

Revocation.

A hearing was scheduled and held on 5 January 2000 at the Marine Safety Office, 800 David Drive, Morgan City.

In support of the Complaint the Investigating Officer introduced in evidence the telephonic testimony, as provided for by 46 CFR 5.535(f) of; (1) Errol J. King, Sr., who is a urine specimen collector for Ira Jane Hurst and Associates, Lafayette, LA, and who collected a specimen from Mr. Pyatt on 18 May 1999; (2) Dr. Bertram J. Lee, who served as a Medical Review Officer for Aires Marine Corporation, Lafayette; and (3) Michael Bachman, Toxicologist at Lab Corps Occupational Testing Services, Inc., Research Triangle Park, N.C.

Also in support of the Complaint the Investigating Officer introduced in evidence the following documents.

I.O. Exhibit No. 1 – a U.S. Postal Service return receipt No. Z7047614589, signed by the Respondent and dated 2 August 1999 which shows that Mr. Pyatt was properly served with the Complaint.

I.O. Exhibit No. 2 – a copy of the Complaint cover letter.

I.O. Exhibit No. 3 – a certified copy of copy No. 1, of a Federal Drug Testing Custody and Control Form for a specimen bearing ID No. 058278183-5, which was the number assigned to Mr. Pyatt's specimen.

I.O. Exhibit No. 4 – certified copies of copies 2, 4, and 6 of the Federal Drug Testing Custody and Control Form for the same specimen, together with the "Test Result."

I.O. Exhibit No. 5 – a copy of the Federal Register dated 4 May 1999 showing that Lab Corps is a federally approved laboratory for specimen testing.

I.O. Exhibit No. 6 – the litigation report of Lab Corps for Mr. Pyatt's specimen.

I.O. Exhibit No. 7 – a “Result Verification” which purports to be the Medical Review Officer’s documentation.

After the Investigating Officer presented all of his evidence and rested his case the question arose as to whether or not the Medical Review Officer complied with the specific requirements of the drug testing regulations. The Administrative Law Judge adjourned the hearing in order to consider whether or not a prima facie case had been established. At a later date, both the Investigating Officer and the Respondent submitted briefs in support of their respective positions. (Attachments A and B)

It is now concluded that the evidence is not sufficient to support the allegations of the Complaint.

ULTIMATE FINDINGS

It is not proved that Jeffery S. Pyatt while being the holder of the above captioned license and document was on 18 May 1999 found to be a User of a Dangerous Drug to wit: marijuana.

CONCLUSIONS

The Respondent and the subject matter of this hearing are within the jurisdiction vested in the U.S. Coast Guard under the provisions of 46 USC Section 7704.

The Complaint is not justified.

OPINION

It is important that the federal government’s drug testing program be administered

so as to eradicate the use of drugs in the American workplace. However, it goes without saying, the program must be administered with justice and fairness to each person tested.

The collector's function in the drug testing procedure is a vital link. The testing laboratory's function is a vital link. The Medical Review Officer's function is a vital link. All of the persons involved in the procedure must strictly abide by the regulations.

At the outset it must be noted that three different "Medical Review Officers" were involved in this case. Dr. Bertram J. Lee was the only "Medical Review Officer" to testify. He testified that he "stamped" the Custody and Control Forms as positive. Dr. Lee never spoke to Mr. Pyatt. He admitted that his only knowledge of Mr. Pyatt was that a "Dr. A-s-u-n-c-i-o-n," (phonetic) who was in training at the time to become a Medical Review Officer, conducted a telephone interview, which was not on a speaker telephone, with Mr. Pyatt. "Dr. A-s-u-n-c-i-o-n's" name does not appear on any of the documents. "Dr. A-s-u-c-i-o-n" did not testify. He is no longer employed as a Medical Review Officer.

On a Medical Review Officer "Result Verification" (I.O. Exhibit No. 7), on which most of the entries are illegible except for the words "positive T HC," the initials of yet another Medical Doctor, "Dr. Murray Lappe," appear. Dr. Lappe did not testify.

There is no evidence of a reliable, substantial, or probative nature that Mr. Pyatt was ever contacted by a Medical Review Officer and given an opportunity to discuss the results of the test.

The Medical Review Officer's duties and responsibilities are set out in the Coast Guard and Department of Transportation regulations at 46 CFR 16.370 and 49 CFR

46 Code of Federal Regulations, Section 16.370 entitled "Medical Review Officer" reads as follows:

- "(a) The employer shall designate or appoint a Medical Review Officer (MRO) meeting the qualifications of 49 CFR 40.33. If the employer does not have a qualified individual on staff to serve as MRO, the employer may contract for the provisions of MRO services as part of its drug testing program.
- (b) The MRO shall review and interpret each confirmed positive test result in accordance with 49 CFR 40.33.
- (c) If the MRO verifies a laboratory confirmed positive report, the MRO shall report the positive test result to the employer or the employer's designated agent."

49 CFR Section 40.33 "Reporting and Review of Results" reads as follows:

"(a) Medical Review Officer shall review confirmed positive results.

(1) An essential part of the drug testing program is the final review of confirmed positive results from the laboratory. A positive test result does not automatically identify an employee/applicant as having used drugs in violation of a DOT agency regulation. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer (MRO) prior to the transmission of the results to employer administrative officials. The MRO review shall include review of the chain of custody to ensure that it is complete and sufficient on its face. (Emphasis supplied)

(2) The duties of the MRO with respect to negative results are purely administrative.

