

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

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**UNITED STATES COAST GUARD,**

**Complainant,**

**vs.**

**NATHANIEL TYRONE JENNINGS,**

**Respondent.**

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**Docket Number 2020-0477**  
**Enforcement Activity No. 5786461**

**DECISION AND ORDER**

**Issued: June 2, 2022**

**By Administrative Law Judge: Honorable Michael J. Devine**

**Appearances:**

**ANDREW S. MYERS, ESQ.**  
**Suspension & Revocation National Center of Expertise**

**and**

**LT GREGORY VELLIKY**  
**Sector Jacksonville**

**For the Coast Guard**

**NATHANIEL TYRONE JENNINGS, *Pro Se***

**Respondent**

## **I. PROCEDURAL HISTORY**

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Nathaniel Tyrone Jennings' (Respondent) Merchant Mariner Credential (MMC). This action is brought pursuant to the authority contained in 46 U.S.C. 7704(b) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

The Coast Guard filed a Complaint on December 1, 2020, charging Respondent with use of or addiction to dangerous drugs under 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35. Specifically, the Coast Guard alleges Respondent took a random drug test on August 18, 2020, which yielded a positive result for marijuana metabolites. Respondent, through counsel, filed an Answer on December 18, 2020, admitting the jurisdictional allegations of the Complaint, and admitting he took a random drug test on August 18, 2020, pursuant to 46 C.F.R. Part 16.<sup>1</sup> However, Respondent denied the remainder of the factual allegations and asserted the affirmative defense of use of CBD oil.

The hearing of this case was originally set to commence in June 2021 but was continued several times due to Respondent's schedule while serving on a vessel overseas. Eventually the hearing was held on October 7, 2021. Due to the COVID-19 pandemic and resulting travel restrictions and health concerns surrounding in-person hearings, the parties agreed to conduct the hearing by the remote video-conferencing application Zoom for Government. At the conclusion of the hearing, the Administrative Law Judge (ALJ) granted the Coast Guard's motion to require Respondent to deposit his MMC with the Coast Guard pursuant to 46 C.F.R. § 5.521(b). Thereafter, Respondent requested a post-hearing conference and has sought return of his

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<sup>1</sup> Respondent's counsel subsequently withdrew and Respondent continued *pro se*.

credentials through cure. The ALJ issued an Order on October 20, 2021, memorializing the conference.

On November 23, 2021, pursuant to 33 C.F.R. § 20.710(b), the Coast Guard submitted its post-hearing brief setting forth legal argument and proposed findings of fact. Respondent sent emails on November 18 and 19, 2021, which are considered as his post-hearing brief. Since Respondent had not provided copies of those submissions to the Coast Guard, I issued an Order regarding *ex parte* communications to address that concern and provided a copy to the Coast Guard. The record is now closed and the case is ripe for a decision.

After careful review of the entire record, including witness testimony, documentary evidence, applicable statutes, regulations, and case law, I find the Coast Guard **PROVED** the charged violation and **REVOCATION** is the appropriate sanction.

## **II. FINDINGS OF FACT**

The following findings of fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record.

1. At all times relevant and specifically on August 18, 2020, Respondent held MMC No. [REDACTED]. (Ex. CG-001).
2. At all times relevant and specifically on August 18, 2020, Respondent served as part of the crew of the Dredge OHIO. (Exs. CG-002, CG-013; Tr. 35-37).
3. Prior to August 18, 2020, American Maritime Safety, Inc., selected the crew of the Dredge OHIO, including Respondent, for random drug testing using a computer program that randomly selected vessels from a database. (Ex. CG-013; Tr. at 143-144).
4. Mr. [REDACTED], a Department of Transportation (DOT)-certified urine specimen collector with Anderson-Kelly Associates, collected a urine specimen from Respondent on August 18, 2020 on the Dredge OHIO. (Exs. CG-002, CG-005; Tr. at 49, 54-55).
5. At all relevant times, the collector was up-to-date on training in DOT collection procedures. (Tr. at 50-53; Ex. CG-005).

