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. 2728
MERCHANT MARINER CREDENTIAL	:	
	:	
	:	
Issued to: MICHAEL JOHN DILLON	:	

APPEARANCES

For the Government:
Lineka N. Quijano, Esq.
LT Jorge I. Santiago

For Respondent:
Sean T. Pribyl, Esq.[1]
Zachary J. Wyatte, Esq.

Administrative Law Judge:
Dean C. Metry

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

On September 6, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard issued findings and conclusions from the bench, finding the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Michael John Dillon proved, and ordering the revocation of Respondent's credential.

[1] Mr. Pribyl appeared on Respondent's behalf at hearing but withdrew from representation on October 26, 2018, after filing Respondent's Appellate Brief. Mr. Wyatte, of Mr. Pribyl's former law firm, currently represents Respondent.

The Coast Guard complaint charged Respondent with use of a dangerous drug, based upon a positive result in a government-mandated periodic drug test.

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. [CG Ex. 1].

On January 29, 2018, Respondent submitted to a government-mandated periodic urine drug test, pursuant to an application for raise-in-grade of his credential. [Tr. Vol. II at 144.] Pursuant to regulation, the sample provided by Respondent was a "split sample": the urine sample was divided by the collector into two separate specimen containers—the primary specimen and the split specimen. [Tr. Vol. I at 34-35, 86-90.] Respondent signed a Federal Drug Testing Custody and Control Form (DTCCF) for provision of his urine specimen. [Tr. Vol. II at 144.]

Respondent's primary urine specimen was tested on January 30 by Alere Toxicology. That test returned a positive result for marijuana metabolites. [Tr. Vol. II at 144.] Results of the test were forwarded to a medical review officer (MRO). [*Id.*]

On January 31, 2018, Respondent called the MRO to inquire about the results of his drug test. [Resp. Ex. A; Tr. Vol. I at 200-04.] Respondent initiated this call because he was eager to receive the test results and complete his application for raise-in-grade. [Tr. Vol. I at 176.]

The MRO informed Respondent that the test had come back positive for marijuana metabolites. [CG Ex. 12; Tr. Vol. I at 106-07, 204.]

On February 1, 2018, the MRO completed "Step 6" of the DTCCF associated with Respondent's urine sample, which reports the result of the test. [CG Ex. 11.] The MRO checked

the box marked "POSITIVE for:" but did not enter any information in the blank line provided for identification of the implicated substance. [*Id.*]

At no time did Respondent request a split sample test, and no split sample test has been conducted.

PROCEDURAL HISTORY

The Coast Guard filed a complaint against Respondent's Merchant Mariner Credential on February 12, 2018. The complaint alleged use of a dangerous drug, based upon the positive result of the January 29 periodic drug test.

Respondent submitted an answer to the complaint on March 9, 2018, admitting all jurisdictional allegations and denying all factual allegations.

Hearing was held on September 5 and 6, 2018, in Miami, Florida, before the Coast Guard ALJ. At hearing, Respondent argued for dismissal of the complaint, with prejudice, for the Coast Guard's failure to establish a *prima facie* case of drug use against Respondent. [Tr. Vol. II at 43, 51, 124.] Respondent's primary argument, which he renews on appeal, was that, because the MRO failed to notify Respondent of his right to request a split sample test, the January 29 drug test was not carried out in substantial compliance with 49 CFR Part 40, and cannot be used to support a *prima facie* case of drug use against Respondent.

Because the untested split sample was still available, the ALJ suggested that Respondent could request a continuance in order to test the split sample, curing any due process concerns arising out of the MRO's failure to inform Respondent of his right to request a split sample test. [Tr. Vol. II at 41-43, 49-51, 109.] Respondent rejected this suggestion and did not ask for a continuance. [*Id.*]

The ALJ, with the parties' consent, ruled from the bench on September 6, 2018. He found the charge of use of a dangerous drug proved, and imposed the mandatory sanction of revocation. [Tr. Vol. II at 147.] An Order memorializing that decision was issued on September

11, 2018. Respondent appealed.

