UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	*	
UNITED STATES COAST GUARD,	*	
COMPLAINANT	*	
	*	
vs.	*	Docket Number: 99-0270
	*	PA Number: PA99002102
License No. 887187	*	
	*	
and	*	
	*	
Merchant Mariner's Document No.	*	
[REDACTED]	*	
	*	
Issued to:	*	
David Shaffer,	*	
RESPONDENT	*	

* * * * * * * * * * * * * * *

Before: Archie R. Boggs
Administrative Law Judge

DECISION AND ORDER

This proceeding was brought pursuant to the authority contained in the provisions of 5 USC *552-559;* 46 Usc Chapter 77; 46 CFR Parts *5* and 16; *49* CFR Part 40; and 33 CFR Part 20.

David Shaffer was served with a Complaint signed by Lt(j.g.) Christopher J. Gagnon., U.S. Coast Guard on *5* October 1999. The factual allegations are as follows:

1. "The Coast Guard alleges that on 7/7/99 the Respondent provided a urine sample as part of a random drug test.
2. The urine was collected and analyzed by Laboratory Specialists Inc. using procedures approved by the Department of Transportation.

3. The sample was found to contain high concentration of nitrate and determined to be adulterated by the laboratory and Medical Review Officer."

Through his representative, Howard P. Elliott, Jr., attorney at law, 1278 Tara Boulevard, Baton Rouge, LA 70806, the Respondent filed an answer

denying the jurisdictional allegations of paragraph 3 and the factual allegations of paragraphs 2 and 3. Mr. Shaffer was represented by attorneys Howard P. Elliott, Jr. and Madro Bandaries, P.O. Box 56458, New Orleans, LA 70156.

Prior to the scheduled date of the hearing, at the request of Respondent's counsel, the Administrative Law Judge held a joint telephone conference with Mr. Bandaries and the Investigating Officer.. Prior to the telephone conference Mr. Bandaries filed a motion for a summary dismissal of the matter and a memorandum in support thereof. The motion for a summary dismissal was denied and the hearing proceeded as scheduled on 12 January 2000.

In the telephone conference Mr. Bandaries requested that subpoenas be issued to prospective witnesses: John Guerin, Donald Duncan, and Mike McCaskill. The Administrative Law Judge provided subpoenas in accord with that request.

At the outset of the hearing the Administrative Law Judge entered in evidence the "Motion for Summary Deposition" (sic) (AU I) and a "Memoranda in Support of the Summarily Deposition" (sic) (AU II).

In support of the Complaint the Investigating Officer introduced into evidence the testimony of four (4) witnesses: (1) Robert Michael McCaskill, operations manager for Economy Boat Store, (2) Paula Landry, specimen collector for West Baton Rouge Medical Clinic, 1048 Commercial Drive, Port Allen, LA 70764, (3) Dr. Leon Glass, laboratory director, Laboratory Specialists, Inc., 1111 Newton Street, Gretna, LA, and (4) Dr. Patrick J. Daigle, Medical Review Officer, West Baton Rouge Medical Clinic.

Also in support of the Complaint the Investigating Officer introduced eleven (11) exhibits. A brief description of those exhibits follows:

1.0. Exhibit No. 1 – a copy of Coast Guard license No. 887187 which was issued to David Bryan Shaffer.

1.0. Exhibit No. 2 – a copy of a merchant mariner's document No. ***[REDACTED]*** with an expiration date of 11/11/00 which was issued to David Bryan Shaffer.

1.0. Exhibit No. 3 – a completed Federal Drug Testing Custody and Control Form, copy No. 6, the collector's copy, for a specimen bearing ID No. 04163769.

1.0. Exhibit No. 4 – a litigation report which bears the signature of the Laboratory Director Leon R. Glass, PHD.

1.0. Exhibit No. 5 – a Department of Health and Human Service Notice to HITS Certified an Applicant Laboratories (7 pages).

1.0. Exhibit No. 6 – another completed Drug Testing Custody and Control Form, copy No. 4, the Medical Review Officer's copy, for the same specimen.

