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. 2734
MERCHANT MARINER CREDENTIAL	:	
	:	
	:	
Issued to: ROBERT GARRETT NELSON	:	

APPEARANCES

For the Government:
Lineka N. Quijano, Esq.
CWO Derek M. Gibson, USCG

For Respondent:
Robert Garrett Nelson, *pro se*

Administrative Law Judge:
Michael J. Devine

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

On June 29, 2020, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O), finding proved the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Robert Garrett Nelson, and ordering the revocation of Respondent's credential.

The Coast Guard complaint charged Respondent with use of a dangerous drug, based upon a positive result in a government-mandated random 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. [D&O at 4.]

Respondent was employed by Key Largo Parasail (KLP). [D&O at 4.] KLP was a member of Keys Consortium, a drug-testing consortium, which in turned engaged Total Compliance Network (TCN) to meet certain Coast Guard requirements for drug testing, including selecting mariners for random testing. [*Id.*] TCN selected mariners for random drug testing from a pool consisting of the members of Keys Consortium (approximately 500 individuals). If the randomly-selected mariner was not available for testing—such as no longer being employed by the marine employer—then TCN randomly selected a mariner from the same employer as the original selectee. [*Id.*]

On August 19, 2019, Keys Consortium notified KLP that TCN had randomly selected a person other than Respondent from their employee list for drug testing. KLP, however, responded that the selectee was no longer employed there. [D&O at 5.] TCN then selected an alternate from KLP's remaining employees, resulting in Respondent's selection. [*Id.*]

Respondent presented himself to a Keys Consortium collector for testing on September 12, 2019. [D&O at 5.] The first sample he provided, which was unobserved, was not within the acceptable temperature range, so the collector informed Respondent he would need to provide a second sample—this time under observation. [D&O at 5-6.] A same-gender observer was summoned and, pursuant to the collector's instructions, accompanied Respondent into the restroom, stood facing Respondent so he could observe him void directly into the cup, and had Respondent pull his shirt out and his pants down and turn in a circle so the observer could determine if Respondent had any contraband on his person. [D&O at 6.] This time, the sample was within the acceptable temperature range. [*Id.*] Each sample was annotated accordingly, poured into two split sample specimen containers, sealed, and sent to a laboratory for testing. [D&O at 6-7.]

The laboratory determined that Respondent's second sample (the one within the acceptable temperature range) was positive for amphetamines at a level of 5,011.40 ng/mL and for methamphetamines at a level of 55,014.20 ng/mL, well exceeding the cut-off levels for positive tests of 250 ng/mL each. [D&O at 7.] Confirmation testing revealed an L-isomer concentration of 3% and a D-isomer concentration of 96%, indicating use of illicit methamphetamine. [*Id.*]

On September 25, 2019, the Medical Review Officer (MRO) for TCN, or one of his assistants, made two attempts to contact Respondent by phone to set up a time to discuss the results of the testing. Respondent did not answer his phone on the first attempt. On the second, he did not accept the call, but asked to be called back. [D&O at 8.] Respondent did not receive another call from the MRO and Respondent did not call the MRO back at any time. [*Id.*] On September 26, 2019, the MRO certified that Respondent's urine had tested positive for amphetamines and methamphetamines. [*Id.*]

PROCEDURAL HISTORY

The Coast Guard filed a complaint against Respondent's Merchant Mariner Credential on October 15, 2019. The complaint alleged use of a dangerous drug, based on the positive result of the September 12, 2019 random drug test.

Respondent filed an Answer on December 13, 2019 and an Amended Answer on January 24, 2020, both admitting all jurisdictional allegations and denying all factual allegations.

The hearing was held on February 6, 2020, in Key West, Florida, before the Coast Guard ALJ. At the hearing, Respondent testified, denying that he had ever used methamphetamines or that he had a prescription for methamphetamines. He also raised questions regarding whether he had been properly afforded his right to request split sample specimen testing at the employer's request. At the conclusion of the hearing, the ALJ notified the parties that the record would remain open until February 10, 2020, to allow Respondent the opportunity to request split sample testing. Respondent did not request split sample testing.