Respondent perfected his appeal by filing an appellate brief on October 26, 2018. The Coast Guard filed a reply brief on December 8, 2018, and this appeal is properly before me.

BASES OF APPEAL

Respondent raises the following issues on appeal:

I. *Error of law, in finding that the Coast Guard established a* prima facie *case of drug use.*

II. *Error of law, in concluding that the MRO's failure to offer a split specimen test was curable at hearing.*

OPINION

I.
Error of law, in finding that the Coast Guard established a prima facie *case of drug use.*

Revocation is a mandatory sanction where it is shown that a credentialed mariner has been a user of, or addicted to, a dangerous drug. 46 U.S.C. § 7704(b). Where a mariner fails a drug test mandated by 46 CFR Part 16, the mariner is presumed to be a user of dangerous drugs. 46 CFR § 16.201(b). In these suspension and revocation proceedings, the Coast Guard may establish a rebuttable presumption of drug use by introducing evidence to support a *prima facie* case of drug use. *Appeal Decision 2560 (CLIFTON)* at 8, 1995 WL 17010110 at 7. A *prima facie* case has three elements: (1) the respondent was the person who was tested for dangerous drugs, (2) the respondent failed the test, and (3) the test was conducted in accordance with Coast Guard drug testing regulations at 46 CFR Part 16 and applicable Department of Transportation (DOT) regulations at 49 CFR Part 40. *Id.; Appeal Decision 2704 (FRANKS)* at 9, 2014 WL 4062506 at 7 (clarifying that, to establish a *prima facie* case, a government-mandated test must be both properly ordered, under Part 16, and properly conducted, under Part 40). If the Coast Guard presents substantial, reliable, and probative evidence as to these three elements, a presumption of drug use has been established, and the burden shifts to the respondent to provide evidence rebutting the presumption of drug use. *Appeal Decision 2603 (HACKSTAFF)* at 4, 1998 WL 34073115 (citing *Appeal Decision 2592 (MASON)* at 5, 1997 WL 33480820 at 4). "If

the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone." *Id.* (citing *Appeal Decision 2555 (LAVALLAIS)* at 3, 1994 WL 16009226 at 2).

In this case, the ALJ concluded that the January 29, 2018, drug test established a rebuttable presumption of drug use against Respondent. Respondent appeals that conclusion, arguing that the ALJ erred in finding that the Coast Guard had established the third prong of the *prima facie* case—that the test was conducted in accordance with 46 CFR Part 16 and 49 CFR Part 40. Respondent asserts that, because evidence as to the third prong of the *prima facie* case was lacking, the ALJ ought to have dismissed the complaint.

The ALJ found that the MRO who verified a positive result in the disputed drug test did not comply with all the particulars of 49 CFR Part 40. Specifically, the ALJ found that the MRO failed to indicate, at Step 6 of the DTCCF, which substance(s) Respondent's urine sample tested positive for, as required by 49 CFR § 40.129(c), and failed to offer Respondent the option to request a test of the split sample urine specimen, as required by 49 CFR § 40.153. [Tr. Vol. II at 145.] The ALJ ultimately concluded that the MRO's errors were curable and technical, and therefore those errors did not preclude the showing of a *prima facie* case of drug use against Respondent. [*Id.* at 145-46.]

