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
vs.	:	
	:	ON APPEAL
LICENSE NO. 799349	:	
and	:	NO. 2646
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: DOMINIC McDONALD	:	

This appeal is taken in accordance with 46 U.S.C. §7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (D&O) dated November 9, 2001, an Administrative Law Judge (ALJ) of the United States Coast Guard at Houston, Texas, suspended Dominic McDonald's (Respondent's) above-captioned merchant mariner document and license for twelve months upon finding proved a charge of misconduct.

Respondent was charged with a single specification of misconduct under 46 U.S.C. § 7703 and 46 C.F.R. § 5.27, in that while engaged in official matters under the authority of his license and merchant mariner document, Respondent wrongfully refused to submit to required chemical testing for dangerous drugs by providing a substituted urine specimen during a pre-employment drug screening on July 31, 2000. The pre-employment drug screening was in preparation for Respondent's bidding on union contracted work as required by the Masters, Mates, and Pilots Union. The specimen that Respondent submitted was later determined to have been inconsistent with human urine.

Coast Guard Marine Safety Unit Galveston, Texas, determined that Respondent's alleged submission of non-human urine constituted a refusal to submit to a urinalysis test pursuant to 46 C.F.R. § 16.105. As a consequence, Marine Safety Unit Galveston sought revocation of Respondent's license and merchant mariner document.

PROCEDURAL HISTORY

Hearings were held in Houston, Texas, on May 16-18, 2001, June 7, 2001, and July 12, 2001. Respondent appeared with counsel and entered a response denying the charge. The Coast Guard Investigating Officer introduced into evidence the testimony of 5 witnesses and 12 exhibits. Respondent introduced into evidence his own testimony, the testimony of 3 additional witnesses, and 18 exhibits. The ALJ's D&O was served on Respondent and his counsel on November 14, 2001, and Respondent filed a timely notice of appeal on December 7, 2001. Respondent filed a timely brief on February 26, 2002, under an approved extension. The Coast Guard filed a reply brief on April 2, 2002. This appeal is properly before me.

APPEARANCES: William Hewig, III, Esq., Kopelman and Paige, P.C., 31 St. James Avenue, Boston, MA, and Ernest Allen Cohen, Esq., P.O. Box 37273, Tuscon, AZ, for Respondent. The Coast Guard was represented by Petty Officer Kenneth Bellino, USCG, stationed at Marine Safety Office Galveston, TX.

FACTS

At all times relevant to this Appeal, Respondent served under the authority of the above-captioned merchant mariner document and license. Respondent went to Concentra Medical Center in Houston, Texas, on July 31, 2000, to give a urine sample for a pre-employment drug test in order to obtain a certificate from the Master, Mates, and Pilots

Union that he was drug free. [Transcript (Tr.) vol. II at 263, 266] Such a certificate would make him eligible to obtain a union contract position in the U.S. Merchant Marine as an officer or mate. [Tr. vol. I at 66-67]

Ms. Patricia Rodriguez is a medical assistant at Concentra Medical Center. [Tr. vol. I at 108] Concentra Medical Center was the designated collection facility for the Masters, Mates, and Pilots Union. [Tr. vol. I at 64] On July 31, 2000, Ms. Rodriguez, an experienced collector, collected a filled specimen container from Respondent at Concentra Medical Center. [Tr. vol. I at 117-118] In the beginning of the collection process, Ms. Rodriguez identified Respondent by the photo identification on his state driver's license and verified his social security number. [Tr. vol. I at 113-114] Respondent took the collection container that Ms. Rodriguez provided and proceeded to a restroom. Behind closed doors and outside of Ms. Rodriguez's presence, Respondent filled the specimen cup, left the restroom, and returned the cup to Ms. Rodriguez. [Tr. vol. I at 120] Ms. Rodriguez, as part of her normal routine, had Respondent fill out a Drug Testing Custody and Control Form (DTCCF). In addition, Ms. Rodriguez placed the contents of the specimen into two separate containers. Upon receipt of Respondent's urine specimen, Ms. Rodriguez sealed both of Respondent's specimen containers in Respondent's presence. [Tr. vol. II at 288-289] Respondent signed the DTCCF for his sample in Ms. Rodriguez's presence signifying both that the specimen containers were sealed in Respondent's presence and that the information in the DTCCF was correct. [Tr. vol. I at 118-119]

The specimens were sent by courier to Quest Diagnostics. [Investigating Officer (I.O.) Exhibits 2, 3] Quest Diagnostics is a federally certified drug testing laboratory.

