

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

BRIAN SCOTT CHESTNUT
Respondent

Docket Number 2015-0048
Enforcement Activity No. 5035011

DECISION AND ORDER

Issued: February 17, 2016

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

**Lieutenant Lynn A. Buchanan, Esq.
and
Mr. Aaron B. Heniger
Marine Safety Unit Port Arthur**

For the Coast Guard

Jude Smith, Esq.

For the Respondent

The United States Coast Guard (Coast Guard) initiated this Suspension and Revocation proceeding seeking revocation of Brian Scott Chestnut's (Respondent) Merchant Mariner's Credential (MMC) Number 000235090. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On February 19, 2015, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7703(1)(B), alleging one count of misconduct pursuant to 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged on August 29, 2014, Respondent participated in a non-DOT for-cause drug screening and tested positive for marijuana metabolites. On March 27, 2015, Respondent filed an Answer denying all jurisdictional and factual allegations.

The undersigned held a hearing in this matter from August 11, 2015 to August 12, 2015, in Dallas, Texas. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Lieutenant Lynn Buchanan, Esq. and Aaron Heniger represented the Coast Guard; Jude Smith, Esq. appeared on behalf of Respondent.

At the hearing, the Coast Guard presented the testimony of six (6) witnesses and had eleven (11) exhibits admitted into the record. Respondent did not present any witnesses or offer any exhibits into the record. The list of witnesses and exhibits is contained in **Attachment A**. On October 17, 2015, Respondent filed a written Closing Argument. On October 30, 2015, the Coast Guard filed a written Closing Argument.

After careful review of the entire record, including the witness testimony, applicable statutes, regulations, and case law, the undersigned finds the Coast Guard **PROVED** one count of misconduct pursuant to 46 C.F.R. § 5.27. Accordingly, Respondent's MMC is **REVOKED**;

however, the **REVOCAION** shall be stayed on an **EIGHTEEN MONTH SUSPENSION** and completion of additional terms outlined below. 46 U.S.C. § 7703(1)(B).

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole:

A. Background

1. At all relevant times herein, Respondent held Merchant Mariner's Credential Number 000235090. (Tr. Vol. 1 at 9-10).
2. At all relevant times herein, NGL Marine employed Respondent to serve as a tankerman aboard the MOUNTAINEER. (CG Ex. 5; Tr. Vol. 1 at 9-10, 102).
3. At all relevant times herein, NGL Marine had a Drug and Alcohol Policy in place applicable to all NGL Marine employees. (CG Ex. 1; Tr. Vol. 1 at 29-30).
4. NGL Marine requires its employees to review NGL Marine's policies and procedures when they are hired. (Tr. Vol. 1 at 96).
5. At all relevant times herein, NGL Marine had a Code of Business Conduct and Ethics applicable to all NGL Marine employees. (CG Ex. 4; Tr. Vol. 1 at 95).
6. Respondent reviewed and acknowledged the Code of Business Conduct and Ethics at the time he was hired. (CG Ex. 3; Tr. Vol. 1 at 95).

B. Employer Ordered Non-DOT Drug Test

7. On or around August 25, 2014, Lieutenant Robb Scott, a Coast Guard employee, called Craig Lagrone, the Vice President of NGL Marine, and informed him Raymond Adaway, a former NGL Marine employee, reported widespread drug and alcohol use throughout the entire NGL Marine fleet. (Tr. Vol. 1 at 25-27).
8. Lt. Scott did not indicate Mr. Adaway identified any specific individuals as being users of alcohol or drugs. (Tr. Vol. 1 at 46).
9. Mr. Lagrone discussed the August 25, 2014 phone call with Del Rice, NGL Marine's HR Director and legal counsel, and Craig Rutland, NGL Marine's Safety Director. (Tr. Vol. 1 at 35).
10. Based on the information obtained during the August 25, 2014 phone call, Mr. Lagrone determined the NGL Marine Drug and Alcohol Policy permitted him to order a "for-cause" non-DOT drug and alcohol test of the entire NGL Marine fleet. (Tr. Vol. 1 at 25,

29-32). Mr. Rice and Mr. Rutland concurred with Mr. Lagrone's determination. (Tr. Vol. 1 at 74).