1.0. Exhibit No. 7 – a completed "Remote Drug Report Form" which shows that the specimen was not tested with the comment "no test:
specimen adulterated: nitrate is too high."

1.0. Exhibit No. 8 – Dr. Patrick J. Daigle's "Medical Review Officer's Report" which also indicates that a test was not performed due to adulteration.

1.0. Exhibit No. 9 – a memo from the Drug and Alcohol Policy and Complaint Office of the U.S. Department of Transportation addressed to the Department of Health and Human Services (HITS) HITS Certified and Applicant Laboratories Medical Review Officers (MROs).

1.0. Exhibit No. 10—none.

1.0. Exhibit No. 11 – a letter addressed to David Shaffer signed by D. B. Cherry, U.S. Coast Guard Investigating Officer, dated 3 May 1997 concerning a DWI conviction of David Shaffer.

1.0. Exhibit No. 12 – a Letter of Warning which was issued to the Respondent by LT(j.g.) J. C. Durbin, Coast Guard Investigating Officer, dated 19 March 1997.

The Respondent called two witnesses: (1) Donald Duncan, a fellow employee and tankerman, and (2) John Guerin, supervisor and dispatcher for Economy Boat Store. Mr. Shaffer testified under oath in his own defense. Also in his defense the Respondent offered two exhibits.

Respondent Exhibit A – a letter addressed to Mr. Shaffer signed by C. J. Gagnon, LT(j.g.) U.S. Coast Guard dated 30 September 1999.

Respondent Exhibit B – an affidavit dated 10 December 1999 by John Guerin. At the conclusion of the hearing on 12 January 2000, after the Investigating Officer and the Respondent argued their respective positions, both sides were afforded the opportunity to submit briefs and Proposed Findings of Fact and Conclusions of Law. Both sides indicated that they wished to do so. Copies of the submissions are attached hereto in full (Attachments A and B).

The rulings on the Proposed Findings of Fact and Conclusions of Law are at pages *5* through 18 of this Decision.

After having thoroughly considered all of the evidence, the Proposed Findings of Fact and Conclusions of Law, and the arguments, it is concluded that the allegations of the Complaint are proved.

The Investigating Officer advised the hearing that Mr. Shaffer's prior record consists of a Letter of Warning which was issued to him on 19 March 1997 and which has been introduced as 1.0. Exhibit No. 12.

ULTIMATE FINDINGS

1. On 7 July 1999 the Respondent provided a urine specimen as part of a random drug test.
2. The urine was collected and analyzed by Laboratory Specialists, Inc., using procedures approved by the Department of Transportation.
3. The sample was found to contain a high concentration of nitrate and it was determined to be adulterated by the laboratory and the Medical Review Officer, resulting in a non-test of the specimen.

In addition to the Ultimate Findings as set out above I adopt the Proposed Findings of Fact as submitted by the Investigating Officer as evidentiary findings in this Decision.

FINDINGS OF FACT

ACCEPTED

1. Respondent, David Shaffer, is the holder of a License number 887187 and Document number ***[REDACTED]*** issued by the Coast Guard. [10 exhibit 1 & 21

ACCEPTED

2. On July 7, 1999 David Shaffer was employed as a Tankerman by Economy Boat Store of Baton Rouge, LA. [testimony of employer, Michael McCaskiIl]

ACCEPTED

3. On July 7, *1999* David Shaffer was ordered by his employer to submit to a DOT random drug test held in the dispatcher's office of Economy Boat Store.