[I.O. Exhibit 5] A screening test was performed at Quest Diagnostics, which revealed that Respondent's urine creatinine concentration was 3 milligrams per deciliter and that his urine's specific gravity level was 1.001. [I.O. Exhibits 3 - 5] The certifying scientist at the laboratory reported this result as a substituted specimen that was not consistent with human urine. [I.O. Exhibit 4]

U.S. Department of Health and Human Services (DHHS) Document 35 of September 28, 1998, as confirmed by the U.S. Department of Transportation's Complementary Memorandum of the same date, set the standards for defining a urine specimen as a substitute specimen. Under these standards, a creatinine concentration level of under 6 milligrams per deciliter and a specific gravity level of at least 1.001 indicates urine outside normal limits and is a substituted sample. [I.O. Exhibit 9] Under these guidelines, Respondent's urine specimen was reported to the Master, Mates, and Pilots Union as substituted and not consistent with human urine. [I.O. Exhibit 1] A confirmatory test was neither required nor conducted. [I.O. Exhibit 9]

BASES OF APPEAL

This appeal is taken from the D&O imposed by the ALJ finding proved the charge of Misconduct. Respondent asserts the following bases of appeal:

I. *Certain findings of fact are not supported by substantial evidence, specifically findings nos. 14, 33, 34, 36, 42, 43 and "Ultimate Finding of Fact" and "Conclusion of Law No. 7."*

II. *Certain Conclusions of Law do not accord with applicable law, precedent, and public policy, specifically conclusions nos. 4 and 5.*

III. *The ALJ abused his discretion in finding the Coast Guard's case proven because there was no evidence of statistical validity to support the Coast Guard's prima facie case of "substitution."*

IV. *The decision and proceedings taken on the whole represent a violation of Respondent's constitutionally guaranteed right of due process under*

Amendment V to the Constitution of the United States, because the procedure, trial and tribunal to which McDonald was subjected was so fundamentally unfair as to be constitutionally impermissible.

OPINION

This Decision is based on the regulations that were in effect at the time of the pre-employment drug test in question, July 31, 2000. Subsequent to the events giving rise to this case, the regulations in question (49 C.F.R. Part 40) were modified in January 2001. The same regulations were again modified while this Appeal was in process, in May 2003. As such, I will address the issue of retroactivity.

In both instances when the regulations in 49 C.F.R. Part 40 were changed, the Department of Transportation (DOT) did not include any affirmative language to indicate that the regulations were intended to be retroactive. In fact, in both instances where the regulations were changed, it was apparent that the DOT specifically intended that the new regulations be prospective. The DOT implemented changes to 49 C.F.R. Part 40 partly in January 2001. [65 F.R. 79462] No language was included in that change calling for retroactivity, a clear indication that the regulations were intended to be prospective. In the most recent May 2003 amendments, DOT was even more specific, stating that if an "employer received a substituted result… before the effective date of this amendment (May 28, 2003)" the result was to be treated as substituted as provided in the prior 49 C.F.R. Part 40. [68 F.R. 31625]

There is a strong presumption against retroactive application of laws and regulations, and a strong presumption in favor of prospective application. The United States Supreme Court has ruled, "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have

retroactive effect unless their language requires this result." Bowen v. Secretary of Health & Human Services, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L.Ed. 2d 493 (1988).

For these reasons, there is a clear indication that DOT intended for the May, 2003, regulatory changes to be prospective. As a result, this Decision will be governed by the definition of "substitute specimen" and the procedures required for that scenario applicable on July 31, 2000 when Respondent submitted his urine specimen, not the provisions subsequently enacted.

I.

Certain findings of fact are not supported by the evidence, specifically findings nos. 14, 33, 34, 36, 42, 43 and "Ultimate Finding of Fact" and "Conclusion of Law No. 7."

I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE).

