

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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
	:	NO. 2697
	:	
<u>Issued to: RANDY JOE GREEN</u>	:	

This appeal is taken in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated January 4, 2011, Bruce T. Smith, an Administrative Law Judge (hereinafter “ALJ”) of the United States Coast Guard at Paducah, Kentucky, ordered the revocation of the Merchant Mariner License of Mr. Randy Joe Green (hereinafter “Respondent”) upon finding proved one charge of *use of or addiction to the use of dangerous drugs*.

The specification found proved alleged that Respondent submitted to a random drug test on July 15, 2010, and that the specimen that he provided subsequently tested positive for the presence of marijuana metabolites.

FACTS AND PROCEDURAL HISTORY

At all times relevant herein, Respondent was the holder of a Coast Guard-issued Merchant Mariner License. [D&O at 2; Coast Guard Exhibit (hereinafter “CG Ex.”) 1]

On July 15, 2010, Respondent reported to his place of employment, American Electrical Power River Operations, near Paducah, Kentucky, and was notified of his selection for random drug testing. [D&O at 2; Transcript (hereinafter “Tr.”) at 26] Respondent’s urine sample was

collected by Mr. Clifford Ray Williamson after Mr. Williamson made a positive identification of Respondent. [D&O at 2; Tr. at 20-35] After collection, Respondent's urine sample was sent to Advanced Toxicology Network laboratory, via Federal Express, for testing. [D&O at 2] Respondent's urine sample was received at the Advanced Toxicology Network laboratory on July 16, 2010. [*Id.*] Ms. Kathy D. Atkins, a certifying scientist, testified that the urine sample bearing Respondent's unique ID number tested positive for the presence of marijuana metabolites. [D&O at 3; Tr. at 75-78] Dr. Daniel Drew, a certified Medical Review Officer, reviewed and verified the drug test results generated by the Advanced Toxicology Network laboratory and determined, after interviewing Respondent (who did not offer any explanation as to how the test could have resulted in a positive result), that Respondent's test was positive. [Tr. at 3-4]

On August 10, 2010, the Coast Guard filed a Complaint against Respondent's Merchant Mariner License, which it amended on September 24, 2010. Both the original Complaint and the Amended Complaint alleged that Respondent provided a random urine sample that subsequently tested positive for the presence of marijuana metabolites. [D&O at 1] On September 2, 2010, Respondent filed an Answer to the Complaint. In his Answer, Respondent checked a box which indicated that he denied only factual allegations 4 and 5 of the Complaint. By inference, he admitted factual allegations 1-3 of the Complaint, which included the allegation that on July 15, 2010, "Respondent took a random drug test." On October 19, 2010, Respondent filed a Motion to Dismiss asserting that the case lacked substantial, reliable, and probative evidence. [Respondent's Motion for Dismissal at 1-2] The ALJ stated that the motion would be held in abeyance until the close of the Coast Guard's case. [Pre-Hearing Conference Memorandum & Order dated October 28, 2010 at 1]

The hearing in the matter convened on December 9, 2010, at the U.S. District Courthouse in Paducah, Kentucky. [D&O at 1] Respondent appeared *pro se*. [*Id.*] The Coast Guard was represented by non-attorneys LT Charlotte A. Keogh and CWO Tim Smith. [*Id.*] The Coast Guard presented the testimony of three witnesses and entered thirteen exhibits into the record. [*Id.*] Respondent called no witnesses but entered six exhibits into the record. [*Id.*]

The ALJ issued his D&O in the matter on January 4, 2011. On January 13, 2011, Respondent filed a Notice of Appeal in this matter. Respondent perfected his appeal by filing an Appellate Brief on March 3, 2011. Therefore, this appeal is properly before me.

BASIS OF APPEAL

This appeal is taken from the ALJ's D&O which found the charge of *use of or addiction to the use of dangerous drugs* proved. In his *pro se* appellate filing, Respondent raises several issues. Given my disposition of the following issue, Respondent's remaining bases of appeal will not be discussed further herein:

Whether the Coast Guard established a prima facie case of drug use against Respondent.

OPINION

To establish a *prima facie* case of drug use based solely on a urinalysis test result, the Coast Guard must prove three elements: (1) that Respondent was tested for a dangerous drug, (2) that Respondent tested positive for a dangerous drug, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2631 (SENGEL), 2621 (PERIMAN), 2592 (MASON), and 2584 (SHAKESPEARE).

Under 46 C.F.R. Part 16, employers are required to conduct five specific types of drug testing: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Serious marine incident testing; and 5) Reasonable cause testing. 46 C.F.R. §§ 16.210-16.250; Appeal Decision 2641 (JONES). Random testing "is specifically authorized by Coast Guard regulation and may, by its very nature, be conducted without notice or any suspicion of drug use." Appeal Decision 2641 (JONES) (citing 46 C.F.R. § 16.230).