ACCEPTED

4. Respondent was positively identified to the Collector by Michael McCaskili, the company's Operations Manager, who stood behind the collector during the collection process. Mr. Shaffer was the last person to give a sample that day. [testimony from Respondent, Michael McCaskiII, Donald Duncan, and Collector]

49 *CFR 40.25(1) (2) allows for the identification of individuals "through the presentation of photo identification or identification by the employers representative*

ACCEPTED

5. When the Respondent approached the Collectors table, he was asked to review the custody and control form paper work, sign the form, and initial the urine sample identification labels. The respondent was then given a clean, new, cup to provide a urine sample in. He was directed to an empty bathroom at the rear of the room. The Respondent entered the bathroom by himself and exited with a filled urine sample cup. [testimony from Respondent, Michael McCaskiIl, and Collector]

ACCEPTED

6. The Respondent brought his sample to the collection table where he presented it to the collector. The Collector then split the sample into two sample containers in the presence of the Respondent. [testimony from Respondent, Michael McCaskiIl, Donald Duncan, and Collector]

ACCEPTED

7. Once the sample was split, The Respondent attempted to leave the room prior to having the sample bottles sealed. [testimony from Respondent, Michael McCaskiIl, and Collector]

ACCEPTED

8. The Respondent walked approximately three feet out the door when he was called back by the Collector and Michael McCaskill. He was out of view of his sample for approximately *5* seconds. [testimony from Michael McCaskill, and Collector]

ACCEPTED

9. Once the Respondent was back in front of the collector and the sample bottles, he then gave the Collector the two identification labels. The labels contained the specimen identification number ***[REDACTED]*** along with

the Respondent's hand written initials. The collector sealed the sample bottles with these labels in the presents (sic) of the Respondent. [testimony from Respondent, Michael McCaskill, and Collector]

ACCEPTED

10. All the urine samples collected that day including the respondents specimen (identification number ***[REDACTED]***) were shipped via courier to Laboratory Specialist, Inc. 1111 Newton Street, Gretna, LA 70053 for testing. [testimony from the Collector and MRO]

ACCEPTED

11. The Respondents urine sample identified with specimen ID number ***[REDACTED]*** arrived at Laboratory Specialist, Inc. intact and free of any apparent tampering on 7/8/99. The sample was assigned laboratory accession number 8715603. [10 exhibit 4 and testimony from Dr. Glass]

ACCEPTED

12. The urine sample with a specimen identification number ***[REDACTED]***, laboratory accession number 8715603, initially screened at 69 ng/mi for THC (marijuana metabolite) and was determined to contain a nitrite concentration of 1112 micrograms/mi. [10 exhibit 4 and testimony from Dr. Glass]

ACCEPTED

13. In a September 28, 1998 notice to HITS certified laboratories, the Department of Health & Human Services defines a urine specimen as adulterated if the nitrite concentration in the sample is greater than or equal to 500 micrograms/mi. [10 exhibit 5]

ACCEPTED

14. Laboratory Specialist, Inc. determined that specimen ID number ***[REDACTED]***, laboratory accession number 8715603 was adulterated. [10 exhibit 4 and testimony from Dr. Glass]

ACCEPTED

15. The Medical Review Officer, Dr. Patrick Daigle, reported specimen ID number ***[REDACTED]***as adulterated and correctly labeled copy four of the custody and control form in block eight as "test not performed" in accordance with a U.S. Department of Transportation memorandum to Medical Review Officers dated

September 28, 1998. [10 exhibits 6, 8, 9 and testimony from Dr. Daigle]

CONCLUSIONS OF LAW

ACCEPTED

During this hearing, the Respondent's attorneys argued that as the result of several flaws in the collection process, the integrity of the sample was not maintained. They further argued, that the results of this test are therefore invalid and should be thrown out. The Coast Guard contends that there were no discrepancies in the collection process that would have compromised the integrity of the urine sample which was provided by the Respondent. In addition to having a nitrite level of 1112 micrograms/mi, over twice the reportable level as adulterated, the sample also contained 69ng/ml of THC (marijuana metabolite). The flaws that were argued are as follows:

The Collector did not identify him properly prior to giving the urine sample.

