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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. MERCHANT MARINER DOCUMENT Issued to: CLIFFORD BLACKMON	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2660

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and 33 CFR Part 20.

By a Decision and Order (hereinafter "D&O") dated August 22, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Honolulu, Hawaii, revoked the merchant mariner document of Mr. Clifford Blackmon (hereinafter "Respondent") upon finding proved a charge of *misconduct*. The specification found proved alleged that on August 27, 2004, Respondent:

> Took a Pre-employment drug test and that the urine specimen subsequently tested positive for Marijuana Metabolite.

PROCEDURAL HISTORY

The hearing in this matter commenced in Honolulu, Hawaii, on January 11, 2005. Respondent was represented by counsel. At the hearing, Respondent admitted all jurisdictional and factual allegations except he denied that he knowingly used an illegal drug and that the test was accurate. [D&O at 2; Respondent's Answer to the Complaint at 1] The Coast Guard Investigating Officer (hereinafter "IO") introduced into evidence the testimony of three witnesses and six exhibits, while Respondent introduced the

testimony of two witnesses, including himself, and three exhibits into evidence. [D&O at 3] Both parties filed post hearing briefs. [*Id.*] In addition, without assistance from counsel, Respondent filed two letters directly with the ALJ; the ALJ provided copies of both letters to Respondent's counsel and the IO. [*Id.*].

The ALJ issued the D&O in the matter on August 22, 2005. Respondent filed his Notice of Appeal on September 19, 2005, and, thereafter, timely filed his Appellate Brief, through counsel, on October 19, 2005. The Coast Guard did not file a Reply Brief. Accordingly, this appeal is properly before me.

APPEARANCE: Respondent was represented by Earle A. Partington, Esquire, Honolulu, Hawaii. The Coast Guard was represented by CPO John Price, USCG, Sector Central Pacific, Honolulu, Hawaii.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued merchant mariner document. [D&O at 4]

On August 27, 2004, Respondent supplied a urine sample for a pre-employment drug screening to Lois Arakawa, a urine collector employed by Straub Occupational Health Services. [D&O at 5; Transcript (hereinafter "Tr.) at 28-29; IO Exhibit 1] After collection, Respondent's sample was sent to Quest Diagnostics Testing Laboratory, a federally certified and registered laboratory, for required drug testing. [D&O at 6; Tr. at 24; 34-36] Both an initial Immunoassay Test and a confirmatory Gas Chromatography, Mass Spectrometry Test showed that Respondent's urine was positive for the presence of marijuana metabolites. [D&O at 7; Tr. at 39, 41, 44-46; IO Exhibit 2] Dr. John

Womack, Senior Medical Review Officer at Advantage Corportation, after discussing the test results with Respondent on August 31, 2004, and, at Respondent's request, directing a different laboratory—LabCorp Laboratory—to conduct a third test of Respondent's urine sample, verified Respondent's test results as positive for the presence of marijuana metabolites on September 9, 2004. [D&O at 8; Tr. at 59-61, 64-68; IO Exhibits 3 & 4] Respondent did not contest the process by which the sample was collected or the results of the tests.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of *misconduct* and ordering the revocation of Respondent's merchant mariner document. On appeal, Respondent asserts only one assignment of error, that the ALJ abused his discretion and acted arbitrarily and capriciously in rejecting polygraph evidence that Respondent submitted at the Hearing to show that that he did not knowingly use marijuana.

OPINION

Respondent accepts in his appeal brief the factual recitation contained in the ALJ's Decision and Order. Specifically, Respondent agrees that the "evidence indicates that his urine sample was properly drawn, safeguarded, and tested and he had a positive result for the metabolite of marijuana." [Respondent's Opening Brief at 1] A merchant mariner who fails a chemical test for dangerous drugs is presumed to be a user of dangerous drugs. *See* 46 C.F.R. § 16.201(b); Appeal Decision 2529 (WILLIAMS). The

respondent must produce persuasive evidence to rebut this presumption. *See* Appeal Decision 2379 (DRUM).

To rebut the presumption of drug use, Respondent testified and offered the results of a polygraph examination, which showed that Respondent was found to be truthful when stating that he did not use drugs prior to the pre-employment test at issue in these proceedings and a subsequent negative drug test.[1] Although Respondent denied using marijuana prior to the pre-employment drug test, he admitted attending a party about five weeks prior to submitting his urine specimen at which other people were smoking marijuana. [Tr. at 110-114] The record shows, however, that Respondent's counsel stipulated that Respondent would not have tested positive based on this exposure to marijuana smoke at the party, given that 5 weeks elapsed between the party and the drug test at issue in these proceedings. [Tr. at 112-113] In addition, during his testimony, Respondent admitted that he was found to have used marijuana in 1996 and that he was sent to a rehabilitation center as a result of that finding (Respondent was to have served six months at the rehabilitation center but he was discharged after serving three months). [Tr. at 107] Finally, Respondent admitted using marijuana twenty-five years ago while in the U.S. Navy. [Tr. at 107-108]

On appeal, Respondent argues that the ALJ presumably rejected the polygraph evidence on the ground that it was *per se* incompetent evidence based solely on a finding that polygraph evidence is rejected as competent evidence in forty-eight of the fifty states.