(b) Medical Review Officer – qualifications and responsibilities.

(1) The MRO shall be a licensed physician with knowledge of substance abuse disorders and may be an

employee of a transportation employer or a private physician retained for this purpose.

(2) The MRO shall not be an employee of the laboratory conducting the drug test unless the laboratory establishes a clear separation of functions to prevent any appearance of a conflict of interest, including assuring that the MRO has no responsibility for, and is not supervised by or the supervisor of, any persons who have responsibility for the drug testing or quality control operations of the laboratory.

(3) The role of the MRO is to review and interpret confirmed positive test results obtained through the employer's testing program. In carrying out this responsibility, the MRO shall examine alternate medical explanations for any positive test result. (Emphasis supplied) This action may include conducting a medical interview and review of the individual's medical history, or review of any other relevant biomedical factors. The MRO shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The MRO shall not, however, consider the results on urine samples that are not obtained or processed in accordance with this part.

(c) Positive test result.

(1) Prior to making a final decision to verify a positive test result for an individual the MRO shall give the individual an opportunity to discuss the test result with him or her. (Emphasis supplied)

(2) The MRO shall contact the individual directly, on a confidential basis to determine whether the employee wishes to discuss the rest result. (Emphasis supplied) A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee. Except as provided in paragraph (c) (5) of this section, the MRO shall talk directly with the employee before verifying a test as positive. (Emphasis supplied)

(3) If, after making all reasonable efforts and

documenting them (Emphasis supplied), the MRO is unable to reach the individual directly, the MRO shall contact a designated management official who shall direct the individual to contact the MRO as soon as possible. If it becomes necessary to reach the individual through the designated management official, the designated management official shall employ procedures that ensure, to the maximum extent practicable, the requirement that the employee contact the MRO is held in confidence.

(4) If, after making all reasonable efforts, the designated management official is unable to contact the employee, the employer may place the employee on temporary medically unqualified status or medical leave.

(5) The MRO may verify a test as positive without having communicated directly with the employee about the test in three circumstances:

(i) The employee expressly declines the opportunity to discuss the test;

(ii) The designated employer representative has successfully made and documented a contact with the employee and instructed the employee to contact the MRO (see paragraphs (c) (3) and (4) of this section), and more than five days have passed since the date the employee was successfully contacted by the designated employer representative: (Emphasis supplied)

On 19 August 1996 the Department of Transportation amended the above provisions to provide as follows:

“(ii) Neither the MRO nor the designated employer representative, after making all reasonable efforts, has been able to contact the employee within 14 days of the date on which the MRO receives the confirmed positive test result from the laboratory;” (Emphasis supplied)

A publication entitled “Medical Review Officer Guide” published by the U.S.

Department of Transportation in October 1990 at page 13 instructs the Medical Review

Officer as follows:

“After the MRO reviews the laboratory positive test report and related matters and verified that the positive report is evidence of unauthorized drug use, the MRO will sign the verification statement on Part 2 of the custody and control form. The MRO may notify the employer of a verified positive by telephone, electronically, or in writing. The Copy 2 of the custody and control form may be sent to the employer, or another form providing the employee’s name, identification number, specimen I.D. number, date of test, result and substance found in the urine, may be used.

In making a determination of either verified positive or negative, the MRO should be careful to document for his or her own files a summary statement of the basis for determination. (Emphasis supplied)

Also in the same publication at page 41, the Guide further directs the Medical

Review Officer as follows:

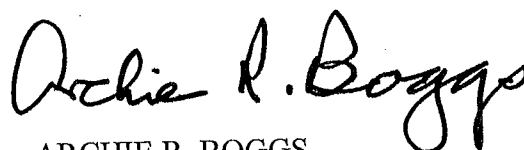
- (1) Prior to verifying a test result as positive, the MRO must give the employee an opportunity to discuss the test result directly with the MRO.
- (2) The MRO must confidentially contact the employee to determine if the employee chooses to discuss the test result. A staff person under the MRO’s supervision may make the initial contact with the employee. A medically licensed or certified staff person (nurse, physician’s assistant, emergency medical technician) may obtain information related to the drug test result from the employee. Except as identified in paragraph (5) below, the MRO must talk directly with the employee before verifying a test as positive.
- (3) If, after making a reasonable effort to contact the employee, the MRO is unable to talk with the employee, the MRO shall contact a designated employer representative who must contact the employee. The employer, in consultation with the MRO, should establish guidelines for what constitutes “a reasonable effort” (time, number of attempts, etc.). The MRO should document all attempts made to contact the employee.” (Emphasis supplied)

The answer to the question as to whether or not any of the three “Medical Review

Officers" complied with the regulations and the Medical Review Officer's Guide is clearly that they did not. This neglect is, indeed, grave – sufficient to warrant dismissal of the Complaint.

ORDER

That the Complaint lodged against license No. 774917 and merchant mariner's document No. 575 84 8671 issued to Jeffery S. Pyatt is dismissed.



ARCHIE R. BOGGS
Administrative Law Judge
United States Coast Guard

Dated on March 28, 2000
New Orleans, Louisiana.