

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

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UNITED STATES OF AMERICA \*  
UNITED STATES COAST GUARD \*

Docket No. 00-0829  
Case Number PA00001894

vs.

ANDRE BENNETT \*

\*\*\*\*\*

DECISION AND ORDER

PETER A. FITZPATRICK  
Administrative Law Judge

APPEARANCES

FOR THE COAST GUARD

LT Jacqueline M. Twomey  
CWO John Gonzales  
United States Coast Guard  
Marine Safety Office Hampton Roads  
200 Granby Street, Room 700  
Norfolk, VA 23510

FOR THE RESPONDENT

Andre Bennett, Pro Se

## I.

### PRELIMINARY STATEMENT

This case began when the United States Coast Guard filed a Complaint against the Respondent Andre Bennett, holder of Merchant Mariner's Document Number 231-72-3256 on November 29, 2000 under the statutory authority contained in 46 U.S.C. § 7704. In the Complaint, the Coast Guard alleged that Mr. Bennett took a pre-employment drug test on September 11, 2000; that it was collected by Cecelia Pretlow of Internal Medical Specialists; that it was tested by Quest Diagnostics, Inc.; and that it tested positive for marijuana metabolite. The Investigating Officer sought the Revocation of Mr. Merchant Mariner's Document in accord with 46 U.S.C. § 7704.

Mr. Bennett filed a timely Answer to the Complaint on December 19, 2000. The Answer admitted all Jurisdictional Allegations. He also Admitted all Factual Allegations except No. 5 (that the specimen tested positive for marijuana metabolite). The Respondent indicated that he wished to be heard on the proposed Order.

A hearing was scheduled for March, 2, 2001 at Norfolk, VA. Approximately two weeks beforehand, on February 15, 2001, a Pre-Hearing Conference was held to review the requests of the parties. Both sides participated and an Order was issued describing the matters discussed. (See Order dated February 26, 2001).

The hearing was conducted as scheduled and the Investigating Officers and Mr. Bennett appeared. The Respondent was not represented by counsel although he had been advised of his right to retain an attorney at the Pre-Hearing conference. Mr. Bennett affirmed his Answers to the Complaint and emphasized again he was not a user of marijuana or any other illegal drug.

The Coast Guard presented the following witnesses: Cecelia Pretlow, Internal Medical Specialists Site Person; James Callies, Scientific Director, Quest Diagnostics Substance Abuse Testing Laboratory, San Diego, CA; and George M. Ellis, President Greystone Health Sciences Corporation. The documentary evidence submitted included copies of the Drug Testing Custody and Control Form, the Quest Diagnostics Litigation Package, the Medical Review Officer's letter to the Coast Guard with attachments; and the Federal Register listing of approved testing laboratories. Appendix B hereto contains a complete listing of the evidence submitted.

Mr. Bennett did not testify and did not present any documentary evidence. After all the evidence was submitted and both sides presented closing statements, I ruled that the Coast Guard had presented sufficient evidence to establish a prima facie case raising the presumption of use set out at 46 CFR § 16.201(b). Mr. Bennett did not present any evidence to rebut that presumption other than his argument, not made under oath, that he did not use marijuana. Accordingly, the Jurisdictional and Factual Allegations of the Complaint were found **PROVED**.

## II.

### STATUTES AND REGULATIONS INVOLVED

#### A. Procedural Matters

1. This proceeding is governed by the Administrative Procedure Act , which is incorporated into these proceedings under 46 U.S.C. 7702, which reads:

##### **§ 7702. Administrative procedure**

- (a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.
2. 46 U.S.C.§§ 7701-7705 sets out the general procedures governing the suspension and revocation of merchant mariners' licenses and documents. 46 U.S.C. § 7704 provides in pertinent part:

##### **§ 7704. Dangerous drugs as grounds for revocation**

- (c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.
3. The regulations governing the performance of chemical tests for dangerous drugs adopted by the United States Department of Transportation are codified at 49 CFR § 40. The specimen collection procedures are set out at 49 CFR § 40.25.
4. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 CFR § 16. Specifically, 46 CFR § 16.201(b) provides that:

## **Subpart B – Required Chemical Testing**

### **§ 16.201 Application.**

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

5. The Rules of Practice, and Evidence, for Formal Administrative Proceedings of the Coast Guard which apply to this proceeding are codified at 33 CFR § 20.

### **III.**

#### **FINDINGS OF FACT**

##### **A. Jurisdictional Allegations Admitted by the Respondent**

1. The Respondent is the holder of Merchant Mariner's Document Number 231-72-3256.

##### **B. Factual Allegations Admitted by the Respondent**

1. On September 11, 2000 Respondent took a pre-employment drug test.
2. A urine specimen was collected by Cecelia Pretlow of Internal Medical Specialists..
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was collected and analyzed by Quest Diagnostics, Inc. using procedures approved by the Department of Transportation.