ACCEPTED

The Respondent testified that the Collector did not ask him to provide positive photo identification prior to giving his sample. He also testified that it was Michael McCaskill, the Operations Manager, who identified him to the Collector. The Collector and Mr. McCaskill also testified that this was the procedure that was followed for everyone giving a sample that day. 49 CFR 40.25(0(2) allows for the identification of individuals by the presentation of photo identification or identification by the employer's representative. Michael McCaskill is the Operations Manager for Economy Boat Store and was the employers representative during the company's random drug test that day.

The Respondent was required to sign the custody and control form and ass6ciated paperwork before he gave his sample.

ACCEPTED

Though having an individual sign the custody and control form and associated paperwork before actually providing a urine sample is improper, it does not constitute a reversible error. Commandant's Decision on Appeal (CDOA) 2554 addressed this very situation. In that decision, the Commandant stated that the record contained

substantial evidence that the required procedures were correctly completed in the presents of the donor. He subsequently up held the validity of the collection. Mr. Shaffer was present when his sample was sealed and labeled. Testimony provided by the Collector, Donald Duncan, and Michael McCaskill has shown that signing the paperwork prior to giving a sample was the procedure followed by everyone who was tested that day.

The Respondent was not asked to wash his hands prior to giving the sample.

ACCEPTED

The mere fact that the Respondent did not wash his hands will not invalidate the results of the test. In CDOA 2522 the Commandant states that "the hand washing requirement is essentially a protection for the tester rather that the individual being tested". The Respondent's attorney's argued that the adulteration could have been the result of particles falling off his hands and contaminating the sample. The Respondent testified to have taken numerous drug tests in the past. Mr. Shaffer never once questioned his need to wash his hands prior to giving a sample to the collector. Moreover, Mr. Shaffer was never denied the opportunity to wash his hands. He was simply not asked to do so. Testimony from Dr. Glass stated that the nitrite level in Mr. Shaffer's sample was 1112 micrograms/mI. This level could not have come from any type of particles falling off Mr. Shaffer's hands according to Dr. Glass. Mr. Shaffer's sample also screened at a level of 69 ng/ml for THC (marijuana).

There was no bluing agent in the toilet bowl and the water faucet was not totally secured in the bathroom of the collections.

ACCEPTED

The bathroom where all the urine samples were collected that day was designated solely for the collection of urine. Both the collector and the employers representative testified they had inspected the bathroom to ensure it was free of any cleaning products or other chemicals. Bluing agents and secured water are to deter the dilution of urine specimens by the individual providing the specimen. The absence of blue water in the toilet absolutely does not corrupt the integrity of the sample provided by the Respondent.

The Respondent left the room and did not witness his sample being sealed by the collector.

The Respondent, Collector and the Employers Representative testified that the respondent placed his sample on the collectors table observed it being poured off and then started to walk away. All parties who were involved with the collection, even the defense witnesses testified that the collector processed one individual at a time and at no time was there more than one person's samples on the table. The collector and Mr. McCaskill testified that as soon as the respondent started to walk away he was called back in to the room. Moreover, they testified that he was away from collectors table for approximately five seconds. This was also the testimony of Donald Duncan who provided a sample just prior to the respondent. They also stated that when the respondent returned to the table, he witnessed the seals being placed on his samples. This act of walking away from the

collection or the test. Too (sic) say it does would give every mariner with something to hide a way of invalidating a drug screen. There were no other samples on the collectors table besides the Respondent's and the Respondent was the last person to give a sample. The sample provided by the Respondent absolutely could not have been mixed up with another sample.

The Respondent initialed the specimen bottle labels prior to having them placed on the bottles.

ACCEPTED

46 CFR 40.25(f)(20) states that "The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her". The intent of this regulation is to ensure that the urine in the specimen bottle is in fact from the individual who provided it. The Respondent initialed the labels on the table and handed them to the collector who in turn affixed them to the bottles in his presents (sic). The regulation does not state the individual shall initial the labels while on the bottle. No, the intent is to ensure the sample belongs to the individual. In this case the evidence clearly shows that it was.

The alleged deviations from the urine collection regulations found in 46 CFR 40.25 are at best minor in nature and do not question the integrity of the sample provided by the Respondent. The Commandant has upheld that minor deviations from the regulations do not invalidate a drug test.