In this case, Respondent allegedly took a random drug test. 46 C.F.R. § 16.230 governs the random drug testing of mariners and requires, among other things, "The selection of crewmembers for random drug testing shall be made by a scientifically valid method." In this case, because Respondent admitted, via his Answer to the Amended Complaint, that he took a random drug test, the issue of randomness was not developed in the record.

However, Respondent arguably raised the issue of whether his drug test was truly random early in the proceedings in his pre-hearing Motion to Dismiss. Therein, Respondent argued that “this case lacks probative evidence. There was no probable or reasonable cause for the random drug test. I was not on duty or aboard a [sic] uninspected vessel ‘upon’ western rivers when I took the random drug test.” [Respondent’s Motion for Dismissal at 2] Respondent also attacked the sufficiency of the evidence presented and the reliability of the drug test due to errors on the chain of custody form and alleged errors committed by the Medical Review Officer. The ALJ ruled that because Respondent’s Motion to Dismiss was better suited to be submitted at the close of the Coast Guard’s case-in-chief, the Motion would be held in abeyance until the close of the Coast Guard’s case. [Pre-Hearing Conference Memorandum & Order dated October 29, 2010 at 1] This ruling was a reasonable response to Respondent’s attacks on the sufficiency and reliability of the evidence, but it was not responsive to his argument that “[t]here was no probable or reasonable cause for the random drug test.”

On appeal, Respondent clearly raises the issue of randomness: “The Respondent never admitted in his answer that the process used by AEP to select its employees for testing was random; as it states in the Decision and Order.” [Respondent’s Appeal Brief at 7] This is contradicted in his Answer to the Complaint, where Respondent admitted that he took a random drug test.¹ By contrast, Respondent’s Motion to Dismiss is highly ambiguous in that the statement, “There was no probable or reasonable cause for the random drug test,” connects legally inconsistent principles. A random drug test does not require probable or reasonable cause. However, it is governed by the legal standards set forth in 46 C.F.R. § 16.230, which requires, among other things, that the selection of crewmembers for random drug testing be made by a scientifically valid method.

The transcript of the hearing suggests that the ALJ was cognizant of the issue of the randomness of Respondent’s drug test. At the hearing, the following discourse took place between the ALJ and the Coast Guard representative:

¹ It appears from the contradiction that Respondent did not realize that, by admitting in his Answer that he took a random drug test, he was conceding the randomness of the test.

JUDGE SMITH: I'm curious, you pled as an element of the offense, and I read it earlier, that the Respondent took a random drug test, but there was no proof by the government about the random drug test. Why did you not do that?

CWO SMITH: Because the Respondent admitted that allegation, Your Honor.

JUDGE SMITH: You are relying on his answer to the Complaint as the basis for your proof in this case?

CWO SMITH: Absolutely, Your Honor.

[Tr. at 167] There was no further discussion of the matter. It seems clear that the ALJ accepted that randomness had been conceded by Appellant's Answer.

The federal courts grant wide latitude in construing the pleadings and papers of *pro se* litigants. SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing Maldonado v. Garza, 579 F.2d 338, 340 (5th Cir. 1978)). *See also* Haines v. Kerner, 404 U.S. 519, 520 (1972) (Allegations set forth in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers). More generally, "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

In this case, the ALJ should have sought clarification from Respondent concerning his statement that there "was no probable or reasonable cause for the random drug test." Depending on Respondent's clarification, the randomness of Respondent's drug test might have become a contested issue.

As previously noted, an element in establishing a *prima facie* case of drug use based solely on a urinalysis test result is that the test must have been conducted in accordance with 46 C.F.R. Part 16. 46 C.F.R. Part 16 requires, as is noted above, that crewmembers selected for random drug testing be selected by a scientifically valid method. 46 C.F.R. § 16.230(c). When randomness is at issue, if it is not shown that a respondent was selected for testing by a

scientifically valid random method, the drug test has not been shown to have been conducted in accordance with 46 C.F.R. Part 16 and one of the elements of a *prima facie* case has not been established.

Whether Respondent intended to contest the randomness of the test is not clear from the statement in his Motion to Dismiss, "There was no probable or reasonable cause for the random drug test." Given that Respondent appears *pro se*, he is entitled to an opportunity to clarify the statement. I am remanding the case so that the ALJ can obtain clarification of Respondent's statement and take any further action required.

ORDER

The ALJ's Order, dated January 4, 2011, is reversed and the case is REMANDED for proceedings consistent with this opinion.

Shelley Bruce - O'Hara
VADM, US Coast Guard
Vice Commandant

Signed at Washington, D.C. this 14th day of November, 2011.