Findings of Fact 14, 33, and 34 went to the issue of whether overhydration could cause a urine sample to be determined substituted, and to the scientific reliability of the evidence the Coast Guard presented in its case in chief. Findings of Fact 36 and 42 went to the credibility and weight the ALJ gave to the testimony of the MRO, a witness for the Coast Guard, and to the Substance Abuse Professional (SAP), called by the Respondent. In Finding of Fact 43, the ALJ found there was no medical explanation for the test results. In Ultimate Finding of Fact and Conclusion of Law 7, the ALJ found that the Respondent's expert witness, Dr. Anthony Colucci was not credible.

I have long held that it is the sole purview of the ALJ to determine the weight of evidence and to make credibility determinations. Appeal Decision 2156 (EDWARDS); Appeal Decision 2116 (BAGGETT); Appeal Decision 2472 (GARDNER). In this case, the ALJ reviewed scientific evidence including a DHHS report on urine specimen validity testing [I.O. Exhibit 9], scientific papers on the characterization of urine for specimen validity determination in workplace drug testing from the Journal of Analytical Toxicology [I.O. Exhibit 10], and another on measuring creatinine and specific gravity after water loading from the Society of Forensic Toxicologists. [I.O. Exhibit 11] The ALJ also heard direct and cross-examination of witnesses for the Coast Guard, including the MRO, [Tr. vol. 2 at 20-32, 110, 122] and the Respondent, including the SAP. [Tr. vol. III at 28-29] The ALJ found that the Coast Guard proved its case in chief by a preponderance of the evidence; he did not find the evidence presented by Respondent sufficient to overcome that preponderance. On review of the record, I do not find any indication that the ALJ's determination of facts and conclusions of law were arbitrary or capricious, not supported by law, or clearly erroneous. Sufficient material exists in the record to support his findings. Therefore, I reject Respondent's first Basis of Appeal.

II.

Certain conclusions of law do not accord with applicable law, precedent, and public policy, specifically conclusions nos. 4 and 5.

In Ultimate Finding of Fact and Conclusion of Law 4, the ALJ found that the Coast Guard had proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed misconduct. [D&0 at 20] Ultimate Finding of Fact and Conclusion of Law 5 was the ALJ's determination that the

Respondent had failed to rebut or otherwise discredit the Coast Guard's case and proof. [D&O at 20]

Respondent contends in his brief that, to the contrary, the Coast Guard did not meet its initial burden of proof because the Coast Guard never proved that he physically altered, substituted, or manipulated his urine sample. Respondent also contends that an unlawful presumption was created, improperly shifting the burden of proof to Respondent. Respondent also argues, nonetheless, that he successfully rebutted the Coast Guard's *prima facie* case.

In his D&O, the ALJ found that the evidence presented by the Coast Guard, including a determination by a federally certified drug-testing laboratory that Respondent's July 31, 2000, urine specimen was substituted, was evidence proving by a "preponderance of reliable, probative, and substantial evidence" that Respondent refused to submit to chemical testing within the meaning of 46 C.F.R. §16.105 (2000). [D&O at 27] The ALJ also found that Respondent failed to provide evidence to counter the evidence presented by the Coast Guard.

The ALJ's use of language sometimes associated with a presumption ("rebut or otherwise discredit" [D&O at 20]) in characterizing the Respondent's failure to present substantial evidence to support his assertions does not show that the ALJ relied upon an impermissible presumption. The text of the ALJ's Ultimate Finding of Fact and Conclusion of Law 5, which states that the Respondent "failed to rebut or otherwise discredit the Coast Guard's" case [D&O at 20]—a phrase that can be used in the context of presumptive evidence and a *prima facie* case—is an expression of the ALJ's determination that the respondent failed to present evidence to diminish the reliability,

probative value, substance, or credibility of the Coast Guard's case-in-chief. This is not an indication of an impermissible burden shift; it means that the ALJ did not find Respondent's evidence sufficient to discredit the Coast Guard's case. The record also shows that the ALJ found certain evidence Respondent presented detrimental to Respondent's own position.

In addition, the DOT regulations do not create a presumption against an individual who submits a sample with a very low creatinine level. In the final rule for 49 C.F.R. Part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs", published in December 2000, DOT specifically stated that the regulatory provisions regarding substituted samples and validity testing do not create a "presumption of guilt." [*See* 65 F.R. 79480.]

Therefore, as discussed above in section I, I will only overturn the ALJ's decision if it is arbitrary, capricious, based on inherently incredible evidence, unsupported by law, or if the ALJ was clearly erroneous in determining facts. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). With no indication that the ALJ acted in such a manner, I find that Respondent's Bases of Appeal II are not supported by evidence in the record and are, therefore, not persuasive.