The ALJ issued his D&O on June 29, 2020. He found the charge of use of a dangerous drug proved, and imposed the mandatory sanction of revocation. [D&O at 26.]

Respondent appealed, and perfected his appeal by filing an appellate brief on August 28, 2020. The Coast Guard filed a reply brief on October 2, 2020, and this appeal is properly before me.

BASES OF APPEAL

Respondent raises the following issues on appeal:

I. *The ALJ erred in finding that the Coast Guard had established a* prima facie *case of drug use.*

II. *The ALJ erred by declining to address Respondent's constitutional claims.*

OPINION

I.
The ALJ erred in finding that the Coast Guard established a prima facie *case of drug use.*

A credentialed mariner who has used, or is addicted to, a dangerous drug, shall have his credentials revoked unless he "provides satisfactory proof that [he] is cured." 46 U.S.C. § 7704(b). Failure of a drug test mandated under 46 CFR Part 16 results in a presumption that the donor used dangerous drugs. 46 CFR § 16.201(b). The Coast Guard may establish a *prima facie* case of drug use by demonstrating that: (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. *Appeal Decision 2560 (CLIFTON)* at 8, 1995 WL 17010110 at 7; *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 of the three

elements, a presumption of drug use has been established, and the burden shifts to the respondent to provide evidence rebutting the presumption. *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).

Here, the ALJ concluded that the Coast Guard established a *prima facie* case, resulting in a presumption of drug use, and that Respondent failed to rebut it. Respondent appeals, asserting that the ALJ erred in concluding that 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—was met. He specifically avers that:

(1) TCN's method of selecting an alternate for random drug testing violated 46 CFR Part 16;
(2) The collector was not properly trained and certified;
(3) The MRO verification process violated 49 CFR Part 40, and the ALJ's offer to request split specimen testing following the hearing did not adequately remedy the failure to offer it during the verification process.

I address each contention in turn.

Selection of alternate

When randomly selecting employees for drug testing, TCN's policy was to initially select from the entire consortium pool. If that employee was determined to be no longer employed or otherwise unavailable for testing, TCN would then select an alternate from a list of employees belonging to the same employer as the initial selectee. Respondent contends that this process unfairly increased his chances of being selected as an alternate and violated applicable regulations. Although this appears to be an issue of first impression for the Coast Guard, I interpret the regulations as permitting TCN's alternate-selection process.

I begin with the text of the regulations. 46 CFR Part 16 requires marine employers to establish drug testing programs, which includes randomly testing covered employees at a

specified minimum annual percentage rate. 46 CFR §§ 16.101, 16.230(a), (g). Drug testing must be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Testing Programs. 46 CFR § 16.113. An employer may undertake this responsibility individually or may seek assistance through a consortium/third party administrator (C/TPA). 46 CFR § 16.105; 49 CFR § 40.347.

Whether undertaken individually or through a C/TPA, selections for random drug testing must be made by "a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with" identifying numbers for crewmembers. 46 CFR § 16.230(c). "Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment." *Id.*

When a "marine employer conducts random drug testing through a consortium, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of covered crewmembers covered by the consortium who are subject to random drug testing . . . ." 46 CFR § 16.230(g). This indicates that a consortium may select either from each individual marine employer or from a pool of all mariners in the consortium. This is emphasized by 49 CFR § 40.347, which states that a C/TPA "*may* combine employees from more than one employer" into one random pool. (Emphasis added). Based on the ability of a consortium to select mariners for random testing either from the entire consortium or from individual employers, I discern nothing inherently impermissible about starting by randomly selecting from the consortium pool, then, if the primary selectee is unavailable, selecting an alternate from that employer's pool.

I next turn to "the context of the regulations and the goals they were meant to achieve." *Appeal Decision 2710 (HOPPER)* at 8, 2015 WL 6777337 at 6. The express intention of the regulations of 46 CFR Part 16 is to "minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment." 46 CFR § 16.101. They also "protect the Fourth Amendment rights of mariners by limiting the discretion of personnel who make selections for drug testing." *HOPPER* at 8, 2015 WL 6777337 at 6. "For this purpose, the

discretion of the personnel making the selections must be limited so as to prevent them from abusing the drug testing process to discriminate against or harass certain crewmembers." *Id.* at 9.