While compliance with applicable regulations is an essential element of a *prima facie* case of drug use, not every violation of 46 CFR Part 16 or 49 CFR Part 40 will prevent the Coast Guard from establishing a *prima facie* case. "Where technical infractions of the procedures in 46 CFR Part 16 and 49 CFR Part 40 occur, the testing procedure is not vitiated where the infractions do not breach the chain of custody or violate the specimen's integrity." *Appeal Decision 2614 (WALLENSTEIN)* at 5, 2000 WL 33965627 at 3 (citing *Appeal Decision 2541 (RAYMOND)*, 1992 WL 12008774, *aff'd*, NTSB Order No. EM-175, 1994 WL 475821). *Cf. Gallagher v. Nat'l Transp. Safety Bd.*, 953 F.2d 1214 (10th Cir. 1992) (holding that where there was no evidence that the integrity of a blood sample was actually compromised by a procedural error that occurred during sample collection, results derived from the sample could properly be relied upon to support the revocation of a pilot's airman certificate).

This principle has been repeatedly affirmed on appeal by the National Transportation Safety Board (NTSB):

> While the DOT regulations regarding drug-testing procedures set forth extremely specific requirements that are designed to ensure the accuracy of drug test results, we have previously recognized that a *de minimus* procedural violation may not automatically render a drug test result invalid. In *Commandant v. Raymond*, NTSB Order No. EM-175, 1994 WL 475821, we affirmed the Coast Guard Commandant's conclusion that the results of a drug test were valid, "notwithstanding several departures from the literal requirements of the [DOT] regulations on proper specimen collection and handling procedures." *Id.* at 2. We also rejected the argument that any deviation from DOT drug testing requirements must render the drug test invalid. *Id.* at 2 n. 3; *see also Commandant v. Sweeney*, NTSB Order No. EM-176 at 5, 1994 WL 475814 at 2 (stating that, "we are unconvinced that there can be no de minimus or irrelevant breaches of the [drug-testing] guidelines or the regulations based on them"). In addition, we have previously suggested that respondents who seek to invalidate the results of a drug test after the Administrator has presented a *prima facie* case on the authenticity of the specimen and accuracy of the test should produce evidence, "circumstantial or otherwise, which would support a finding that the integrity of [the] specimen [was] compromised." *Administrator v. Corrigan*, NTSB Order No. EA-4806 at 6 (1999), 1988 WL 637945 at 3.

Administrator v. Flores, NTSB Order No. EA-5279 at 7-8, 2007 WL 1233533 at 3 (footnote omitted; alterations in original).[2]

Here, we have two procedural violations. The first, the MRO's failure to indicate which metabolite was detected in Respondent's urine sample on the DTCCF, is of the category of minor, technical infractions that do not jeopardize the integrity of the drug testing protocols. There is no factual dispute as to what substance Respondent's urine tested positive for: the test came back positive for a marijuana metabolite (THC), at a concentration above the 50 ng/ml screening cut-off level. [CG Exs. 6, 9; Tr. Vol. I at 70-71.] Respondent was informed by the MRO that the sample had tested positive for marijuana. [CG Ex. 12; Tr. Vol. I at 107, 204.] The MRO indicated, on the Form CG-719P documenting the final result of Respondent's periodic

[2] *Raymond* and *Sweeney* were appeals from Commandant's Decisions in merchant mariner suspension and revocation proceedings. *Flores* and *Corrigan* were brought against a pilot and an aviation mechanic, respectively, by the Federal Aviation Administration, in relation to that agency's drug testing requirements. 49 CFR Part 40 provides testing procedures for government-mandated drug testing in both the maritime and aviation modes, and, as demonstrated by the NTSB quotation, when assessing the validity of a drug test conducted under either authority, common principles of interpretation apply. *See Flores* at 8 n. 7.

drug test, that the sample was verified "Positive for Marijuana." [CG Ex. 2.] The record is clear and unambiguous. The MRO's failure, after marking Step 6 of the DTCCF "positive," to indicate which substance was implicated, was an immaterial administrative oversight.

The second procedural violation warrants more analysis. The ALJ found that the MRO failed to inform Respondent of his right to request a split sample test, as required by 49 CFR § 40.153. Respondent maintains that he only learned of his right to request a split sample test from his attorney, during the preparation of his defense. [Respondent's Appellate Brief at 27; Tr. Vol. I at 212-13.]