6. The collector followed the following protocol during Respondent's August 18, 2020 urine collection: (Tr. at 59-63).
  - a. The collector secured the faucet of the restroom and put blue dye in the restroom toilet. (Tr. at 59).
  - b. The collector verified Respondent's identity by looking at Respondent's I.D. (Tr. at 60-61).
  - c. The collector then filled out Step 1 of the Federal Drug Testing Custody and Control Form (CCF). (Tr. at 61).
  - d. The collector had Respondent remove all items from his pockets and wash his hands; the collector then handed a collection cup to Respondent and directed Respondent to enter the restroom and fill the collection cup. (Tr. at 61).
  - e. When Respondent came out of the restroom with the urine sample, the collector checked the sample's temperature and verified it was in the normal range. (Tr. at 61).
  - f. In Respondent's presence, the collector poured the urine into two split specimen bottles and sealed the bottles. (Tr. at 61-62).
  - g. The collector had Respondent initial the sealed bottles. (Tr. at 61-62).
  - h. The collector then completed Steps 2 through 4 of the CCF. (Tr. at 62).
  - i. The collector had Respondent complete Step 5 of the CCF, which includes Respondent's signature verifying a statement that the specimen bottles were sealed in his presence. (Tr. at 62).
  - j. The collector placed the sealed split specimen bottles and the lab copy of the CCF into the plastic test kit bag and sealed the bag. (Tr. at 62).
7. The CCF used for Respondent's August 18, 2020 urine collection identified Respondent's sample as Specimen ID #Y39734254. (Ex. CG-002).
8. Medtox Laboratories, Inc. (Medtox) of St. Paul, Minnesota, received Specimen ID #Y39734254 on August 21, 2020. (Ex. CG-015 at 5).
9. Medtox is a SAMSHA certified laboratory. (Exs. CG-010, CG-015; Tr. at 85-87).
10. On August 21, 2020, Specimen ID #Y39734254 tested positive for marijuana metabolites in both initial and confirmation testing. (Ex. CG-015 at 46, 113; Ex. CG-018; Tr. at 75, 82, 93).

11. Medtox employed marijuana metabolite cut-off levels of 50 ng/ml for initial testing and 15 ng/ml for confirmation testing. (Tr. at 82).
12. Through gas chromatography mass spectrometry confirmation testing, Specimen ID #Y39734254 tested positive for marijuana metabolites at a level of 19 ng/ml. (Ex. CG-003; Ex. CG-015 at 113; Ex. CG-018; Tr. at 82).
13. Medtox properly maintained the chain of custody for Specimen ID #Y39734254. (Tr. at 83-85; Ex. CG-015).
14. Dr. Walter H. Oakes is, and at all times relevant to these proceedings was, a licensed physician and certified Medical Review Officer (MRO). (Tr. at 106; Ex. CG-006).
15. On August 25, 2020, Dr. Oakes reviewed the test results transmitted by Medtox. (Exs. CG-004, CG-008).
16. On August 25, 2020, Dr. Oakes called Respondent and informed him that Medtox's analysis showed his urine specimen tested positive for marijuana. Later on August 25, 2020, Respondent called Dr. Oakes back and requested split specimen testing. (Ex. CG-007).
17. Dr. Oakes certified on August 25, 2020, that Specimen ID #Y39734254 tested positive for marijuana metabolites. (Exs. CG-004, CG-008).
18. Medtox forwarded the second vial of Specimen ID #Y39734254 to Clinical Reference Laboratory (CRL) for split specimen testing. (Tr. at 130-131; Ex. CG-019).
19. CRL performed testing and issued a report confirming the split specimen sample tested positive for marijuana metabolites. (Ex. CG-019; Ex. CG-009; Tr. at 132).
20. Dr. Oakes reviewed the test results of the split specimen testing performed by CRL for Specimen ID #Y39734254. (Tr. at 107-111; Exs. CG-004, CG-008, CG-009).
21. Dr. Oakes certified on August 28, 2020, that split specimen testing of Specimen ID# Y39734254 was also positive for marijuana metabolites. (Ex. CG-009).
22. Respondent denied using marijuana. (Tr. at 34, 114, 127, 129, 139, 158, 161, 163-168, 170, 172; Exs. R-D, R-E).
23. Respondent purchased and used a hemp oil spray containing cannabidiol (CBD) on August 17, 2020. (Tr. at 174, 177; Exs. R-A, R-B).
24. Respondent's doctor recommended the use of CBD oil to alleviate pain in his knees. (Tr. at 169, 178; Ex. R-F).