The urine specimen Mr. Shaffer provided initially tested above the cutoff for marijuana by laboratory. However, they were unable to perform the confirmatory portion of the test because the nitrite level in the urine was far above normal levels found in the human body. According to Dr. Glass, the laboratory director, the only explanation for the abnormally high nitrite levels found in Mr. Shaffer's urine, is that he adulterated his urine in an attempt to alter the results of the test.

By providing an adulterated urine sample, he has failed to cooperate with the testing process in a way that can frustrate its completion. Federal Register! Volume 61 Number 140 dated Friday, July, 19, 1996 instructs us to treat this type of action as a refusal to test and invoke the same consequences as a positive test.

The Respondent's "Recommended Findings," "Argument" and "Conclusion" are as follows:

I.

ACCEPTED

This matter came for hearing before the Honorable Archie R. Boggs, Administrative Law Judge on January 12, 2000 in Baton Rouge, Louisiana, with the Hearing Officer inviting both sides to recommend findings.

II.

ACCEPTED

Respondent incorporates the evidence of the foregoing hearing into these recommended findings.

III.

N.B. It is not possible for the AU to rule on specified, numerical

Findings of Fact as has been done for the Investigating Officer because

of the form in which the submission is made.

Respondent was before the hearing officer for a violation of 46 CFR 5.27, referred to as Misconduct. The charging officer alleges three Factual Allegations of Misconduct:

(1) The Coast Guard alleges that on July 7, 1999 the Respondent provided a urine sample as part of a random drug test. (2) The urine was collected and analyzed by Laboratory Specialist, Inc. using procedures approved by the Department of Transportation. (3) The sample was found to contain too high a concentration of nitrites and determined to be adulterated by the laboratory and Medical Review Officer.

After the hearing on the matter respondent says that the Hearing Officer is bound by the law, and by the rules of evidence to determine that *"the urine was (not) collected and analyzed by Laboratory Specialist, Inc. using procedures approved by the Department of Transportation* . Evidence presented by Respondent and the Coast Guard distinctly, and without doubt demonstrate that Department of Transportation rules were not followed, and in effect were disregarded, resulting in Respondent loosing his lively hood. Pursuant to 46 CFR § 5.69, the Hearing Officer is bound to a *Standard of Proof"* that his findings must be supported by reliable, probative, and substantial evidence, further defined as evidence of such probative value as a reasonable, prudent, and responsible person is accustomed to rely upon when making decision in important matters.

As Respondent has lost his employment over this matter, it is certainly important, and further, a review of the case presented by the Coast Guard, clearly demonstrates that the Hearing Officer, accepting the evidence as a reasonable, prudent, and responsible person, is bound to conclude that the charges against Respondent are unfounded based on the evidence. Thus Respondent says that the recommended findings of this Hearing should be that the charges are unfounded or not proven.

IV.

ARGUMENT

Respondent Shaffer testified that he did not adulterate his urine specimen. The Coast Guard presented no direct evidence to rebut his denial, in fact no witnesses were presented to show that Respondent has ever done anything wrong. Respondent has never been arrested for drug violations, and in fact has spent most of his employment history since the 1970's in river work, with a Coast Guard certification.

Respondent testified that he had taken a number of drug tests over the past twenty (20) years and that he had never failed any of them. Further his un-refuted testimony showed that he had never been *"fined or suspended"* by the Coast Guard before. In addition, Respondent took the stand in his own defense, yet counsel for the Coast Guard choose not to cross-examine him other than have him identify a" *Warning Letter"* issued on March 1997 from the Coast Guard, said letter involving the deposition of a Denhamn Springs, LA Municipal Court issue. (It is noted that the letter was admitted into evidence over the objections of counsel for Respondent, as it was an impotent and improper attempt at impeachment of Respondent, without a foundation being laid for impeachment. In addition the irrelevant status of the letter, as well as it's ancient status, precludes it's use in these proceedings. Apparently counsel for the Coast Guard is averring that the letter was an" *action* by the Coast Guard against Respondent. However this is untenable, as the ordinary person would not assume that a warning letter was an" *official action"* by the Coast Guard. This is clear from Respondent's un-refuted testimony that the issue came up while he was applying for the reactivation of his Coast Guard license so that he could once again resume river work. In his application, Respondent voluntarily provided information involving a First Offense Driving while Intoxicated charge. The March 19, 1997 letter plainly notes that Respondent presented information,