This deviation cannot fairly be categorized as a minor or administrative oversight. The mariner's right to request a split specimen test must be protected, as an integral component of the 49 CFR Part 40 drug testing procedures. This is illustrated by the requirement that, if a split specimen test is requested following a positive result, and no split sample is available, the drug test must be cancelled, and another test performed under direct observation. *See* 49 CFR §§ 40.187(e), 40.201(e).

At hearing, in light of Respondent's assertion that no split sample test was offered, the ALJ proposed a cure: because the reserve urine sample was preserved and available for testing, Respondent could request a continuance in order to obtain a split specimen test.[3] [Tr. Vol. II at 41-43, 49-51, 109.] Respondent declined the ALJ's proposal, arguing that there is no regulatory provision for such an *ex post facto* cure, some seven months after the disputed positive test result. [Tr. Vol. II at 49-51, 109.] In Respondent's view, the MRO's failure to notify Respondent of his right to have the split specimen tested was an incurable error, and prevented the Coast Guard from establishing a *prima facie* case of drug use, meriting dismissal of the Coast Guard complaint, with prejudice. [*Id.* at 43, 51, 124-25, 133.]

There are several Appeal Decisions that consider procedural testing errors that are more comparable to the MRO's failure to notify Respondent of the split sample testing protocol than

[3] Respondent had testified he would have requested the split sample be tested at the time of the MRO interview, had the test been offered. [Tr. Vol. I at 204-05.]

to a minor clerical oversight. In *Appeal Decision 2621 (PERIMAN)*, 2001 WL 34080160, the respondent mariner raised several Part 40 compliance issues on appeal, including a claim that the MRO had not properly notified him of his right to request a split specimen test.[4] The Appeal Decision found that various questions raised about compliance with 49 CFR Part 40 required remand to the ALJ for further development of the record.

In *Appeal Decision 2668 (MERRILL II)*, 2007 WL 3033593, the MRO verified a positive drug test result without first discussing that result with the respondent mariner, contrary to the provisions of 49 CFR Part 40. "The regulatory failure here, that the MRO verified Respondent's test result as positive after attempting to contact Respondent for seven days, rather than waiting the fourteen-day period required by 49 CFR § 40.33(c)(5), is clearly a technical error that did not breach the chain of custody or violate the integrity of Respondent's urine specimen." *MERRILL II* at 13. *MERRILL II* affirmed the ALJ's conclusion that the Coast Guard had established a *prima facie* case of drug use, despite the MRO's failure to fully comply with Part 40. *Id.* at 8.

In *Appeal Decision 2537 (CHATHAM)*, 1992 WL 12008770, the results of the respondent's drug test were transmitted telephonically, in violation of the then-effective 49 CFR § 40.29(g)(4), which was intended to protect the confidentiality of drug test results. The ALJ's conclusion that this regulatory breach did not invalidate the test results was upheld on appeal: "Notwithstanding the technical deviation from the regulation, in the case herein, the collection process, chain of custody, integrity of the urine specimen and reliability of the drug testing procedures employed were neither hampered nor invalidated. Accordingly, this technical violation constitutes harmless error." *CHATHAM* at 7-8, 1992 WL 12008770 at 5.

As noted above, the split specimen testing provisions, found at Subpart H, are an integral part of 49 CFR Part 40. However, an MRO's failure to notify a mariner of the right to request a split specimen test during the verification interview does not automatically invalidate an otherwise compliant testing process, absent any breach of the chain of custody or violation of the specimen's integrity. Where the split specimen remains sealed, preserved, and available for testing, as in this case, the only apparent negative consequence of the MRO's failure is a delay in

[4] The split sample was no longer available at the time of the *PERIMAN* hearing.

split specimen testing. Such a delay is an inconvenience, but it does not justify the invalidation of an otherwise valid drug test, nor the summary dismissal of suspension and revocation proceedings based upon such a drug test.