III.

The ALJ abused his discretion in finding the Coast Guard's case proven because there was no evidence of statistical validity to support the Coast Guard's prima facie case of "substitution."

Respondent contends that there is insufficient evidence in the record to support the ALJ's conclusion that his urine was substituted. After a careful review of the record,

I do not find Respondent' argument in this regard to be persuasive. Pursuant to the standards in effect at the time, urine is "substituted" when it has a creatinine concentration level of under 6 milligrams per deciliter and a specific gravity level of at least 1.001. [I.O. Exhibit 9] Respondent's urine creatinine concentration was 3 milligrams per deciliter and his urine's specific gravity level was 1.001. [I.O. Exhibits 3 - 5] Based on this definition, I find that the ALJ did not err in determining that Respondent's urine was substituted. Having said that, the issue remaining is whether the definition of "substituted sample" in effect at that time is supported by evidence of "statistical validity".

Respondent argues that in order to find the Coast Guard's case proven, the ALJ first had to find that the Coast Guard had presented sufficient evidence of the statistical validity of the regulatory standards for a substituted sample. The Coast Guard is charged with enforcing the regulations. The Coast Guard does not have to prove the validity of a regulation each time it engages in a Suspension and Revocation (S&R) hearing. Regulations necessary to enact a statute are subject to an extensive process involving public notice, comment, and revision. This process is designed to ensure that regulations are reasonable, necessary and proper. Challenges to the validity of a regulation are appropriate for the notice and comment periods in the rule-making process, not in the administrative enforcement of the regulations. Determining the validity of regulations is the province of the Federal courts, which have a long tradition of giving "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer". Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Because there is no indication that the regulations were not

developed in accordance with the applicable law, and because of the inappropriateness of an executive agency to intrude on the province of the Federal Courts, I find that Respondent's Basis of Appeal III is not persuasive.

IV.

The Decision and proceedings taken on the whole represent a violation of the Respondent's constitutionally guaranteed right of due process under Amendment V to the Constitution of the United States, because the procedure, trial, and tribunal to which McDonald was subjected was so fundamentally unfair as to be constitutionally impermissible.

Respondent contends that the ALJ established an irrebutable presumption, had an unalterably closed mind, disparaged witnesses presented by Respondent, and imposed a post-hearing requirement upon Respondent's expert witness but not upon the Coast Guard's expert witness. These actions by the ALJ, it is alleged, constituted a denial of due process.

S&R proceedings are administrative, not judicial, proceedings whose purpose is to promote safety at sea; judicial review is available in the federal courts. S&R proceedings have as the focus of their inquiry issues of compliance with statutes and regulations; Constitutional issues are the province of the Federal Courts. 46 U.S.C. §7701 *et seq.* Therefore, I will not make a determination on Respondent's constitutional claims. However, I note that Respondent's due process rights have been safeguarded within the Coast Guard's administrative process; a process that has been held to be constitutionally sufficient. *See,* for example, *Williams v. Department of Transportation*, 781 F.2d 1573 (11th Cir. 1986). To that end, the record clearly indicates that Respondent has been afforded the right to appear before a neutral trier of fact, to face all evidence presented against him, to present evidence on his own behalf, to cross-examine the Coast Guard's witnesses and to call witnesses on his own behalf, and to appeal the ALJ's

behalf, and to appeal the ALJ's decision to a higher authority. Therefore, although it is not my province to determine the validity of the constitutional claims raised by Respondent, I have no doubt that such claims would be found baseless upon further review.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision with respect to Assignments of Error I, II, and III was not arbitrary, capricious, or clearly erroneous. Because Suspension and Revocation proceedings are administrative, not judicial, and because issues of constitutionality are the province of the federal courts, I make no determination on the constitutional claims raised within Respondent's Assignment of Error IV. Competent, reliable, probative, and substantial evidence existed to support the findings and order of the Administrative Law Judge. Therefore, I find Respondent's bases of appeal I, II, and III to be without merit.

ORDER

The Decision and Order of the Administrative Law Judge is AFFIRMED.

Signed at W shington, D.C., this 5th day of April, 2004.

T.J. BARRETT
Vice Admiral, U.S. Coast Guard
Vice Commandant