Although, as noted, I am not aware of any final agency action or other precedent directly on point, the Federal Motor Carrier Safety Administration (FMCSA) has expressly endorsed the alternate selection method at issue here. In the "interpretations browser" of its official website, it concludes that the method is "scientifically valid" and explains:

> This method is similar to methods used by organizations, including the Department of Labor's Bureau of Labor Statistics . . . . This procedure has a small degree of theoretical bias for a simple random sampling selection procedure. The theoretical bias, though, is so minimal the FMCSA does not believe the agency should prohibit its use.
>
> This method is useful for operational settings, such as FMCSA's motor carrier random testing program. The method is less impartial toward drivers than other theoretical methods, but maintains a deterrent effect for both motor carriers and drivers. This method should deter motor carriers from claiming drivers are unavailable each time the C/TPA selects one of its drivers, thereby never having its drivers subject to actual random tests.[1]

Respondent offers that the FMCSA's rationale for permitting such a practice within the motor carrier industry does not apply to the maritime industry. I disagree. First, Respondent's premise that the rationale behind FMCSA's interpretation is that drivers' jobs often require them to be away for extended periods is incorrect. The FMCSA details a scenario where a driver "is presently on long-term absence due to *layoff, illness, injury, or vacation*." *Id.* (emphasis added). The same causes of absence are, of course, present in the maritime industry. Second, merchant mariners, too, can often be away for extended periods, irrespective of whether that was the practice of Respondent's particular employer. Third, and more to the point, the same deterrent effect cited by the FMCSA is equally applicable and beneficial in either industry. I find FMCSA's interpretation persuasive.

I also reject Respondent's assertion that this method violates regulations because his

[1] www.fmcsa.dot.gov/regulations/title49/section/382.305 (last visited January 4, 2021).

statistical probability of being selected increased when the pool shifted from the entire consortium to KLP's employees. 46 CFR § 16.230(c) requires that "each covered crewmember shall have an equal chance of being tested *each time selections are made.*" (Emphasis added). In other words, for each selection, each member of that pool must have an equal chance of being selected—not that each crewmember continues to have the same chance of being selected in subsequent selections. That would be an absurd—if not impossible—result and contrary to the plain meaning of the regulation.

Instead, for this method of alternate selection to be valid, what is important is that each selection must be scientifically random, with each employee *within the given pool* having an equal chance of being selected, and the decision to select an alternate from the primary selectee's employees instead of the entire consortium must be based on a non-discretionary policy that provides no opportunity to target a particular individual or to otherwise manipulate the results. *See HOPPER* at 10, 2015 WL 6777337 at 7.

Those requirements are met here. TCN used a scientifically valid method to randomly select a mariner from the consortium pool. When informed that the primary selectee was no longer employed, the selecting officials had no discretion in the matter: adhering to policy, they randomly selected an alternate from the pool of employees from KLP, again using a scientifically valid method. For each selection, each mariner in the appropriate pool had an equal chance of being selected. The fact that there were fewer people in the KLP pool on the second selection, by itself, does nothing to invalidate the process.

Under the circumstances, I am satisfied that TCN's selection of Respondent for random testing was in accordance with applicable regulations.

Certification of collector

Respondent asserts that the ALJ abused his discretion by finding that the person who collected Respondent's specimen was a certified DOT collector. Specifically, Respondent avers that the collector failed to meet the documentation requirements of 49 CFR § 40.33 because the certificate of training completion she offered at the hearing was missing one of its two

signatures. This does not warrant relief for two reasons.

First, the ALJ is given broad discretion to weigh evidence and decide factual matters. His findings of fact are entitled to great deference and will only be overturned if they are shown to be arbitrary and capricious or clearly erroneous. *Appeal Decision 2695 (AILSWORTH)* at 5, 2011 WL 6960129. Respondent has shown neither. The ALJ relied not only on the certificate, but also on the collector's testimony, which detailed her experience and training. [Tr. at 57-58, 60-62; CG Ex. 6.] Despite a missing signature, the ALJ's finding that the collector was DOT-certified is supported by substantial evidence.