11. The Coast Guard did not require Mr. Lagrone to order a drug and alcohol test or attempt to coerce him into ordering a test. (Tr. Vol. 1 at 35-36, 47-48). Mr. Lagrone testified he would have ordered the drug and alcohol test if he had received the report from a different source. (Tr. Vol. 1 at 47-48).
12. On August 29, 2014, all 33 on-duty personnel assigned to the NGL Marine fleet were required to submit to a non-DOT drug and alcohol test. (Tr. Vol. 1 at 35-37, 125).
13. NGL Marine employed Mr. Adaway as a mariner on the APACHE. (Tr. Vol. 1 at 26, 51-53). Mr. Adaway resigned on August 19, 2014, upon the APACHE's return from a 28 day hitch. (Tr. Vol. 1 at 26, 51-53).
14. NGL Marine hired Respondent on August 19, 2014, and he reported to the MOUNTAINEER that evening. (Tr. Vol. 1 at 88-89, 105).
15. Respondent worked on the MOUNTAINEER from August 19, 2014 to September 3, 2014, and did not work on any other vessels during that period. (Tr. Vol. 1 at 105-106).
16. At times, the APACHE and MOUNTAINEER would "tie up" next to each other, and the mariners from the two boats would interact. (Tr. Vol. 1 at 107-109).
17. Mr. Ebey, the NGL Marine Operations Manager, testified it is unlikely Respondent and Mr. Adaway ever interacted with each other. (Tr. Vol. 1 at 109).

C. The Collection Process

18. On August 29, 2014, Jarvis Crofton, a trained urine specimen collector with SECON, collected a urine sample from Respondent for the purpose of performing a non-DOT urinalysis drug test. (Tr. Vol. 1 at 163, 167-168).
19. Mr. Crofton adhered to the following collection procedure when collecting urine specimens on the MOUNTAINEER:
 - a. Mr. Crofton began the collection process by verifying the identity of the person providing the specimen. (Tr. Vol. 1 at 171).
 - b. Next, the specimen provider urinated in a cup while Mr. Crofton observed. (Tr. Vol. 1 at 171).
 - c. After a urine sample was provided, Mr. Crofton poured the sample into a specimen vile and dumped the remainder of the urine out. (Tr. Vol. 1 at 171).
 - d. Mr. Crofton sealed the specimen vile, and the donor initialed and dated the seal on the vile. (CG Ex. 9; Tr. Vol. 1 at 172).
 - e. Next, Mr. Crofton completed a Custody and Control Form with the specimen provider's information and had the specimen provider sign the Custody and Control form. (CG Ex. 9; Tr. Vol. 1 at 173-174).

- f. Lastly, Mr. Crofton packed the specimen vile in a pouch and placed the pouch inside a box with the completed Custody and Control Form. (Tr. Vol. 1 at 173-174).
 - g. Mr. Crofton left the MOUNTAINEER without his paperwork for the drug tests he had conducted on the vessel. (Tr. Vol. 1 at 179-180). Soon after leaving the vessel, Mr. Crofton realized the paperwork was still on the vessel. Id. Mr. Crofton immediately returned to the vessel and obtained the paperwork. Id.
 - h. Mr. Crofton testified there were no irregularities in any of the paperwork for the drug tests he conducted on the MOUNTAINEER. (Tr. Vol. 1 at 180).
 - i. Once Mr. Crofton returned to his office, the specimen viles were transferred to a “big box” where they were stored until their release to SECON’s courier. Id.
 - j. Mr. Crofton testified there were no abnormalities with Respondent’s specimen sample, including temperature. (Tr. Vol. 1 at 178-179).
20. Respondent signed a Non-Federal Four-Part Drug Testing Custody and Control Form certifying he provided his specimen and that Mr. Crofton sealed Respondent’s specimen in a vile with a tamper-evident seal while in his presence. (CG Ex. 6, 9).
21. SECON sent Respondent’s specimen to Alere. (CG Ex. 9).