### **III. DISCUSSION**

The purpose of Coast Guard suspension and revocation (S&R) proceedings is to promote safety at sea. See 46 U.S.C. § 7701. ALJs are authorized by 46 C.F.R. § 5.19 to suspend or revoke an MMC for violations arising under 46 U.S.C. § 7704. Under 46 U.S.C. § 7704(b), an MMC shall be revoked if the holder has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that he is cured. See generally Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (rev'd on other grounds) (definition of cure established). Here, the Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent took a random drug test on August 18, 2020, which yielded a positive result for marijuana metabolites. The Coast Guard seeks revocation of Respondent's MMC in accordance with 46 C.F.R. § 5.59. For the reasons stated below, I find the Coast Guard **PROVED** the charged violation based on the evidence in the record as a whole. Before turning to the specific charges, I first address whether I have jurisdiction in this case.

#### **A. Jurisdiction**

Under Coast Guard case law, jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). When the Coast Guard charges use of a dangerous drug, jurisdiction exists so long as the respondent holds a credential at the time the Coast Guard initiates the proceedings. Appeal Decision 2712 (MORRIS) (2016); Appeal Decision 2721 (TOWNSEND) (2018). Here, the record shows Respondent held MMC No. [REDACTED] when the Coast Guard filed the Complaint initiating the case. (Ex. CG-001). Respondent also admitted jurisdiction in his Answer. Accordingly, I have jurisdiction to adjudicate this matter.

## **B. Burden of Proof**

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard S&R hearings before United States 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 U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988) at \*3; see also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (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 Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (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 the charged violation. Having discussed the burden of proof in this case, I now turn to the specific allegations in this case.

## **C. The Coast Guard Proved a *Prima Facie* Case of Use of a Dangerous Drug**

The drug testing procedures in 46 C.F.R. Part 16 were established not only to protect public safety interests but also to ensure that the constitutional rights of the mariner were safeguarded throughout the drug testing process. Appeal Decision 2704 (FRANKS) (2014) at

\*5. By expressly mandating limited, specific types of drug tests—pre-employment, periodic, random, serious marine incident, and reasonable cause testing—the drafters of the regulations ensured that the constitutionally protected privacy interests of the mariner were balanced with the overriding need to ensure a drug-free and safe workplace.<sup>2</sup> Id. at \*4.

As stated above, the Coast Guard bears the burden of proof. When the Coast Guard seeks revocation of a mariner’s credential based on a failed drug test conducted pursuant to 46 C.F.R. Part 16, the Coast Guard can obtain a presumption that the respondent is a user of dangerous drugs if it presents a *prima facie* case. 46 C.F.R. § 16.201(b).<sup>3</sup> A *prima facie* case is made when the following three elements are established: 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998); Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2584 (SHAKESPEARE) (1997). In establishing the afore-mentioned three elements, the Coast Guard, in effect, establishes that the drug test was properly ordered for one of the reasons listed in Part 16 (*i.e.*, the test was a pre-employment, periodic, random, serious marine incident, or reasonable cause drug test) and the test was conducted in a reliable manner in accordance with 49 C.F.R. Part 40 (the regulations governing the specimen collection, laboratory testing, and verification processes). See Appeal Decision 2704 (FRANKS) (2014) (discussing the “why” and “how” of drug testing under 46 C.F.R. Part 16).

Once the Coast Guard establishes a *prima facie* case that a respondent is a user of or addicted to dangerous drugs, the respondent may then present evidence to rebut the presumption

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<sup>2</sup> See 46 C.F.R. §§ 16.210-16.250.

<sup>3</sup> 46 C.F.R. § 16.201(b): If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.



of the positive drug test result. If the respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997).

As discussed below, I find the Coast Guard established a *prima facie* case of drug use, and Respondent failed to rebut the presumption arising from the establishment of the *prima facie* case.

**1. Respondent Was the Person Tested for Dangerous Drugs and the Collection Process Satisfied the Requirements of 49 C.F.R. Part 40**

The Coast Guard must prove Respondent was the person who submitted the specimen that was tested for drugs. Appeal Decision 2603 (HACKSTAFF) (1998) at \*3. To meet this element of the *prima facie* case, the Coast Guard must show that the specimen collection process complied with the requirements of 49 C.F.R. Part 40, Subparts C, D, and E.