Here, evidence was introduced to show that the chain of custody was intact, and the integrity of the specimen had been maintained. The ALJ's proposal, to continue the hearing and allow Respondent to obtain confirmatory split specimen testing at an independent laboratory, remedied the MRO's failure to notify Respondent of that option. When that proposal was rejected by Respondent, the ALJ did not err in finding that, because the Coast Guard had introduced substantial evidence as to the three elements of a *prima facie* case, a presumption of drug use was established.

II.

Error of law, in concluding that the MRO's failure to offer a split specimen test was curable at hearing.

Respondent argues that the MRO's failure to offer a split sample test was not curable at hearing, and that the ALJ erred by concluding otherwise. Respondent contends that, by offering to continue the hearing to allow Respondent to request testing of the preserved split specimen, the ALJ exceeded his authority and "legislated from the bench." [Respondent's Appellate Brief at 27.] Respondent further asserts that the Coast Guard could have discovered the MRO's failure prior to hearing, and then taken action to cure it. [*Id.* at 30-31.]

Coast Guard suspension and revocation proceedings are governed by the regulations promulgated in 33 CFR Part 20 and 46 CFR Part 5.

> Suspension and Revocation proceedings are remedial, not penal in nature, fix neither criminal nor civil liability, and are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. The Coast Guard has enacted regulations to protect the due process rights of individuals during the administration of their cases and those regulations are to be construed so as to obtain a just, speedy, and economical determination of the issues presented.

Appeal Decision 2693 (CONTRERAS) at 9, 2011 WL 6960127. *See also* 46 CFR §§ 5.5, 5.51, and *Appeal Decision 2689 (SHINE)* at 16, 2010 WL 4607369.

A suspension and revocation hearing "is presided over by, and conducted under the exclusive control of, an ALJ," in accordance with applicable regulation. 46 CFR § 5.501. "The ALJ shall regulate and conduct the hearing so as to bring out all the relevant and material facts and to ensure a fair and impartial hearing." *Id.* In order to fulfill this duty, Coast Guard ALJs are endowed with "all powers necessary to the conduct of fair, fast, and impartial hearings." 33 CFR § 20.202. These powers include, but are not limited to, those listed in § 20.202 and in the rest of Part 20, including the authority to schedule and reschedule hearings. 33 CFR § 20.704.

Respondent argues that absence of any statute or regulation specifying a procedural cure for the MRO's failure to notify a mariner of the right to request a split specimen test demonstrates "[t]he clear intent of Congress [] that the MRO, and only the MRO, could offer the split sample test to the Respondent at the time the results of the drug test were provided." [Respondent's Appellate Brief at 29.] Therefore, Respondent asserts, "Neither the ALJ nor the Coast Guard are empowered by Congress to offer a split sample to an employee," and the ALJ's suggestion to the contrary was improper. [*Id.* at 26.]

Respondent's assertion that the MRO, and only the MRO, can notify a mariner of the right to request a split sample test is without legal basis. A review of relevant statutes, regulations, and regulatory history does not support Respondent's assertion that only the MRO is authorized to offer Respondent a split specimen test.

46 U.S.C. § 7101(i) mandates that the Coast Guard require applicants for merchant marine officer credentials to be tested for use of dangerous drugs.[5] 46 CFR § 16.220 regulates the tests mandated by § 7101(i), which are termed "periodic testing requirements." Respondent's test at issue here, taken in support of his application for raise-of-grade of his

[5] The general statutory authority for other federally-mandated drug testing of merchant mariners is found at 46 U.S.C. § 2103, which grants the Coast Guard "general superintendence over the merchant marine of the United States and of merchant marine personnel." *See Transp. Inst. v. U.S. Coast Guard*, 727 F. Supp. 648, 660-61 (D.D.C. 1989) (affirming Coast Guard regulatory authority to mandate merchant mariner drug testing, citing, inter alia, 46 U.S.C. §§ 2103, 3306, 7101).