D. The Testing Process

22. Alere received Respondent’s specimen on September 3, 2014, with the bottle seal intact. (CG Ex. 9; Tr. Vol. 2 at 24).
23. At all relevant times herein, Alere was a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory. (Tr. Vol. 2 at 60).
24. An Alere employee extracted an aliquot of Respondent’s specimen and poured it into a labeled test tube. (Tr. Vol. 2 at 17). The employee then put the aliquot through an amino acea screening test, and it tested presumptive positive for marijuana metabolites. (CG Ex. 9; Tr. Vol. 2 at 20, 23-25).
25. The amino acea screening test yielded a result of 61 nanograms per milliliter. (CG Ex. 9; Tr. Vol. 2 at 33-35). The cut-off was 20 nanograms per milliliter. Id.
26. Next, a confirmatory test was performed using a second aliquot taken from Respondent’s specimen. (CG Ex. 9; Tr. Vol. 2 at 37).
27. The second aliquot was analyzed using Liquid Chromatography Mass Spectrometry (LC/MS). (CG Ex. 9; Tr. Vol. 2 at 37).
28. The confirmatory test yielded a result of 32 nanograms per milliliter of the carboxy acid of THC, a marijuana metabolite. (CG Ex. 9; Tr. Vol. 2 at 33-35). The cut-off was 6 nanograms per milliliter. (CG Ex. 9; Tr. Vol. 2 at 43).

29. David Golz, a Certifying Scientist/Responsible Person for Alere, testified regarding the screening test, confirmatory test, and the procedures at Alere. (Tr. Vol. 2 at 3-79).
30. Mr. Golz previously testified as an expert in court regarding the use of LC/MS technology approximately 50 times. (Tr. Vol. 2 at 69).
31. Mr. Golz has a Bachelor of Science in Chemistry and Applied Biology from the Georgia Institute of Technology. (CG Ex. 7). He is a Diplomat for the Forensic Toxicology Certification Board in Forensic Toxicology, a Fellow with the American Board of Forensic Toxicology, and a Full Member of the Society of Forensic Toxicologists. (CG Ex. 7).
32. In 2012, Mr. Golz attended the LC/MS Method Development and Validation for Forensic Toxicology workshop at the Society of Forensic Toxicologists Annual Conference. (CG Ex. 7). In 2013, he co-authored the white paper Enhanced Studies of LC/MS Capabilities to Analyze Postmortem Samples. (CG Ex. 7; Tr. Vol. 2 at 66-67).
33. Mr. Golz worked for the Georgia Bureau of Investigation from 2004-2012 where he used LC/MS technology. (CG Ex. 7; Tr. Vol. 2 at 69).
34. Mr. Golz held training sessions in the use of LC/MS for other personnel at the laboratories he worked for. (Tr. Vol. 2 at 67).
35. Mr. Golz testified the screening and confirmatory cut-offs for a non-DOT test are sometimes determined by the client. (Tr. Vol. 2 at 43). A DOT confirmatory test has a mandatory cut-off of 15 nanograms per milliliter for marijuana metabolites. Id. However, a cut-off of 6 nanograms per milliliter was used for Respondent's confirmatory test. (CG Ex. 9; Tr. Vol. 2 at 43).
36. The initial screening test looks for all possible marijuana metabolites in a person's sample, but the confirmatory test only looks for one particular marijuana metabolite, the carboxy acid of THC. (Tr. Vol. 2 at 34-35).
37. LC/MS testing and Gas Chromatography Mass Spectrometry (GC/MS) testing use similar technologies. (Tr. Vol. 2 at 21-22). GC/MS testing pushes samples through a machine using gas, and LC/MS testing pushes samples through a machine using liquid. (Tr. Vol. 2 at 21-22).
38. LC/MS testing detects THC with the same accuracy as GC/MS testing and uses the same types of calibrators and controls as GC/MS testing. (Tr. Vol. 2 at 71-72).
39. The National Laboratory Certification Program allows LC/MS technology to be used to test specimens. (Tr. Vol. 2 at 62-63). Mr. Golz does not use LC/MS when conducting DOT tests because his lab would have to go through an extensive validation process to be permitted to use LC/MS for DOT tests. Id.
40. The record does not indicate any abnormalities in the drug testing procedures or security protocols used during the testing of Respondent's specimen. (CG Ex. 9).