At the time of the collection at issue in this case, Great Lakes Dredge & Dock Company, LLC (hereinafter Great Lakes) employed Respondent and he was working aboard the Dredge OHIO. (Tr. at 37-38, 54, 165; Ex. CG-013). On August 18, 2020, [REDACTED] [REDACTED] a certified urine specimen collector with Anderson-Kelly Associates, went to the Dredge OHIO to collect urine specimens from the crew for a random drug test. (Ex. CG-003; Tr. at 49, 54-55). At all times relevant to this proceeding, the collector was certified in collection procedures meeting the DOT drug testing program standards. 49 C.F.R. § 40.31(a). (Ex. CG-005; Tr. at 50-51). The collector has completed over a thousand urine specimen collections in his career. (Tr. at 50). He recalled boarding the Dredge OHIO, being escorted to the area where the collection took place, which he described as a “crew lounge area with a single stall toilet off of it,” and conducting the collection; and he testified that he followed the standard collection procedures to which he always adheres. (Tr. at 54-55, 59-63). He did not recall any issues or problems with the

collection process that day and stated he would have noted in the “Remarks” section in Step 2 of the CCF if there were any issues or problems. (Tr. at 63). The collector identified the CCF containing his signature and Respondent’s signature, for this collection on August 18, 2020, which had a Specimen ID #Y39734254. (Ex. CG-002). There were no notes in the “Remarks” section in Step 2. (Ex. CG-002).

As to the collector’s standard collection procedures, he testified that he would have secured the faucet in the bathroom by shutting off the water or covering the faucet handles with tamper-evident tape, added blue dye to the toilet, and removed any potentially adulterating substances like soap from the bathroom. (Tr. at 59). He would allow only one donor to go into the bathroom at a time to produce a sample. (Tr. at 60). For each donor, he would check his or her I.D. to ensure the donor was on the crew list, and fill out Step 1 of the CCF. (Tr. at 60-61). He would then ask the donor to wash his or her hands and remove everything from his or her pockets. (Tr. at 61). The collector would then choose a test kit in the donor’s presence, hand the donor a sample cup, and have the donor go into the bathroom to fill the sample cup. (Tr. at 61). When the donor came out of the bathroom with the sample, the collector would have done all of the following in the presence of the donor: check the sample’s temperature with a temperature strip placed onto the plastic sample cup, pour the sample into the two smaller plastic vials (also called split specimen bottles) of the test kit, take the seals which contain a unique identifying number off the bottom of the CCF and seal the vials, and have the donor initial the seals on the vials. (Tr. 61-62). The collector would then place the two sealed vials into the plastic bag, and complete Steps 2 through 4 of the CCF. (Tr. at 62). He would then have the donor complete Step 5 of the CCF, which requires the donor’s signature, date of birth, date of the collection, and phone number. (Tr. at 62). Finally, the collector would give the donor his or her copy of the

CCF, keep the top copy of the CCF, place the lab's copy of the CCF into the bag along with the two sealed vials, and seal the bag. (Tr. at 62).

On cross-examination, Respondent alleged the collector did not secure the faucets in the bathroom. (Tr. at 58, 63-64). The collector did not have a specific recollection of every action he took in this case, but he stated his normal practice would have been to secure the faucets and that he believed he taped the faucets for this case. (Tr. at 64). This was the only part of the collector's testimony Respondent challenged. (Tr. at 58). Although Respondent stated the faucets were not secure, he did not indicate this flaw caused his sample to become adulterated or misidentified. Accordingly, I find the Coast Guard did prove Respondent was the person who provided Specimen ID #Y39734254.

**2. Respondent's Sample Tested Positive for Marijuana Metabolites and the Testing and MRO Confirmation Processes Satisfied the Requirements of 49 C.F.R. Part 40**

Next, the Coast Guard must show Respondent's sample must test positive for the alleged drug, here, marijuana metabolites. In order to prove this part of the *prima facie* case, the Coast Guard must show the test was conducted in accordance with 49 C.F.R. Part 40, Subparts F, G, and H. Appeal Decision 2728 (DILLON) (2020) at \*2. As set forth below, the Coast Guard proved Respondent's sample tested positive for marijuana metabolites.

William Collie testified on behalf of Medtox as to the testing of Respondent's urine specimen. (Tr. at 70-100). Mr. Collie is the Certifying Scientist Supervisor for Medtox. (Tr. at 71). Only laboratories certified by the U.S. Department of Health and Human Services (HHS) under the National Laboratory Certification Program (NLCP) may perform DOT drug testing. 49 C.F.R. § 40.81(a). At all times relevant to this proceeding, Medtox was certified by the NLCP. (Tr. at 71-72; Ex. CG-010).