merchant mariner credential, is of this type. Neither § 7101(i) nor any other statute provides any specifics as to drug testing procedure, and no statute makes reference to the role of the MRO. Nor does any federal statute mandate split sample testing for merchant mariners.[6]

Having dispensed with Respondent's claim that Congress intended for the MRO to hold the exclusive power to offer a split specimen test, we next look to the governing DOT and Coast Guard regulations. As cited earlier in this opinion, 49 CFR § 40.153 requires, in the case of a positive drug test result, that the MRO inform an employee of the right to have a split specimen test, and that the request for such a test must be made within 72 hours. 49 CFR § 40.171 provides the procedure by which an employee can request a split specimen test, and allows for situations where an untimely request must be honored: "As the MRO, if you conclude from the employee's information that there was a legitimate reason for the employee's failure to contact you within 72 hours, you must direct that the test of the split specimen take place, just as you would when there is a timely request." § 40.171(b)(2). Nothing in 49 CFR Part 40 precludes authorization of a split sample test weeks or months after the employee's 72-hour window to request a test as of right; quite the contrary. *See* 65 Fed. Reg. 79462, 79499 (Dec. 19, 2000) ("MROs sometimes authorize tests of the split specimen well after the 72-hour period has elapsed (e.g., weeks or months later). Nothing in the rule precludes an MRO from doing so.").

In addition to prescribing the procedures for transportation employee drug testing, 49 CFR Part 40 also identifies certain errors that require the cancellation of a drug test. Certain enumerated "fatal flaws" always require cancellation of a drug test, §§ 40.199, 40.201, and other "correctable flaws" may require cancellation, if left uncorrected, § 40.203. The regulations do not identify an MRO's failure to inform the test subject of the right to request a split specimen test as either a fatal or a correctable flaw.

If a flaw is correctable, corrective action is compulsory, as 49 CFR § 40.205(b) provides:

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[6] The Omnibus Transportation Employees Testing Act of 1991 mandated split sample drug testing for employees performing safety-sensitive functions in the railroad, aviation, motor carrier, and mass transit industries. Pub. L. No. 102–143, 105 Stat. 917 (Oct. 28, 1991) (codified as amended at 49 U.S.C. §§ 5331 (mass transit), 20140 (rail), 31306 (motor carrier), 45102 (aviation)). In 2001, the split sample testing requirement was extended to the Coast Guard's merchant marine chemical testing program by regulation. *See* 65 Fed. Reg. 79462, 79475 (Dec. 19, 2000).

"If, as a collector, laboratory, MRO, employer, or other person implementing these drug testing regulations, you become aware of a problem that can be corrected . . . you must take all practicable action to correct the problem so that the test is not cancelled." Further, 49 CFR § 40.209 provides:

> (a) As a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause a test to be cancelled as listed in this subpart. Decisions about the ultimate impact of these errors will be determined by other administrative or legal proceedings, subject to the limitations of paragraph (b) of this section.
>
> (b) No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test.

The aim of § 40.209 is "to prevent administrative or judicial decisions invalidating drug tests that were fair and correct, but had certain *de minimis* irregularities." 65 Fed. Reg. 79462, 79503 (Dec. 19, 2000). A non-exhaustive list of problems that do not require cancellation was added to the regulation,

> Because of comments to other sections of the rule asking for clarification about whether certain mistakes in the process should be the basis for cancellation, and on the basis of the Department's experience in dealing with issues in many drug testing cases . . . . This is not an exclusive or exhaustive list. These matters must be documented, and may result in corrective action for employers or service agents involved, but the proper remedy is not to cancel the test. This is a safety rule, and it is not consistent with safety to permit someone with a positive drug test to continue performing safety-sensitive functions because a collector made a minor paperwork error that does not compromise the fairness or accuracy of the test.

Id. Delay in the collection process is among the listed non-fatal errors. 49 CFR § 40.209(b)(4).