E. Test Verification

41. Dr. Kim Lykins, a certified MRO, interviewed Respondent, who could not provide an explanation for the positive test result. (CG Ex. 10; Tr. Vol. 2 at 85-87).
42. Respondent did not take any medications that could have resulted in a false positive for marijuana. (CG Ex. 10; Tr. Vol. 2 at 85-87).
43. Dr. Lykins verified Respondent's specimen as positive for marijuana. (CG Ex. 10; Tr. Vol. 2 at 81, 86-88).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke a mariner's license, certificate, or document for violations arising under 46 U.S.C. § 7703.

A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before ALJs. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). "The term 'substantial evidence' is synonymous with 'preponderance-of-the-evidence' as defined by the [United States] Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Sec. and Exch. Comm'n, 450 U.S. 91 (1981).

The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Prod. of California, Inc. v. Constr. Laborers Pension Trust for S.

California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed misconduct.

B. Misconduct

The Coast Guard alleges Respondent committed misconduct by violating NGL Marine’s Drug and Alcohol Policy (Drug Policy) and Code of Business Conduct and Ethics (Code of Conduct) when he participated in a non-DOT for-cause drug screening that tested positive for marijuana metabolites. Title 46 C.F.R. § 5.27 defines misconduct as “human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship’s regulation or order, or shipping articles and similar sources.” Thus, in order to prove misconduct, the Coast Guard must prove NGL Marine’s Drug Policy or Code of Conduct is a “formal, duly established rule” Respondent violated when he tested positive for marijuana metabolites.

A private employer may require drug testing in addition to the mandatory DOT tests, and the results of these tests may be used to prove drug use if there is evidence linking the results of the test to the mariner and proving the reliability of the test. Appeal Decision 2704 FRANKS (2014); Appeal Decision 2675 MILLS (2008). In this circumstance, “[since] the employer is not acting as an instrument or agent of the government, the constitutional harms that Part 16 seeks to avoid are absent. . . .” Appeal Decision 2704 FRANKS (2014). Accordingly, to prove Respondent tested positive for marijuana metabolites, the Coast Guard must demonstrate the drug test conducted was a non-DOT test that is reliable and linked to Respondent.

C. Respondent’s Argument

Respondent offers two main arguments in his defense. First, Respondent asserts the drug test conducted was required to comply with DOT regulations (46 U.S.C. §§ 16 and 40) and failed

to do so. Respondent maintains the “for cause” test described in NGL Marine’s Drug Policy is an implementation of the mandatory DOT “reasonable cause” drug test, and is therefore a government mandated DOT test. Further, Respondent argues Lt. Scott articulated Mr. Adaway’s report of drug and alcohol use to Mr. Lagrone in a manner that created such significant government involvement the drug test must be considered a government mandated DOT test.

Second, Respondent asserts NGL Marine failed to comply with their Drug Policy. Respondent maintains Mr. Adaway’s broad complaint regarding drug use by members of the NGL Marine fleet was not sufficient to justify a “for cause” test pursuant to NGL Marine’s Drug Policy. Respondent reasons because Mr. Adaway resigned on the same day Respondent was hired, there is no possibility Mr. Adaway’s complaint was based on Respondent’s actions. Further, Respondent maintains it was improper to require all 33 on-duty personnel assigned to the NGL Marine fleet to submit to a drug and alcohol test. For the reasons discussed below, Respondent’s arguments are not persuasive.

D. The drug test administered on August 29, 2014, was a non-DOT drug test

The record demonstrates the drug test administered on August 29, 2014, was a non-DOT drug test. Mr. Lagrone, the Vice President of NGL Marine, testified he ordered a non-DOT drug test based on the “for cause” drug testing requirements in the NGL Marine Drug Policy. (Tr. Vol. 1 at 25, 29-32). These “for cause” testing requirements are separate from those required by the “reasonable cause” standard articulated in the DOT regulations (46 U.S.C. §§ 16 and 40).