Mr. Collie testified as to the authenticity of the lab copy of the CCF. (Ex. CG-003; Tr. at 85-87). Medtox received Specimen ID #Y39734254 on August 21, 2020, with the split sample specimen bottle seals intact (Ex. CG-003; Ex. CG-015 at 5). Upon receipt, Medtox assigned Specimen ID #Y39734254 the unique accession number E2843694. (Ex. CG-003; Ex. CG-015 at 5; Tr. at 79). At no time during Medtox's possession of Specimen ID #Y39734254 was the chain of custody compromised. (Tr. at 83-85; Ex. CG-015). Medtox ensured its equipment produced accurate results by performing calibration and quality control tests. (Tr. at 81, 84-85).

Medtox performed an initial screening of Respondent's specimen, utilizing a 50 ng/ml cut-off level, which produced a presumptive positive result for tetrahydrocannabinolic acid (THCA), a marijuana metabolite. 49 C.F.R. § 40.87(a). (Exs. CG-003, CG-015 at 46; Tr. at 75, 82, 99). Medtox then performed confirmatory testing using gas chromatography mass spectrometry. (Tr. at 82). The cut-off level for positive marijuana metabolite confirmatory tests is 15 ng/ml. 49 C.F.R. § 40.87(a). (Tr. at 82, 93). After confirmatory testing, Specimen ID #Y39734254 tested positive for THCA/marijuana metabolites at a level of 19 ng/ml. (Tr. at 93; Ex. CG-003; Ex. CG-015 at 113; Ex. CG-018). Van Phan served as Medtox's certifying technician/scientist for the testing of Specimen ID #Y39734254 and certified the testing met all relevant federal standards. (Ex. CG-003; Ex. CG-015 at 5; Tr. at 87).

Determining if Respondent failed the drug test also requires an analysis of the verification by the MRO of the positive drug test result produced by the laboratory. The Coast Guard presented the testimony of Dr. H.J. Khella, an MRO and medical director for Industrial Medical Testing (IMT). (Tr. at 105-106). Dr. Khella stated Dr. Walter Oakes worked for IMT at all times relevant to this proceeding, is a licensed physician and a certified MRO, and performed the MRO verification of Respondent's drug test results. (Tr. at 106-111; Ex. CG-006). Dr.

Khella also participated in the verification process by fielding some phone calls from Respondent. (Ex. CG-007).

Dr. Khella explained his office first reviewed the chain of custody information contained in the laboratory report and the MRO's copy of the CCF to ensure there were no flaws in the documentation. (Tr. at 111-112). Then, in accordance with an MRO's obligation to discuss positive drug screen results with a mariner and provide the mariner with an opportunity to give a legitimate explanation for a positive finding, Dr. Oakes spoke to Respondent by phone on August 25, 2020. (Tr. at 1112-114; Ex. CG-007). Dr. Oakes recorded notes of his phone call (Ex. CG-007), and the Coast Guard played portions of Respondent's phone calls with the MRO into the record at the hearing (Exs. CG-020A, CG-020B, and CG-020C; Tr. at 118-122).

During the first call, Dr. Oakes informed Respondent that his urine specimen tested positive for marijuana, and asked Respondent if he had a prescription for medical marijuana. (Ex. CG-007; Ex. CG-020A; Tr. at 118). Respondent stated he did not have a prescription for medical marijuana but he had used a CBD product. (Ex. CG-007; Ex. CG-020A). Dr. Oakes told Respondent a product containing "pure" CBD would not cause his urine to test positive for marijuana, but a CBD product that contained impurities—implying a product that contained some tetrahydrocannabinol (THC)—could cause a positive marijuana result. (Ex. CG-007; Ex. CG-020A; Tr. at 118-119). Dr. Oakes informed Respondent using a CBD product was not an acceptable reason for testing positive for marijuana and he would have to verify the result as positive. See 49 C.F.R. § 40.137. (Ex. CG-020A; Ex. CG-007; Tr. at 119). Dr. Oakes further told Respondent, "You only have 19 nanograms of marijuana (unintelligible few words). To be negative it needs to be under 15. So it's the CBD most likely that caused you to have a positive

test.” (Tr. at 119; Ex. CG-020A). Later on August 25, 2020, Respondent called Dr. Oakes again to request that his split specimen be tested. (Ex. CG-007).