accepted by the Coast Guard, that he did not have symptoms commonly associated with problem drinking or alcoholism, and further the Coast guard through it's own investigation, verified the statements of Respondent.)

It is therefore clear, that the testimony of Respondent, on it's face is uncontroverted by the Coast Guard.

The Coast Guard in it's Factual Allegations of Misconduct, plainly states that Respondent's *"urine was collected and analyzed by Laboratory Specialist, Inc. using procedures approved by the Department of Transportation.* "Not only was this shown to be untrue, the Coast Guard co-opted Respondent's witness, Donald Duncan, and more or less made him an expert witness, as he was a former drug test collector. Duncan, to the chagrin of the Coast Guard, testified that he was very familiar with drug test procedures, as approved by the Department of Transportation, and they were not followed in this instant matter!

As to the procedures, found at 46 CFR § 16.101 et. seq., it was as if they were unknown to the collector. Paula Landry. First, at 46 CFR § 16.101(b) ,the regulations *prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs.* "Respondent is being adjudged pursuant to 46 CFR § 16.105(c) to the effect that he has *"Refused to submit"* by engaging in conduct *"that clearly obstructs the testing process.* "Yet the Coast Guard presents no evidence, whatsoever, that Respondent engaged in any conduct that obstructs the testing process!

The Coast Guard is asserting that when a specimen is deemed to be adulterated, the only person that can be at fault is the alleged provider of the specimen. This is illogical. Certainly Respondent is allowed to rebut the Coast Guard's claims. Curiously, Respondent notes that while he is charged with conduct *that clearly obstructs the testing process,"* the Coast Guard ignores the actions of the collector, Paula Landry, who by her own admission, violated 46 CFR § 16.105(c)! The case against Ms. Landry is buttressed by the testimony of those present, namely Donald Duncan and John Guerin. The admitted failure to follow the proper procedures required by law by Ms. Landry are enough to allow the Hearing Officer to find for Respondent, and Respondent so moves.

The failure to follow proper collection standards is certainly important. As to the integrity of the specimen, 46 CFR § 16.310 (e) requires that *Collection personnel shall take precautions to ensure that each specimen is not adulterated or diluted during the collection process.* "Ms. Landry's own admissions clearly show that she took

no such precautions, and that Respondent lost his employment due to her inaction., as well as the breach of duties specifically required of her by law.

The drug testing procedure is found at 49 CFR 40.1 et. seq. Ms. Landry in preparation for testing, at 49 CFR 40.23, (d) (1), is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be constructed as accusatorial or otherwise offensive or inappropriate." Respondent says that it is clearly inappropriate, and to his detriment, for Ms. Landry to not follow the clear procedures, found in the CFR's, for specimen collection integrity, as she clearly has this burden imposed on her.

Respondent says that the record shows that this was a true random test, and that both he and the witnesses testified that once he was told of the test, he was, at all times thereafter, in view of the other participants. Thus when could Respondent have prepared for the alleged adulteration, and when could it have taken place ! The Coast Guard offers no theory or evidence that it did or even could have.

Ms. Landry, the collector, and Respondent's employer were bound to follow 49 CFR 40.25, (f) in maintaining the integrity of the specimens. Yet, both Ms. Landry and Donald Duncan say there was no bluing in the water as required by 49 CFR 40.25, (f) (1), there was no identification of the participants as required by 49 CFR 40.25, (f) (2), a fact admitted by Ms. Landry. In addition, there was no admonishment to wash and dry hands prior to giving the specimen as required by 49 CFR 40.25, (f) (6), and unbelievably, Ms. Landry had the participants sign the *"Federal Drug Testing and Control Form,"* including the certification that the participant had provided the urine specimen, prior to the process. This negligent oversight by the collector is of such magnitude, that a failure to follow it, requires the Hearing Officer to find for Respondent.