As noted earlier, when a split sample test is requested and no split specimen is available, the test must be cancelled. "In such cases, we have an apparently valid, verified positive result, indicating that the employee used illegal drugs. However, because of the accidental unavailability of the split specimen, the employee can continue to perform safety-sensitive functions." 65 Fed. Reg. 79462, 79474 (Dec. 19, 2000). "[T]his situation involves strong evidence of a violation of the rules (e.g., a verified positive test), with the test being cancelled only because of a process problem (e.g., the split leaked away)." *Id.* at 79500. In that scenario,

the employee is required to submit to an "immediate" recollection, under direct observation. 49 CFR § 40.187(e). "The rationale for the direct observation aspect of the procedure reflects the belief that an employee, having recently tested positive, may have an additional incentive to cheat on the second test." 65 Fed. Reg. 79462, 79474 (Dec. 19, 2000). The DOT "do[es] not view this provision as penalizing an employee because a laboratory or collector erred. Rather, in the face of a laboratory or collector error, we view this provision as closing an inappropriate loophole for an employee who appears to have used illegal drugs." *Id.*

The clear aim and design of 49 CFR Part 40 is to protect employees' right to a fair and accurate test while providing maximum flexibility to correct or cure any procedural problems in order to prevent employees with verified positive test results from returning to safety-sensitive functions.

In consideration of this regulatory analysis, the action of the ALJ in this case, offering Respondent a continuance in order to test the split sample, was entirely congruent with the letter and purpose of 49 CFR Part 40, and was within his adjudicative and administrative authority under 33 CFR Part 20. Where the split sample was still available for testing, a continuance to allow for independent testing of that sample would have cured the MRO's error and preserved Respondent's right to a split sample test, without compromising the public safety aims of the relevant DOT and Coast Guard regulations. By declining to request the offered continuance, Respondent waived his right to a split sample test.

Respondent's secondary assertion that the Coast Guard erred in failing to discover and remedy the MRO's error, prior to hearing, is unpersuasive. The MRO testified, on direct examination, that he offered Respondent a split specimen test during the verification interview. [Tr. Vol. I 108-09.] Under cross-examination, the MRO conceded that he could not specifically remember offering Respondent a split sample test. [Id. at 151.] Weighing this testimony, and other conflicting evidence, the ALJ determined that no split sample testing offer was made. [Tr. Vol. II at 145.] This resolution of conflicting evidence is a proper function of the adversarial hearing process, and does not give rise to any inference that the Coast Guard was derelict in

failing to discover the apparent weakness in the MRO's memory.[7]

I conclude that, where the split specimen was preserved and available for testing, the MRO's failure to timely notify Respondent of the right to request a split specimen test was a curable procedural error. The ALJ's proposal to continue the hearing in order to conduct an independent laboratory test of the preserved split specimen was an appropriate exercise of his adjudicatory authority under 33 CFR Part 20, and was consistent with the particulars of drug testing regulation at 49 CFR Part 40. Respondent was not prejudiced by the ALJ's proposal, and by rejecting it, he has waived his right to a split specimen test.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The sanction of revocation imposed by the ALJ was appropriate.

ORDER

The ALJ's Decision and Order, issued from the bench on September 6, 2018 and memorialized by Order of September 11, 2018, is AFFIRMED.

ADMIRAL, USCG

Signed at Washington, D.C., this 8 day of APRIL, 2020.

[7] Even if it were shown that the Coast Guard did not exercise due diligence in its investigation and preparation for hearing, Respondent has not shown how any such oversight has prejudiced him, where the split sample was still available for testing at the time of hearing. *Cf. Appeal Decision 2628 (VILAS)* at 18, 2002 WL 32061803 at 11 (alleged inadequacy of Coast Guard investigation provides no defense where elements of negligence have been proved), *aff'd*, NTSB Order No. EM-197, 2004 WL 557602.