool "must not" serve as the collector of a urine specimen. Respondent argues, "There is good reason for the prohibition because, without it, there is a presumption of impropriety and substantial questions are raised as to the credibility and reliability of the evidence regarding the chain of custody over the specimen." [Respondent's Appeal Brief at 14]

I see no basis for the notion that there is an inherent presumption of impropriety if the collector and the employee providing the specimen are in the same testing pool. To the extent that "substantial questions" might be raised if the collector and the employee providing the specimen are in the same testing pool, the ALJ has addressed those questions. I find no error in his conclusion that the relationship between Respondent and the collector in this case did not render Respondent's drug test results unreliable.

B. The ALJ's finding that the Chief Mate was a qualified urinalysis collector.

Respondent argues that the ALJ's finding that the Chief Mate was a certified urine collector is not supported by substantial evidence, in that a collector is required to have refresher training every five years according to the drug testing guidelines, Exhibit A, and the Chief Mate's training had been more than five years before the collection of Respondent's specimen. MSC's drug free workplace program manager, who was in charge of drug testing for MSC,

testified that the five-year retraining requirement had been waived because it was not feasible in light of MSC's afloat operations and forward deployments around the world; the guidelines had been tailored to MSC. [Tr. Vol. I at 69-70, 85] The program manager testified that both a training officer and another management official had authorized the waiver before he arrived at his position, although he did not know their names and the waiver was not documented, and higher management concurred with the waiver. [Tr. Vol. I at 70, 73, 86] Given this testimony, the record contains substantial evidence to support the ALJ's conclusion that the Chief Mate was properly qualified to collect Respondent's urine specimen.

Respondent also contends that the ALJ's finding that the Chief Mate had participated in twenty sample collections prior to the collection of Respondent's urine sample on May 28, 2015 is not supported by substantial evidence because he had merely witnessed them, and had only assisted with three or four. Further, Respondent contends that "the record is rife with missteps" on the part of the Chief Mate, and, "when taken all together, they clearly demonstrate that [the Chief Mate] did not fully understand the import of his job as specimen collector for purposes of drug testing and, therefore, he was not qualified to collect specimens for purposes of drug testing." [Respondent's Appeal Brief at 17]

The ALJ determined that the Chief Mate was a certified urinalysis collector, having completed training, given that the five-year retraining requirement had been waived; he rejected the notion that anything else was required, focusing instead on the collection procedures actually followed.[1] [D&O at 20-21] I agree with this determination.

C. The ALJ's finding that the Chief Mate followed most but not all of the applicable collection procedures.

Respondent contends that the ALJ's finding that the Chief Mate followed most but not all of the specimen collection procedures set forth in the Navy's checklist is not supported by substantial evidence, rather that substantial evidence supports the conclusion that the Chief Mate

[1] The record supports Respondent's assertion that the ALJ erred in finding that the Chief Mate had collected at least twenty samples prior to collection of Respondent's sample; the Chief Mate testified that he "did not collect any" urine samples prior to collecting the post-accident samples following the allision, but had witnessed twenty individual collections. [Tr. Vol I at 179] This was harmless error, not affecting the ALJ's ultimate determination.

did not follow any of the collection procedures. Respondent cites testimony by his witnesses, which differed from the Chief Mate's testimony. The ALJ essentially accepted the Chief Mate's testimony.

The ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record; "where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence." *Appeal Decision 2711 (TROSCLAIR)* at 8, 2015 WL 9818203 at 5 (quoting *Appeal Decision 2616 (BYRNES)* at 6, 2000 WL 33965629 at 3).

The Chief Mate's testimony was not inherently incredible; the ALJ's finding was not clearly erroneous or arbitrary and capricious.

D. Conclusion concerning the ALJ's findings of fact with respect to the sufficiency of the collection process and the chain of custody.

