

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

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

vs. \*

LONZELL SYKES \*  
Respondent \*

Docket No. 99-0319

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DECISION AND ORDER

PETER A. FITZPATRICK  
United States Administrative Law Judge

APPEARANCES:

FOR THE COAST GUARD

Lt. Kevin Carroll  
CWO John Gonzales  
United States Coast Guard  
Marine Safety Office – Hampton Roads  
Norfolk, VA

FOR THE RESPONDENT

Mr. Larry Blanchard

PRELIMINARY STATEMENT

This case began upon the filing of the Complaint on October 27, 1999. It alleged that Mr. Sykes took a Pre-Employment drug test on January 19, 1999 at the offices of Richard Hoffman, MD and that the result showed that his urine specimen contained Cocaine Metabolite. The specimen is alleged to have been collected and analyzed in accord with the procedures approved by the U S Department of Transportation.

The Respondent's Answer was filed that same day. Mr. Sykes denied all jurisdictional and factual allegations. He also indicated that he did not understand the term "Affirmative Defense".

A pre-hearing conference was held at Norfolk and all parties were present. At the outset I reviewed the Complaint and Answer and explained the nature of the hearing and the applicable law. The Respondent indicated that he was not a user of dangerous drugs and denied those allegations of the Complaint. Both sides provided a description of the witnesses to be presented and the case was set for hearing as previously scheduled on December 17, 1999.

The hearing was conducted as scheduled and the Respondent, his representative Mr. Larry Blanchard, and the Investigating Officers were present. The witnesses sponsored by the Coast Guard included Ms. Nancy Briach, Collection Site Person; Mr. James Callies, Scientific Director, Quest Diagnostics, Inc.; and Mr. George Ellis, President, Greystone Health Sciences Corporation.

The Investigating Officer also offered four exhibits into evidence. (IO 1- 4).

The Respondent testified but did not sponsor any other witnesses or exhibits.

At the conclusion of the hearing I found that the allegations in the Complaint were ~~PROVED~~ by the Preponderance of the Evidence. After receiving the Respondent's

record and mindful of the requirements of the applicable statute (46 USC 7704), I ordered Mr. Sykes' Merchant Mariner's Document to be REVOKED.

## II

### FINDINGS OF FACT

1. Lonzell Sykes is the holder of Merchant Mariner's Document 224-66-6499 issued by the United States Coast Guard.

2. On January 19, 1999, Mr. Sykes took a Pre-Employment drug test at the offices of Dr. Richard Hoffman in Norfolk. Ms. Nancy Briach was the person who collected his urine sample and completed the associated documents. She signed the Drug Testing Custody and Control Form and sealed the shipping container in Mr. Sykes' presence. Thereafter, she packaged the sample for shipment with the required forensic seals.

3. Ms. Briach executed the certification on the Drug Testing Custody and Control form (DTCC) attesting to the fact that the specimen was provided by Mr. Sykes, and that it was collected, labeled, and sealed in accordance with Federal requirements. Also, Mr. Sykes himself executed the certification on the DTCC form attesting that the specimen was his, that it was sealed in his presence, and that the information provided on the form was correct. (I.O. 2).

4. The sample was received at Quest Diagnostics on January 22, 1999. The receipt of the kit as well as the handling and testing of the sample are documented on the laboratory's internal chain of custody. (I.O. 4). An examination of the seals on the mailing kit and bottle were performed to assure that the items were intact. There is no indication in this case that the specimen was opened after it had been sealed and before it arrived at the laboratory.

An internal chain of custody and additional numbering system were established at the laboratory. The initial drug screen was conducted and it revealed the presence of Cocaine in Mr. Sykes' sample.

5. Next, another aliquot was taken from the sample and a confirmatory test (gas chromatography/mass spectrometry) (GC/MS) was conducted. That result revealed the presence of Cocaine metabolite in excess of the Federal threshold level. The Certifying Scientist, Eric R. Mortensen, signed the DTCC form on January 22, 1999.

6. The laboratory results were sent to the Medical Review Officer, Doctor Stephen Oppenheim. Nearly 9 months later on September 20, 1999 the Doctor was able to speak with the Respondent and Doctor Oppenheim concluded the test result was positive.

7. That positive finding was forwarded to the Coast Guard Marine Safety Office and the Complaint here followed.

### III

#### CONCLUSIONS OF LAW

1. The Respondent and the subject matter of this hearing are within the jurisdiction of the Coast Guard under Sections 7702 and 7704, Title 46, United States Code.

2. All Jurisdictional and factual allegations of the Complaint are supported by the Preponderance of the Evidence. They are PROVED.