NGL Marine’s Drug Policy permits NGL to conduct a non-DOT “for cause” test “*any time* it feels that the employee may be under the influence of drugs or alcohol, including, but not limited to, the following circumstances . . . a report of drug or alcohol use while at work or on duty.” (CG Ex. 1) (emphasis added). The policy then states “DOT employees will also continue to be subject to testing pursuant to DOT requirements.” (CG Ex. 1). In contrast, a DOT “reasonable cause” test must be founded on a “reasonable and articulable belief” the mariner

used a dangerous drug based on “direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use” preferably by two individuals in supervisory positions. 46 C.F.R. § 16.250. The language in NGL Marine’s Drug Policy permitting a drug test at “any time” NGL Marine feels an employee is under the influence of drugs or alcohol establishes a requirement that is separate from Part 16’s strict observation requirements. The policy’s requirements were met when Mr. Lagrone ordered a “for cause” test based on a report regarding widespread drug and alcohol use throughout the entire NGL Marine fleet.

Additionally, NGL Marine conducted the drug test using non-DOT procedures. Mr. Crofton, a trained urine specimen collector with SECON, testified Respondent’s urine specimen was collected using non-DOT procedures, including a non-DOT Custody and Control Form. (Tr. Vol. 1 at 171-179). Mr. Golz, a Certifying Scientist/Responsible Person for Alere, testified Respondent’s specimen was tested using non-DOT procedures. (Tr. Vol. 2 at 3-79). Therefore, the record demonstrates the drug test administered on August 29, 2014, was ordered and conducted using non-DOT policy and procedures.

Further, Lt. Scott’s phone call to Mr. Lagrone informing him there had been a complaint of drug and alcohol abuse throughout the NGL Marine fleet does not constitute such significant government involvement that the drug test must be considered a government mandated DOT test. Testing ordered by a private employer to comply with Federal regulatory requirements constitutes Government action and Fourth Amendment protections apply. Appeal Decision 2704 FRANKS (2014). NGL Marine made an independent decision to order Respondent to submit to a drug test; therefore, the drug test Respondent participated in was not a government action. Mr. Lagrone credibly testified the Coast Guard did not require him to order a drug and alcohol test or attempt to coerce him into ordering a test. (Tr. Vol. 1 at 35-36, 47-48). He further credibly testified he would have ordered the drug and alcohol test if he had received the report from a

different source. (Tr. Vol. 1 at 47-48). Therefore, the August 29, 2014 drug test was not a government action subject to the DOT testing requirements. Rather, it was a non-DOT drug test ordered by a private employer pursuant to internal company policy. Additionally, the fact multiple mariners were ordered to submit to the drug test does not render the test invalid. See Appeal Decision 2625 ROBERTSON (2002).

E. The drug test administered on August 29, 2014, is reliable, linked to Respondent, and proves he had marijuana metabolites in his system on that date

The drug test administered on August 29, 2014, is reliable, linked to Respondent, and proves he had marijuana metabolites in his system on that date. Respondent provided a urine specimen in a non-DOT “for cause” drug test on August 29, 2014, at which time he signed a non-DOT Custody and Control Form. (CG Ex. 6, 9; Tr. Vol. 1 at 171-179). Respondent’s urine specimen was sent to Alere, where it was put through a screening test that tested presumptive positive for marijuana metabolites. (CG Ex. 6, 8, 9; Tr. Vol. 2 at 17, 20, 23-25). The cutoff level for the screening test was twenty (20) nanograms per milliliter. (Tr. Vol. 2 at 33-35). The laboratory then performed a confirmatory test on Respondent’s specimen using a LC/MS machine, which returned the presence of marijuana metabolites measuring thirty-two (32) nanograms per milliliter. (CG Ex. 9; Tr. Vol. 33-35). The confirmatory test had a cutoff level of six (6) nanograms per milliliter. (CG Ex. 9; Tr. Vol. 2 at 43).