Returning to Respondent's contention that the ALJ's overall finding, that collection and custody of specimens were sufficient, was erroneous, the ALJ arrived at that finding as follows:

> [The Chief Mate] and Respondent testified that they reviewed and initialed the checklist and Respondent initialed the tamper proof seals for his specimen. The evidence shows Respondent's specimen was placed in a plastic bag and sealed. After collection of the specimens, [the Chief Mate] put the specimens in a box and placed them in the refrigerator in his stateroom. . . . The evidence shows that the specimens were in sealed packages consistent with Section 5.4 of the HHS Guidelines and MSC Procedures and remained intact prior to shipment and were verified to be intact on arrival at the lab. Although there were some technical errors in this matter, the facts are sufficient to indicate the collection of specimens was sufficient and the custody of the samples was sufficiently maintained. Technical infractions such as those argued by Respondent are insufficient to invalidate a test where they do not cast doubt on the chain of custody or the specimen's integrity.

[D&O at 21 (citing *Appeal Decision 2688 (HENSLEY)*, 2010 WL 4607368)]

The ALJ was correct that any deviations from the specimen collection procedures were minor; he did not abuse his discretion in finding that they did not affect the reliability of Respondent's drug test. The ALJ's determinations regarding the reliability of the drug test

results are supported by substantial evidence and are not clearly erroneous. I will not disturb them.

II.

The ALJ erred when he concluded that the technical infractions argued by Respondent were insufficient to invalidate the test where they do not cast doubt on the chain of custody or the specimen's integrity

Respondent argues that the ALJ erred in failing to find that there "was a compromise of the custody of the urine specimens while they remained on board the USNS MERCY from May 28, 2015, prior to shipment from Fiji on June 11, 2015, to the U.S. Army Lab." [Respondent's Appeal Brief at 19] Respondent contends that in finding "no persuasive evidence showing Respondent's specimen was in anyway adulterated or tampered with and no evidence that would invalidate the custody and control procedures leading up to the specimen's shipment" [D&O at 21], the ALJ improperly required Respondent to demonstrate that the specimen was adulterated or tampered with. [Respondent's Appeal Brief at 19-20] Respondent further contends that "the specimen should be deemed unreliable if Respondent demonstrated that a proper chain of custody and control was not maintained." [Respondent's Appeal Brief at 20]

Respondent asserts that the evidence shows the "rigid chain of custody" mandated by the HHS drug testing guidelines was not maintained with respect to the storage of Respondent's specimen, in that the Chief Mate did not lock his stateroom, where the specimens were stored. [Respondent's Appeal Brief at 20-21]

Respondent cites no case law in support of his position that a specimen automatically should be deemed unreliable if a rigid chain of custody and control was not maintained. To the contrary, "Each case must be considered on its own merits. The chain of custody must be strong enough so that, on the record as a whole, the decision of the arbitrator can be found to be supported by substantial evidence." *Frank v. Department of Transportation,* 35 F.3d 1554, 1557 (Fed. Cir. 1994).

The ALJ noted that "there was some testimony that the stateroom was not locked at all

times," but, as set forth above, it was uncontroverted that Respondent initialed the tamper-proof seals for his specimen, it was placed in a plastic bag and sealed, and the sealed packages were verified to be intact when they arrived at the testing lab. As recited in the last section, the ALJ found that "the custody of the samples was sufficiently maintained," and noted that technical infractions do not invalidate a test where they do not cast doubt on the chain of custody or the specimen's integrity, citing *Appeal Decision 2688 (HENSLEY)*, 2010 WL 4607368. [D&O at 21]

Again, it is well settled that the decision of the ALJ will only be reversed if it is arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g., Appeal Decision 2717 (CHESBROUGH)* at 10, 2017 WL 6941489 at 7. The record shows that the ALJ considered the evidence presented by Respondent but ultimately determined that the storage errors that occurred were insufficient to undermine the reliability of Respondent's drug test result. I find no error in his acceptance of the test despite technical errors.

III.

The ALJ abused his discretion by accepting the testimony of Dr. Cairns as corroborating the allegation that Respondent had ingested cocaine.

Respondent argues that Dr. Cairns's testimony, that Respondent must have ingested cocaine in the ninety-day period prior to August 6, 2015,[2] is inconsistent and contradicts the fact that his lab initially reported that Respondent's hair sample was determined to be negative for all drugs.