## IV

### OPINION

1. Where a mariner is charged in the Complaint with a positive result on a drug test conducted in accord with the Department's regulations, the statutory mandate set out at 46 U.S.C. 7704(c) is controlling. That provision, in pertinent part, states that if it is shown (at a hearing) that the holder of a merchant mariner's license or document has been the user of a dangerous drug, the mariner's credentials "shall be revoked unless the holder provides satisfactory proof that the holder is cured." In such case the burden of proving the elements of the charge rests upon the Investigating Officer. The standard of proof, which must be established, is that the charge must be proved by substantial, reliable, and probative evidence. That term, as described in Appeal Decision 2603 (HACKSTAFF) (1998) is the same as the preponderance of the evidence standard. See Steadman v SEC, 450 US 91 (1981).

In a case where the charge is founded solely on the results of chemical testing by urinalysis, the presumption set out at 46 C.F.R. 16.201(b) is applicable. That rule provides that where a mariner fails a chemical test for dangerous drugs, "the individual will be presumed to be a user of dangerous drugs". As the Commandant recently stated in Hackstaff (Id. at 5):

"...46 C.F.R. § 16.105 defines "fails a chemical test for dangerous drugs" to mean that a Medical Review Officer (MRO) reports as "positive" the results of a chemical test conducted under 49 C.F.R. § 40.

In other words, 46 C.F.R. § 16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 C.F.R. § 40 chemical test of a merchant mariner's sample was reported as positive by an MRO."

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Thus, in order to successfully invoke the presumption above, the Investigating

Officer must show (1) that the Respondent was the person who was tested; (2) that the Respondent failed the test; and (3) that the test was conducted in accordance with 46 C.F.R. § 16. (Id.) If all three elements are proven the burden of going forward with the evidence shifts to the Respondent who must rebut the presumption. (Id.).

The analysis below will therefore examine whether the Investigating Officer met the requirement to prove the three criteria necessary to invoke the presumption of illicit drug use against Mr. Sykes.

2. Ms. Briach conducted the collection of Mr. Sykes' specimen on January 19, 1999. Mr. Sykes signed the DTCC form and certified that the urine specimen provided was his, that is was not adulterated, that the container was sealed with a tamper proof seal in his presence, and that the information provided on the form and on the label affixed to each bottle was correct. (IO – 2). The Collector too, certified that the specimen identified on the form was the one provided by the Donor and that it was collected, labeled, and sealed in accord with applicable Federal requirements.

At the hearing Ms. Briach specifically pointed out that she remembered Mr. Sykes and conducted the collection in accord with the DOT requirements. Indeed, the Respondent did not challenge the collection procedure at the hearing. A review of the certification above, the DTCC form, and the testimony of Ms. Briach make it clear that Lonzell Sykes was the individual involved in the collection here. There is no doubt too, that the evidence present on this record shows a properly conducted urine collection in accord with the DOT and Coast Guard regulations.

3. Similarly, there is no challenge in this case to the accuracy of the chemical drug tests and procedures followed at Quest Diagnostics. Mr. Callies, the laboratory's Scientific Director, described the procedures followed once the specimen arrived at the laboratory. It was inspected for tampering and to assure the sealed bottle was intact. A

bar code was applied to the bottle before the testing commenced. The first test was an enzyme immunoassay screening. In the instance at bar, Mr. Sykes' screening result showed a value for cocaine of 198 ng/ml.

Next, another aliquot was removed from the original specimen and was subjected to a confirmatory analysis called gas chromatography/mass spectrometry. That test showed that Mr. Banks' specimen contained 1177 ng/ml of the cocaine metabolite sought. The Federally established cutoff on the confirmatory test is 150 ng/ml. (I.O. 4).

Considering Mr. Callies' testimony, the detailed "Litigation Package" submitted by the laboratory and the lack of any challenge here to the testing process. I have concluded that Mr. Sykes' specimen was properly tested by a Federally authorized drug testing laboratory and that the results are accurate.

4. Quest Diagnostic's Final Report was issued on January 25, 1999 and sent to the Medical Review Officer. The MRO was not able to contact the Respondent until September 20, 1999 when Dr. Oppenheim interviewed him by telephone. After that interview the Doctor concluded that there was no reasonable medical explanation for the presence of the drug in the Respondent's system and that a positive test result was involved. The Doctor signed the DTCC form verifying a positive result.

I find that the Medical Review Officer properly performed his duties in verifying the test results here as Positive.


5. Mr. Sykes testified that he does not use illicit drug and cannot understand how the urine sample here tested positive. That denial is not sufficient to rebut the convincing evidence submitted in support of the Complaint. The evidence here is substantial, reliable and probative that the Respondent was the mariner who took the drug test, that the test was performed in accord with the applicable regulations, and that the results were

positive for cocaine metabolites.

**ORDER**

For the reasons set out above, I find that the Complaint in this case is PROVED. In accord with 46 USC 7704 and in the absence of any evidence of "cure", the Respondent's Merchant Mariner's Document is hereby REVOKED.

Done and dated this 13<sup>th</sup> day of January, 2000  
At Norfolk, Virginia.

  
PETER A. FITZPATRICK  
United States Administrative Law Judge