Second, even were I to consider the omission of a signature on the certificate to be a violation of 49 CFR § 40.33, this is, at most, a *de minimis* procedural violation that does not invalidate the test result. 49 CFR § 40.209(b) expresses the *de minimis* nature of an error related to a collector's qualifications:

> 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. Matters that do not result in the cancellation of a test include, but are not limited to, the following: . . . (3) The collection of a specimen by a collector who is required to have been trained (see § 40.33), but who has not met this requirement[.]

Precedent supports that such errors generally will not result in relief. "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." *Administrator v. Flores*, NTSB Order No. EA-5279 at 7-8, 2007 WL 1233533 at 3. A minor technical infraction of the regulations will invalidate a drug test result only if it "breaches the chain of custody or violates the specimen's integrity." *Appeal Decision 2688 (HENSLEY)* at 6-7, 2010 WL 4607368 at 1. Here, despite an absent signature on a certificate, there is no *bona fide* dispute that the collector was adequately trained and that she collected the sample according to DOT procedures, and there certainly is no indication that her collection breached the chain of custody or violated the specimen's integrity.

For both reasons, I will not disturb the ALJ's finding that the collector was DOT-certified or invalidate the test results.

MRO verification process

49 CFR § 40.129 directs that an MRO verify all non-negative results. This verification process includes conducting or attempting to conduct a verification interview with the employee. 49 CFR § 40.129(a)(4). The MRO is also required to notify the employee of the right to request that the split specimen be tested. 49 CFR § 40.153. The regulations detail the requirements for conducting or attempting to conduct the verification interview and circumstances when an MRO may verify a test result as positive without interviewing the employee. 49 CFR §§ 40.131, 40.133. This includes when an employee "expressly declines the opportunity to discuss the test" or when an MRO makes a minimum of three attempts to contact the employee, then notifies and seeks assistance from a designated employee representative. 49 CFR §§ 40.131(c), 40.133(a).

Respondent asserts that his positive result should be invalidated because the MRO failed to adhere to these notification procedures. The ALJ considered and rejected this argument. I conclude he did not abuse his discretion in doing so.

There was, as the ALJ noted, conflicting testimony about the MRO's attempts to conduct a verification interview. The MRO testified, based on notes maintained by his office, that during a first attempt to reach Respondent by phone, there was no answer. On a second attempt, Respondent answered, a member of MRO's staff explained the reason for the call, and Respondent hung up. The MRO considered this an express declination of the opportunity to discuss the test and verified the test as positive without making any further attempts to contact Respondent.

In his own testimony, Respondent acknowledged missing the first call and answering the second, but stated that after the caller said "something about drug test or something," he informed the caller that his phone was about to die and asked that they call him back. [Tr. at 237.] The MRO's office never attempted to call back, nor did Respondent attempt to call the MRO's office. Testimony from Respondent's mother supported his account.

Contrary to the Coast Guard's contention, the ALJ did not determine that Respondent refused a verification interview. Rather, having considered the conflicting evidence, the ALJ found that "Respondent did not accept the call at that time but asked to be called back again," and never stated that this amounted to an express declination. [D&O at 8.] He nevertheless reasoned, "Even if the MRO telephone contact . . . should not have been considered an express rejection of the MRO interview by Respondent, at most this would be a procedural error and is not a valid basis to cancel a chemical test. *See* 49 CFR § 40.209." [D&O at 21.]

I agree. Assuming, without deciding, that it was a procedural error for the MRO to have validated the test result without further efforts to contact Respondent, that error was, under the circumstances, harmless, and does not render the test invalid.