[1] Respondent admits that the results of the subsequent drug test had little evidentiary value since the cutoff for a positive test result was higher than provided for under 46 C.F.R. Part 16. [Tr. at 114-116]

[Respondent Opening Brief at 11] Respondent further argues that rejecting the polygraph evidence based on such a finding was arbitrary and capricious. [Respondent's Opening Brief at 1-2]

Respondent's argument initially fails because his presumption is incorrect. Far from rejecting the polygraph evidence as *per se* incompetent, the ALJ admitted the testimony of the person who administered the polygraph to Respondent, Mr. George Tatum, III and the resultant polygraph test results into evidence without objection from the Coast Guard. [*See* Tr. at 91-102; Respondent's Exhibit A] Contrary to Respondent's assertion, the record shows that the ALJ did consider the polygraph evidence admitted at the hearing, but that, after consideration, he determined that the polygraph examination was not persuasive evidence sufficient to overcome the presumption created by Respondent's positive chemical test result. [D&O at 15-17] In addition to the fact that polygraph evidence is not admitted in forty-eight of fifty states, the ALJ specifically noted that Mr. Tatum testified that at least four or five percent of polygraph examinations could give inaccurate or wrong results. [D&O at 16-17] In addition, the record shows that Mr. Tatum testified that inaccuracies could be the result of "examiner misinterpretation, it could be some physiological anomaly with the examinee, . . . countermeasures . . . it could be the setting of the sun, it could be indigestion, it could be just about anything." [Tr. at 93]

In Coast Guard suspension and revocation proceedings, the ALJ is free to determine the appropriate weight to be given any evidence, including polygraph evidence

like that at issue in the instant proceeding. Appeal Decision 2546 (SWEENEY). I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2333 (AYALA), 2344 (KOHAJDA), 2363 (MANN), 2390 (PURSER), 2474 (CARMIENKE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2581 (DRIGGERS), and 2584 (SHAKESPEARE). Given the evidence contained in the record, the ALJ could reasonably have determined that the testimony of a qualified and competent polygraph examiner, opining that Respondent's denial of marijuana use was truthful, did not overcome the presumption of drug use created by the positive chemical test. Such a reasonable determination was neither a *per se* rejection of polygraph evidence nor an arbitrary or capricious decision.

Most of the Respondent's brief consists of information explaining polygraph examinations and supporting their validity. Except for the fact that Mr. Tatum was trained as a polygraph examiner by the Department of Defense Polygraph Institute, that he worked for the FBI, and the manner in which he conducted his examination, none of this information supporting the validity of polygraph examinations was presented to the ALJ. Consequently, this information does not impeach the ALJ's determination that the polygraph evidence did not overcome the presumption of drug use. Furthermore, despite all the information presented by Respondent, both "state and federal courts continue to express doubt about whether such evidence is reliable." *United States v. Sheffer,* 523 U.S. 303, 312 (1998). In fact, a *per se* exclusion of polygraph evidence would not unconstitutionally infringe on Respondent's right to present a defense. *Id.* at 314.

Furthermore, the polygraph evidence admitted in this case does not directly rebut the presumption that Respondent used marijuana. Instead, the polygraph evidence was simply another opinion, in addition to the ALJ's own assessment of Respondent's credibility, as to whether Respondent was telling the truth. Balanced against Respondent's denial of marijuana use in 2004 and the polygraph evidence, the ALJ could also consider the fact that Respondent failed a drug test and admitted using marijuana in 1996, and that he also used marijuana while in the Navy. Given this evidence and his opportunity to observe the Respondent's testimony, the ALJ's determination that Respondent was not credible was well within his broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. Appeal Decision 2369 (HAUCK).

Finally, the record shows that Respondent failed to present any credible evidence as to why the marijuana metabolite may have been present in his urine other than drug use. His counsel stipulated that there was no way that passive inhalation, or even intentional use of marijuana, at the party he attended on July 19th or 20th would result in a positive drug test on August 27, 2004. [Transcript at 130.] This was consistent with the testimony of Dr. Jambor, the laboratory director, that within three weeks of exposure, the marijuana metabolite would be sufficiently eliminated from a person's system to result in a negative test. [Tr. at 35-56]

I have consistently held that mere supposition or speculation unfounded in fact will not serve to vitiate a certified laboratory analysis, conducted in accordance with

applicable regulations. Appeal Decision 2596 (HUFFORD). Consequently, there is no reason to set aside the ALJ's finding that Respondent's testimony and the polygraph evidence did not "rebut the drug test result when considering the entire record as a whole." [D&O at 17]

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, Respondent's basis of appeal is without merit.

ORDER

The order of the ALJ, dated at Houston, Texas, on August 25, 2005, is **AFFIRMED.**

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 9 of November, 2006.