Mr. Golz, a Certifying Scientist/Responsible Person for Alere, testified regarding LC/MS technology. (Tr. Vol. 2 at 3-79). Mr. Golz has extensive experience with LC/MS, including co-authoring a white paper regarding LC/MS, conducting LC/MS testing for Alere and the Georgia Bureau of Investigation, holding training sessions in the use of LC/MS, attending an LC/MS workshop, and testifying as an expert regarding LC/MS on approximately fifty occasions. (CG Ex. 7; Tr. Vol. 2 at 66-69). Based on this experience, the undersigned finds Mr. Golz is an expert in LC/MS technology.

Mr. Golz testified regarding the similarities between LC/MS technology and GC/MS technology, which SAMHSA has long considered reliable for confirmatory testing. 73 Fed. Reg. 71858 (Nov. 25, 2008) (Tr. Vol. 2 at 3-79). Mr. Golz testified GC/MS and LC/MS testing use similar technologies, with GC/MS pushing samples through a machine using gas and LC/MS pushing samples through a machine using liquid. (Tr. Vol. 2 at 21-22). Mr. Golz also testified LC/MS testing detects marijuana metabolites with the same accuracy as GC/MS testing, LC/MS testing uses the same types of calibrators and controls as GC/MS testing, and the National Laboratory Certification Program allows LC/MS technology to be used to test specimen. (Tr. Vol. 2 at 62-63, 71-72). Additionally, the revised SAMHSA Guidelines for Federal Workplace Drug Testing Programs lists LC/MS as acceptable for confirmatory tests and states “methods, such as liquid chromatography/mass spectrometry . . . have been proven to be reliable to test specimens.” 73 Fed. Reg. 71858 (Nov. 25, 2008). Based on the foregoing, the undersigned finds LC/MS confirmatory testing is reliable.

Mr. Golz explained the initial screening test looks at numerous metabolites produced by marijuana. (Tr. Vol. 2 at 33). When the initial screening test yields a positive result, a confirmatory test is performed that only looks for the carboxy acid of THC. (Tr. Vol. 2 at 35). Since Respondent’s specimen measured thirty-two (32) nanograms per milliliter, significantly above the cutoff level of six (6) nanograms per milliliter, Respondent’s specimen yielded a positive result.

Dr. Lykins, an MRO, received and verified Respondent’s positive laboratory test results. (CG Ex. 10; Tr. Vol. 2 at 86-88). She also interviewed Respondent to determine whether a legitimate medical explanation existed for Respondent’s positive drug test. (Tr. Vol. 2 at 85-87). During the interview, Respondent explained he was not taking any medication at the time of the drug test. (Tr. Vol. 2 at 85-87). Based on her interview with Respondent, Dr. Lykins determined there was no alternative explanation for Respondent’s positive drug test. (CG Ex. 10; Tr. Vol. 2

at 86-87). Ultimately, a certified laboratory and MRO determined Respondent's specimen contained marijuana metabolites. Based on all the above, the drug test administered on August 29, 2014, is reliable, linked to Respondent, and proves he had marijuana metabolites in his system on the date of the test.

F. NGL Marine's Drug Policy and Code of Conduct are formal, duly established rules Respondent violated when he tested positive for marijuana metabolites

Finally, as discussed *supra*, to prove Respondent committed misconduct in violation of 46 C.F.R. § 5.27, the Coast Guard must prove NGL Marine's Drug Policy or Code of Conduct is a "formal, duly established rule," and Respondent violated the rule when he tested positive for marijuana metabolites. A "formal, duly established rule" can be "found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." 46 C.F.R. § 5.27. A company's policy regarding drug use and testing can be a formal, duly established rule. Appeal Decision 2675 MILLS (2008).