Respondent offered Exhibit I, a document that reported as negative the results of a voluntary hair sample that Respondent submitted to LabCorp for drug testing on August 6, 2015, to rebut the evidence of drug use provided by the results of the May 28, 2015, urinalysis test. In response, the Coast Guard offered the testimony of Dr. Cairns. Accompanying this testimony, the Coast Guard offered Exhibits 23 and 24, documents providing more detailed information

[2] Respondent's argument actually attributes to Dr. Cairns' testimony "that the Respondent must have ingested cocaine in the 90-day period prior to May 28, 2015," but this is simply a mistake, as the testimony was consistently that the 90-day period ended on August 6. [Tr. Vol. II at 133, 137]

concerning the testing of Respondent's LabCorp hair sample, which were explained by Dr. Cairns. Exhibit 24 revealed that cocaine metabolites were found within Respondent's hair sample, but at a level below the cutoff level. This is not contradiction of the reported negative result, but further information about it.

Respondent further argues that the ALJ abused his discretion in finding that the testimony of Dr. Cairns corroborated evidence of drug use on the part of Respondent. He contends that because the Doctor's testimony is not based on "scientific certainty" but rather "only a high probability," the ALJ should not have accepted that testimony as providing evidence of drug use. [Respondent's Appeal Brief at 23] This is a reference to the following assessment by the ALJ:

> I find Dr. Cairns testimony to be substantial, persuasive evidence showing an indication of cocaine use. The voluntary hair test presented by Respondent when considered in the light of Dr. Cairn's testimony *corroborates* the evidence of a positive result from the urinalysis test from the May 28, 2015, collection on the USNS MERCY.

(emphasis added) [D&O at 29]

The notion that "high probability" is never associated with "scientific certainty" is specious. Dr. Cairns testified that the detailed analysis of Respondent's hair test results indicated a "high probability that the donor sample contains cocaine and metabolites at approximately 2 nanograms per ten milligrams of hair." [Tr. Vol. II at 136] He also testified that, in specific circumstances defined by government regulations, samples are analyzed with no cutoff. [Tr. Vol. II at 144-45, 160, 162] Such an analysis uses mass spectrometry, which provides a quantitatively accurate result, as opposed to "approximately 2 nanograms." [Tr. Vol. II at 160]

However, additional information about a negative test result must be used with care. *Appeal Decision 2718 (LEWIS)*, 2018 WL 1905131, teaches that evidence from a hair drug test reported as negative but showing the presence of dangerous drugs within the hair sample cannot be viewed as a positive drug test, *id.* at 9, 2018 WL 1905131 at 5; yet it can be used to rebut a respondent's claim based on the negative hair test that he is not a user of dangerous drugs, *id.* at 8, 2018 WL 1905131 at 5. Corroborating the Government's case in chief is the other side of the coin of rebutting Respondent's defense (the later hair test). Respondent's evidence concerning

the August 6, 2015, hair test opened the door to the Government's presentation of Dr. Cairns's testimony. The ALJ's characterization of that testimony as corroboration was not error, and I see no abuse of his discretion.

IV.

The collection process did not comply with 46 C.F.R. Part 16 and 49 C.F.R. Part 40, as required by Appeal Decision 2704 (FRANKS).

Respondent asserts that the ALJ erred by failing to enforce the requirement, elaborated in *Appeal Decision 2704 (FRANKS)*, 2014 WL 4062506, that the collection process for drug testing comply with 46 C.F.R. Part 16 and 49 C.F.R. Part 40. Instead, he complains that the ALJ found that *FRANKS* did not apply.

This case is not predicated on the results of a drug test authorized under 46 C.F.R. Part 16; the drug test here was not conducted under the procedures set forth at 49 C.F.R. Part 40 and is not a so-called "DOT drug test." In these proceedings:

> The mere fact that the specimen collection was for a purpose other than one authorized and subject to Coast Guard regulations is not reason to exclude the evidence. . . . as long as the evidence is relevant and material, and not inherently incredible, it can be considered in a suspension and revocation hearing. It is the province of the Administrative Law Judge to determine whether it is reliable and probative and to determine the weight that the evidence will be accorded.