By signing the *"Federal Drug Testing and Control Form,"* at the insistence of the collector, prior to the test, Respondent was forced to say that the testing procedure was correctly done prior to his engaging in the process. The form should have been signed at the conclusion of the collection procedure. Further, the collector, by her own admission, stated that she printed Respondent's name onto the form after he had sinned the form. John Guerin said

that he also was required to sign the form before the test, and this was verified by the testimony of Donald Duncan, who said the same thing.

In addition, Respondent was clearly given indications that the test was over, as he was allowed to leave the testing room, and had to be called back. Thus Respondent was not present for the splitting of his urine sample into two bottles, as all evidence demonstrates that they were being sealed in his absent. This is a violation of 49 CFR §40.25 (f) (20), whereas *"the individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.* "In addition, 49 CFR § 40.25 (g) is put at risk, *"as collection site personnel shall keep the individual 's specimen bottle within sight both before and after the individual has urinated After the specimen is collected, it shall be properly sealed and labeled."* Respondent's test should have been repeated when the collector allowed this to transpire.

It is also unclear from the record how many people were present in the collection room.. Donald Duncan said that he took the test before Respondent, who had just come off a boat, and further that Mike McKaskill left the room after his test. John Guerin said that Donald Duncan, Respondent and someone else, other than the collector were in the room. This testimony demonstrates that there was no control of the testing site at all. As there were numerous people in the room, and as the collector had decided not to follow procedure, it would have been very easy for samples to get mixed up, or even to be tampered with.

Attorneys for Respondent wonder when the Coast Guard will investigate the collection actions of Ms. Landry and her employer, and if other participants in the drug program have received similar treatment! Respondent notes for the record that the <u>failure to follow procedure</u>, on the part of the collector, <u>is uncontroverted</u> in this action.

It is therefore plain that the collection procedure used and endorsed by the Coast Guard on July 7, 1999 <u>was no procedure at all</u>. Yet the Coast guard would aver otherwise. In support of their position that the procedures for drug testing are to be liberally constructed, an argument on it's face plainly in contradiction of 46 CFR §16.101 (b), the Coast Guard cited three Commandant's Decisions In Decision No. 2527, (Coast Guard v. 599185), the

decision certainly concerns itself with improper specimen collection. However, the decision turns on the fact that the failure to seal the container was supported only by the testimony of the Appellant. This case is easily distinguished from that of Respondent in that all witnesses, including the specimen collector, agree that the procedure was not followed. Further, Respondent's case shows numerous violations of procedure, and not the one instance cited in this decision. Thus this cited authority of the Coast Guard is without merit. The other two cases have even less jurisprudence to enlighten the Hearing Officer.

The Hearing Officer is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in evidence (SEE: Appeal decisions 2522 (Jenkins), 2519 (Jepson). Thus the Hearing Officer must take into consideration the admitted failure to follow procedure by Ms. Landry's own testimony, and the credibility of Donald Duncan, the ex offico expert, co-opted by the Coast Guard, that the procedure was thrown overboard even before the test begin!

Further, the Hearing Officer had the opportunity to hear Respondent, to adjudge his demeanor, and to find it credible. Respondent took the stand, answered every question posed to him, leaving no ambiguity. The Coast Guard did not attack his testimony, other than the feeble attempt to impeach his credibility with the 1997 warning letter, discussed supra. Thus Respondent's testimony has to be accepted as fact, as it is uncontested,

The sufficiency of the chain of custody involving the collected specimen goes only to the weight of the evidence (SEE: generally Appeal decision 2467 (BLAKE), NTSB Order No. EM-156 (1990) and U.S. v. Lopez, 758 F.2d 1157 (1st Circuit 1985). The evidence clearly demonstrates disruptions and irregularities in the chain of custody beginning with the collection procedure. The Hearing Officer, based on the testimony, and admission of Ms. Landry, is obligated to determine that the proper chain of custody was not maintained.