The record demonstrates NGL Marine's Drug Policy and Code of Conduct are both formal, duly established rules. NGL Marine's Code of Conduct is applicable to all NGL Marine employees, and Respondent reviewed and acknowledged this policy when he was hired. (CG Ex. 3; Tr. Vol. 1 at 94-95). Additionally, NGL Marine's Drug Policy is applicable to all NGL Marine employees, and NGL Marine employees review NGL Marine's policies and procedures when they are hired. (Tr. Vol. 1 at 29-30, 96). Thus, NGL Marine's Drug Policy and Code of Conduct are formal, duly established rules.

Respondent violated NGL Marine's Drug Policy and Code of Conduct when he tested positive for marijuana metabolites on August 29, 2014. NGL Marine's Drug Policy states the company prohibits "[t]he presence of any detectable amount of prohibited substances in the employee's system while at work, while on Company premises (including its vehicles) or customer premises, or while on company business." This policy defines prohibited substances as

including “illegal drugs (controlled substances as defined in Schedules I and II of the Controlled Substances Act and their subsequent amendments in 21 United States Code §§ 801 *et seq.*)” Similarly, NGL Marine’s Code of Conduct states employees should “report to work in condition to perform their duties, free from the influence of illegal drugs or alcohol, or any other substance that may impair such employee’s ability to perform the essential functions of his or her job or create an unsafe work environment. The use of illegal drugs in the workplace will not be tolerated.”

The August 29, 2014 drug test established Respondent had marijuana metabolites in his system on that date. Title 21 U.S.C. § 812 lists marijuana as a Schedule I controlled substance. Therefore, marijuana is an illegal drug as defined by NGL Marine’s Drug Policy. Although NGL Marine’s Code of Conduct does not define an illegal drug, it is reasonable to assume an illegal drug for purposes of NGL Marine’s Drug Policy is also an illegal drug for purposes of its Code of Conduct. By having marijuana metabolites in his system on August 29, 2014, Respondent violated NGL Marine’s Drug Policy by having the presence of a detectable amount of illegal drugs in his system while at work. Additionally, Respondent violated NGL Marine’s Code of Conduct by failing to report to work free from the influence of illegal drugs. Therefore, the Coast Guard proved Respondent committed misconduct by violating two formal, duly established rules.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times herein, Respondent held Merchant Mariner Credential Number 000235090.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(1)(B); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-559.
3. On August 29, 2014, Respondent took a properly ordered non-DOT drug test, and it yielded a positive result for marijuana metabolites in the amount of 32 nanograms per milliliter.

4. The Coast Guard has **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed misconduct by violating two formal, duly established rules pursuant to 46 C.F.R. § 5.27 and 46 U.S.C. § 7703(1)(B).

SANCTION

In Coast Guard Suspension and Revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ. . . .” Appeal Decision 2694 (LANGLEY) (2011) (internal quotations omitted); see also 46 C.F.R. § 5.569(a); 33 C.F.R. § 20.902(a)(2). Title 46 C.F.R. § 5.569 contains the Table of Suggested Range of an Appropriate Order for various offenses. However, Coast Guard Administrative Law Judges have wide discretion to formulate an order adequate to deter a mariner’s repetition of the violations found proved. Appeal Decision 2475 (BOURDO) (1988).

The Coast Guard seeks to revoke Respondent’s credential based on misconduct for violation of two formal, duly established rules, NGL Marine’s Drug Policy and Code of Conduct. Although Respondent violated these rules by testing positive for marijuana metabolites, the charge in this case is violation of a formal, duly established rule, not use of or addiction to a dangerous drug, a charge that would mandate revocation. Title 46 U.S.C. § 7703(1)(B) is the controlling statute, and it permits suspension or revocation when misconduct is found proved. The table in 46 C.F.R. § 5.569 does not suggest a sanction for violation of an employer’s Drug Policy or Code of Conduct. The only guidance provided in the applicable regulations can be found at 46 C.F.R. § 5.59, which mandates revocation for misconduct based on the wrongful possession, use, sale, or association with dangerous drugs.