The opportunity to discuss test results with the MRO and to request split sample testing are integral to 49 CFR Part 40, but both are subject to a harmlessness analysis. *Appeal Decision 2728 (DILLON)* at 8, 2020 WL 3270610 at 5; *Appeal Decision 2668 (MERRILL II)* at 12-13, 2007 WL 3033593. Failure to follow these requirements "does not automatically invalidate an otherwise compliant testing process, absent any breach of the chain of custody or violation of the specimen's integrity." *DILLON* at 8, 2020 WL 3270610 at 5.

Here, there is no indication of a breach of the chain of custody or violation of the specimen's integrity. Respondent testified during the hearing that he had never used methamphetamines and did not have a prescription or any other valid reason for testing positive. The MRO testified that the test results were such as to eliminate the possibility of an over-the-counter drug being the source of the positive test. [D&O at 20; tr. at 200.] There is therefore nothing that Respondent could have offered the MRO that would have caused the MRO to verify the test as negative, so any error in not providing further opportunity for Respondent to discuss the test result with the MRO is harmless.

Regarding split specimen testing, the split specimen was preserved and, at the time of the hearing, available for testing. Not only did Keys Consortium, after being informed of the

positive result, notify Respondent that he could request split specimen testing (albeit at his own expense), but so too did the ALJ expressly provide Respondent the opportunity to request split specimen testing. Even assuming pre-hearing error, this ordinarily would cure it. *See DILLON* at 8-9, 2020 WL 3270610 at 5 ("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 split specimen testing. Such a delay is an inconvenience, but it does not justify the invalidation of an otherwise valid drug test . . . .").

Respondent nevertheless contends that the ALJ's offer for post-hearing testing was inadequate because it did not account for his inability to pay for it. This fails because, in extending the invitation to request post-hearing testing, the ALJ expressed that "the employer could be required to pay for it." [Tr. at 251.] Respondent declined this invitation and thus waived his right to split specimen testing.

II.

The ALJ erred by declining to address Respondent's constitutional claims.

Lastly, Respondent asserts that the ALJ erred by declining to address his claims of constitutional error. I disagree.

It is true, as Respondent notes, that when private individuals conduct drug testing pursuant to Federal regulatory requirements, they are acting as agents of the Government. *Appeal Decision 2704 (FRANKS)* at 7, 2014 WL 4062506 at 4 (citing *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 611-15 (1989)). Hence, constitutional protections apply. I am certainly cognizant of and informed by constitutional concerns as I interpret and apply regulations in these proceedings, for example in *FRANKS*, as are ALJs, and as are agencies when they draft regulations. *See id.* at 5-7.

Still, suspension and revocation proceedings are, by their nature, "administrative, not judicial." *Appeal Decision 2689 (SHINE)* at 11, 2010 WL 4607369. "Their purpose is to promote safety at sea" and their focus is on "compliance with statutes and regulations." *Id.* (citing 46 U.S.C. § 7701(a)). Following the administrative process, a respondent has recourse to

federal courts, 5 U.S.C. §§ 702, 706, and it is *their* purview to address the constitutionality of duly-enacted statutes and regulations; these proceedings are not the proper forum for such issues. *Id.* (citing *Weinberger v. Salfi,* 422 U.S. 749, 765 (1975)). *See also Califano v. Sanders,* 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."); *Administrator v. Carr*, NTSB Order No. EA-5703, 2014 WL 1118223 at 12 ("The law judge correctly stated the NTSB does not have jurisdiction to entertain questions of constitutionality of FAA regulations.") (footnote omitted); *Appeal Decision 2646 (McDONALD)* at 11-12, 2003 WL 24123732 at 7; *Appeal Decision 2556 (LINTON)* at 4, 1994 WL 16009227 at 2 ("[T]o the extent Appellant challenges the constitutionality of the regulatory procedures themselves, he does so inappropriately in this forum, and those assertions of error will not be addressed here.").

Here, Respondent's constitutional challenges concern procedures expressly sanctioned by regulation. His challenges are therefore outside the purview of this administrative proceeding and the ALJ did not err in declining to address them.

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, was appropriate.

ORDER

The ALJ's Order dated June 29, 2020 is AFFIRMED.

ADM, USCG

Signed at Washington, D.C., this 10 day of MARCH, 2021.