V.

Respondent avers, that considering the foregoing argument, the law, and the record of the hearing, that he is entitled to have the issue before the Hearing Officer, summarily dismissed, as the Coast Guard's charge has not been proved. Further, considering the argument and the record, and if the matter is not summarily dismissed, Respondent says that the Hearing Officer is bound to rule that the charge is not proven. The record will support

no other decision.

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 Chapter 77, Section 7701 et seq.

Complaint: proved.

OPINION

As the Investigating Officer clearly summarized in his Conclusions of Law the Respondent's attorneys contended that this matter should be dismissed because there were several actions, or inactions, on the part of the collector which were not in strict compliance with the regulations and therefore the integrity of the specimen was not maintained.

The Commandant of the Coast Guard in numerous prior decisions on appeal since the enactment of the drug testing laws has consistently ruled that "technical infractions" of the regulations do not break the chain of custody or violate the specimen's integrity.

In a recent CDOA #2614 (Wallenstein) the Commandant ruled as follows:

"Where tec infractions of the procedures in 46.. Parts 16 and *49* C.F.R. Part 40 occur, the testing procedure is not vitated where the infractions do not breach the chain of custody or violate the specimens integrity." See appeal decisions 2541 (Raymond) and 2537 (Chatham).

Also in CDOA 2562 (Bear) the Commandant stated:

"Appellant sets forth the following basis of appeal:

I. The Administrative Law Judge erred in considering the results of the urinalysis as evidence of drug use because the collection procedure did not strictly adhere to the mandatory, minimum drug testing regulations set forth in 46 C.F.R. Part 16 and 49 C.F.R. Part 40. Specifically, Appellant urges that the Administrative Law Judge's finding that the collection was proper is plain error because of the following shortcomings in the procedure:

a. Appellant's urine specimen was tainted because Ms. Kuamoo-Chew's minor daughter was permitted in

the collection area an5l- handled Appellant's urine sample, in violation of 49 C.F.R. 40.25.

b. The Government did not present sufficient evidence that Ms. KuamooChew had received proper training to collect urine specimens, as required by 49 C.F.R. 40.23(d)(2).

c. The Government presented no proof that Appellant was provided with a 'Statement to Donor' and 'Standard Written Instructions Setting Forth Their Responsibilities,' as required by 49 C.F.R. 40.23(a)95) and 40.23(d)(2), respectively (Page 5)

in the instant case Appellant does not identify how such an oversight may have affected the integrity of the urine specimen or chain of custody or tainted the results of the drug test. Accordingly, Appellant's assertion is without merit I have previously held that the failure to meet a technical requirement of the regulations does not vitate an otherwise proper chain of custody. Appeal decisions 2542 (Deforge); 2522 (Jenkins) and 2537 (Chatham)." (Page 13)

There has been no contention that David Shaffer's urine specimen, bearing I.D. No. 04163769, was not contaminated.

There has been no breach in the chain of custody. The specimen's integrity has not been violated.

The allegations of the complaint are proved.

ORDER

That License No. 887187 and Merchant Mariner's Document No. ***[REDACTED]*** and all other valid licenses, merchant mariners' documents or certificates of service issued to David Shaffer by the United States Coast Guard, or any predecessor authority, now held by you, be and the same are hereby Revoked; and upon service of this order upon you, you are directed to forthwith deliver and surrender your license and document to the United States Coast Guard Marine Safety Office, Freeport McMoran Building, 1615 Poydras Street, Room 737, New Orleans, LA.

The procedure for appeals is attached.

ARCHIE R. BOGGS

Administrative Law Judge
United States Coast Guard

Dated: 8 June 2000
New Orleans, Louisiana