In this case, the undersigned found Respondent violated NGL Marine’s Drug Policy forbidding “[t]he presence of any detectable amount of prohibited substances in the employee’s system while at work” NGL Marine’s Drug Policy defines prohibited substances to include illegal drugs (controlled substances as defined in Schedules I and II of the Controlled Substances Act and their subsequent amendments in 21 United States Code §§ 801 *et seq.*). Additionally,

Respondent violated NGL Marine's Code of Conduct requiring employees to "report to work in condition to perform their duties, free from the influence of illegal drugs or alcohol . . ."

Therefore, the policies Respondent violated are rules prohibiting association with dangerous drugs. The detection of marijuana metabolites in Respondent's urine constitutes wrongful association as contemplated in 46 C.F.R. § 5.59.

Accordingly, taking into account all the facts and circumstances of this case, the undersigned finds **REVOCATION** appropriate for Respondent's violation of 46 U.S.C. § 7703(1)(B). The undersigned finds due to the circumstances of this drug test and keeping in mind the interest of safety at sea, the revocation shall be **STAYED** on an **EIGHTEEN MONTH SUSPENSION** with additional conditions imposed as outlined in the **ORDER** below.

ORDER

IT IS HEREBY ORDERED the allegations in the Complaint are found **PROVED**.

IT IS HEREBY FURTHER ORDERED all of Respondent Brian Chestnut's Coast Guard-issued credentials are **REVOKED**.

IT IS HEREBY FURTHER ORDERED the **REVOCATION** shall be **STAYED** on an **EIGHTEEN MONTH SUSPENSION** and completion of the following additional terms and conditions:

- a. Respondent must enroll in a drug rehabilitation program certified by a governmental agency or accepted by an independent professional association and provide the Coast Guard with adequate evidence of enrollment;
- b. Respondent must successfully complete all elements of the drug rehabilitation program and provide the Coast Guard with adequate evidence of completion;
- c. Respondent must participate in a random, unannounced drug-testing program for a minimum period of one year following successful completion of the drug rehabilitation program. During the drug-testing program, Respondent must take at

- least twelve random drug tests spread reasonably throughout the year. These tests must be conducted in accordance with Department of Transportation procedures found in 49 C.F.R. Part 40. Respondent must provide the Coast Guard with the results of each random drug test;
- d. Respondent must attend a substance abuse monitoring program (such as AA/NA) for a minimum period of one year following successful completion of the drug rehabilitation program. Respondent must attend at least two meetings per month during this period and provide the Coast Guard with adequate evidence of attendance;
 - e. Respondent must provide the Coast Guard with a return to work letter from a designated MRO stating he is drug free and the risk he will use dangerous drugs is sufficiently low to justify his resumption of safety-sensitive duties under his credentials; and
 - f. Respondent must bear the cost of all aforementioned conditions.

IT IS HEREBY FURTHER ORDERED if during the **SUSPENSION PERIOD** Respondent fails to complete any of the above terms and conditions, including any positive drug test, Respondent's Coast Guard issued credentials shall be immediately **REVOKED**.

IT IS HEREBY FURTHER ORDERED Respondent immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard's Investigating Officer.

PLEASE TAKE NOTICE service of this Decision and Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001–20.1004, a copy of which can be found in **Attachment B**.

SO ORDERED.

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date:

ATTACHMENT A
WITNESS AND EXHIBIT LIST

WITNESS LIST

COAST GUARD'S WITNESSES

1. Craig Lagrone
2. Michael Ebey
3. Capt. Preston Blanchard
4. Jarvis Crofton
5. David Golz
6. Dr. Kim Lykins

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- CG Ex. 1 Drug and Alcohol Policy
- CG Ex. 2 Statement from Craig Lagrone
- CG Ex. 3 Log Entry
- CG Ex. 4 Code of Business Conduct and Ethics
- CG Ex. 5 NGL Marine Payroll
- CG Ex. 6 Non-Federal Four-Part Drug Testing Custody and Control Form
- CG Ex. 7 David Golz's CV
- CG Ex. 8 Alere Drug Test Report
- CG Ex. 9 Alere Litigation Package
- CG Ex. 10 MRO Verification Worksheet
- CG Ex. 11 MRO Drug Test Report

ATTACHMENT B
APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.