##### **C. Factual Allegation Not Admitted by the Respondent**

5. That specimen subsequently tested positive for marijuana metabolite.

#### IV.

#### OPINION

##### A. General

1. The Coast Guard has jurisdiction over Respondent and this matter pursuant to 46 U.S.C. 7704, which states that "if it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." The Coast Guard has the burden of proving the charge and its supporting specification by a preponderance of the evidence or "by substantial, reliable and probative evidence." 46 C.F.R. § 5.539; 46 C.F.R. § 5.63; Appeal Decision No. 2603 (HACKSTAFF) (1998); See also, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). It is now well established that the Investigating Officer must prove three elements to meet this burden as set out in Appeal Decision 2583 (WRIGHT) (p. 3)(1997):

To meet this burden, as applied to the specification at hand, the Investigating Officer must prove three elements: 1) that the respondent was the individual that was tested for dangerous drugs; 2) that the respondent failed the test; and 3) that the test was conducted in accordance with 46 C.F.R Part 16. Appeal Decisions 2379 (DRUM), 2279 (LEWIS).

See also Appeal Decision 2584 (SHAKESPEARE) (1997).

It should also be noted that this proceeding is conducted under the provisions in 46 C.F.R. Part 5, 33 C.F.R. Part 20, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

2. Cecelia Pretlow testified that she was the collector at Internal Medical Specialists on September 11, 2000 when Mr. Bennett provided his urine sample in connection with a pre-employment chemical test for dangerous drugs. She described the procedure in detail which was followed. At the hearing she demonstrated it with examples of the urine collection kit used. She stated that Mr. Bennett was identified before he was allowed to participate; that she completed one collection at a time; and that the completed collection specimen was secured until it was picked up by the courier service for shipment to the testing laboratory in the afternoon. She affirmed that she made many of the entries on the Drug Testing Custody and Control Form and signed the certification thereon as follows (Exhibit IO-2):

I certify that the specimen identified on this form is the specimen presented to me by the donor providing the certification on Copy 4 of this form, that it bears the same specimen identification number as that set forth above, and that it has been collected, labeled and sealed as in accordance with applicable Federal requirements.

She testified too that Mr. Bennett signed that same form in her presence. He certified as follows (Exhibit IO-2):

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner, that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each bottle is correct.

Ms. Pretlow was a very credible witness and she exhibited a thorough knowledge of the procedures to be followed in a Department of Transportation urine specimen collection. I believe her testimony and found it to be probative. Indeed, Mr. Bennett did not point out any specific aspect of the collection here which was alleged to be improper.

Accordingly, there is no question on this record that Mr. Bennett was the donor of the sample collected by Ms. Cecelia Pretlow.

3. James Callies testified regarding the testing procedures at Quest Diagnostics. That laboratory held and still holds a current certification from the U.S. Department of Health and Human Services to meet the standard for Mandatory Guidelines for Federal Workplace Drug Testing Programs (Exhibit IO-3). The Scientific Director testified that an internal chain of custody was established to track the sample at the laboratory; that it was subjected to both initial and confirmatory tests; that the latter was a gas chromatography and mass spectrometry analysis; and that the results revealed the presence of marijuana metabolite above the established federal threshold level.

I believe Mr. Callies was a very credible witness and his testimony and the laboratory's "Litigation Package" (Exhibit IO-4) firmly supports the conclusion that the actual testing of Mr. Bennett's specimen was accomplished in accord with the Department of Transportation and Coast Guard regulations.

4. The final witness who testified at the hearing was George Ellis, President of Greystone Health Sciences Corporation. He described the Medical Review Officer's role in the drug testing program and stated that Dr. Plander, the MRO in this case, was employed by Greystone. Mr. Ellis testified that Dr. Plander interviewed Mr. Bennett and concluded that there was no reasonable medical explanation for the presence of marijuana metabolite in the Respondent's system. Accordingly, the Doctor signed the DTCCF and found the test to be "POSITIVE." (Exhibit IO-2).

Mr. Ellis also discussed Mr. Bennett's claim brought up at the hearing that the mariner may have inhaled marijuana smoke of others on a recent occasion prior to the pre-employment drug screen here. Mr. Ellis stated that the Federal cut off levels for marijuana



were established to eliminate that possibility and that clinical trials had shown that such passive exposure would not cause a mariner to have a positive result on the test.

Mr. Bennett elected not to testify so the record is devoid of detailed evidence of the exact circumstances under which the alleged exposure was made. Moreover, Mr. Bennett did not present any witnesses or evidence to substantiate this claim.

Reviewing this evidence as a whole, I am persuaded that the chemical test here was conducted in accordance with the applicable regulations. The collector, the testing laboratory, and the Medical Review Officer performed their respective functions properly. Thus, the result of the test here is valid. The Investigating Officer successfully raised the presumption of use set out in the regulations. See 46 CFR § 16.201.

No evidence was presented by the Respondent so the presumption has not been rebutted.

5. Accordingly, I am of the opinion that Mr. Bennett is the user of dangerous drugs (marijuana) within the meaning of the statute (46 U.S.C. § 7704(c)). Since there has been no showing that Mr. Bennett has been “cured” of his drug use, I am compelled to **REVOKE** his Merchant Mariner’s Document in accord with the statutory mandate.

V.

**ORDER**

For all of the foregoing reasons, **IT IS ORDERED THAT** the Merchant Mariner's Document issued to Andre Bennett by the U.S. Coast Guard is hereby **REVOKED**.



PETER A. FITZPATRICK  
Administrative Law Judge  
United States Coast Guard

Done and dated this *16* of March, 2001 at  
Norfolk, Virginia