Appeal Decision 2560 (CLIFTON) at 7, 1995 WL 17010110 at 6 (approving admission of evidence of a separate drug test result elicited on cross-examination of the respondent). Hence, a non-DOT drug test may be used to establish substantial evidence of drug use in these proceedings, provided that the test and its associated positive result are found to be reliable. *See Appeal Decision 2704 (FRANKS)* at 11, 2014 WL 4062506 at 9 ("a drug test not complying with Part 16 may be used to establish drug use when the drug test is not compelled by the Coast Guard's drug testing regulations").

It is true that the ALJ made statements suggesting that *FRANKS* did not apply (*FRANKS* not directly on point for this matter [D&O at 12]; the limitations of *FRANKS* may not apply

[D&O at 15]). Yet he also applied *FRANKS* to this case and found that the drug test "satisfies the concerns of *FRANKS* . . . , that the mariner test be directed for one of the permissible bases . . . because it was a properly required post-casualty drug test under [both 46 C.F.R. Part 16 and MSC/HHS guidelines]." Hence any statement he made about whether *FRANKS* applied is of no consequence.

FRANKS states, in the context of a drug test purporting to be required by 46 C.F.R. Part 16, that "a government-mandated drug test must be both properly ordered (in accordance with 46 C.F.R. Part 16) and properly conducted (in accordance with 49 C.F.R. Part 40). If it is not, the test cannot form the basis for suspension and revocation proceedings." *FRANKS* at 9, 2014 WL 4062506 at 7. The holding of *FRANKS* is the first part of that statement: a government-mandated drug test must be properly ordered (in accordance with 46 C.F.R. Part 16) in order to form the basis for suspension and revocation proceedings. The ALJ faithfully adhered to that holding.

The second part of the statement in *FRANKS*, that a government-mandated drug test must be properly conducted in order to form the basis for suspension and revocation proceedings, is dictum in *FRANKS*, but is the subject of part I of this opinion. The essence of the holding in part I is that a drug test must be properly conducted, not in the sense of perfect adherence to specimen collection and custody protocols, but in the sense of establishing that the sample tested was provided by the mariner in question and its integrity had not been compromised. *Accord, Appeal Decision 2688 (HENSLEY)* at 6-7, 2010 WL 4607368. As noted in part II of this opinion, the ALJ applied this established principle and, as factfinder, found the test in this case reliable.

As the ALJ noted and as alluded to at the beginning of this opinion, "[T]he Coast Guard approved MSC's request to use generally equivalent procedures pursuant to a Memorandum of Agreement with MSC to satisfy both military requirements and the interests of safety at sea." [D&O at 12] Accordingly, the literal terms of 46 C.F.R. Part 16 and 49 C.F.R. Part 40 do not apply. Nevertheless, the *FRANKS* principles apply: a government-mandated drug test must be both properly ordered and properly conducted—proper as to both its "why" and its "how."

In summary, the ALJ considered the "why" of the testing in this case and found that the test was proper under 46 C.F.R. Part 16 as well as under MSC/HHS guidelines, as a post-casualty drug test. [D&O at 16] I agree with this finding.[3] The discussion in the first two sections of this opinion addressed the "how" of the testing in this case; any divergences from the standards of the DHHS Urine Specimen Collection Handbook, as well as 49 C.F.R. Part 40, were technical, did not cast doubt on the chain of custody or the specimen's integrity, and did not undermine the reliability of Respondent's drug test results.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The Order imposed by the ALJ, revoking Respondent's Merchant Mariner Credential, is AFFIRMED.

ORDER

The ALJ's Decision and Order dated July 7, 2016, is AFFIRMED.

ADM, USCG
VICE COMMANDANT

Signed at Washington, D.C., this 5 day of NOV, 2018.

[3] The ALJ also found that the test was employer-directed, which might relieve it of Part 16 requirements. However, the employer in this case is the government. As the ALJ noted, the test satisfies the concerns of *Franks* that a test be directed for a permissible reason under 46 C.F.R. part 16.