In response to Respondent’s request for split specimen testing, MedTox shipped the second vial (“Bottle B”) of Respondent’s specimen to CRL, which received the sample on August 27, 2020. (Tr. at 130-131; Ex. CG-019). CRL performed testing and issued a report confirming that the split specimen sample tested positive for marijuana metabolites. (Exs. CG-019, CG-009; Tr. at 132). Based on the review of MedTox’s laboratory report, information provided by Respondent during the verification process, and CRL’s split specimen report, Dr. Oakes completed the MRO copy of the CCF, verifying that Specimen ID #Y39734254 tested positive for marijuana. (Ex. CG-004). Dr. Oakes also issued results on IMT’s letterhead confirming Respondent’s specimen tested positive for marijuana for both the initial specimen and the split specimen. (Exs. CG-008, CG-009).

The evidence presented by the Coast Guard showed Medtox complied with the regulations governing sample testing and split specimen testing contained in 49 C.F.R. Part 40, Subparts F and H. The evidence further shows the MRO, Dr. Walter Oakes, complied with the verification process and split specimen testing regulations of 49 C.F.R. Part 40, Subparts G and H. Accordingly, I find the Coast Guard proved Respondent’s Specimen ID # Y37700626 tested positive for marijuana metabolites.

### **3. The Selection Process that Resulted in the Crew of the Dredge OHIO Being Selected for a Random Drug Test Complied with 46 C.F.R. Part 16**

As the final element of proving a *prima facie* case, the Coast Guard must show Respondent’s marine employer properly ordered the drug test for one of the reasons set forth in 46 C.F.R. Part 16; in other words, the Coast Guard must prove the test was a properly

administered pre-employment, periodic, random, serious marine incident, or reasonable cause drug test. See 46 C.F.R. Part 16 and 49 C.F.R. Part 40.

Here, Respondent's employer, Great Lakes, ordered the crew of the Dredge OHIO, including Respondent, to undergo a random drug test on August 18, 2020. (Tr. at 35-37; Ex. CG-013). Marine employers are required to establish programs for chemical testing for dangerous drugs on a random basis for crewmembers on inspected vessels who occupy a position required by the vessel's Certificate of Inspection. 46 C.F.R. § 16.230(a)(1). It is clear from the record the Dredge OHIO is an inspected vessel and that its crewmembers are subject to the random drug testing requirements of 46 C.F.R. Part 16. (Tr. at 25-26; Ex. CG-013).

Random selection must be done in accordance with a scientifically valid method, such as a computer-based random number generator that selects a vessel for testing, provided that each vessel subject to the marine employer's test program remains equally subject to selection. 46 C.F.R. § 16.230(c); Appeal Decision 2710 (HOPPER) (2015). Marine employers may use third party administrators/consortiums to coordinate and administer the random chemical testing program required by Part 16. 46 C.F.R. § 16.230(d); 49 C.F.R. § 40.3. In this case, Great Lakes contracted with American Maritime Safety, Inc. (AMS) to administer their drug and alcohol testing program. (Ex. CG-013; Tr. at 26). In July of 2020, AMS issued an email notification to Great Lakes listing nine vessels and four alternate vessels that had been randomly selected for drug testing. (Ex. CG-013). Dredge OHIO was one of the alternate vessels. According to the testimony of Jason Campbell, Vice President of Health, Safety, and Environment for Great Lakes, a number of the nine selected vessels were not operational and had no crew at the time of notification, causing the Dredge OHIO, although originally an alternate, to be selected for testing. (Tr. at 40). AMS generated the selection list through a computer program that randomly

selected the vessels from a database. (Tr. at 143-144). The use of the computer program for selection is sufficient to show there was a valid random selection process and no unfair targeting of Respondent for testing. Accordingly, I find that the random selection process in this case complied with the requirements of 46 C.F.R. Part 16.

#### **4. Respondent's Evidence Was Insufficient to Rebut the *Prima Facie* Case Presented by the Coast Guard**

Respondent denied throughout the hearing that he is a user of or addicted to dangerous drugs. (Tr. at 34, 114, 127, 129, 139, 158, 161, 163-168, 170, 172; Exs. R-D, R-E). He argued the cause for his urine sample testing positive for marijuana metabolites in the August 18, 2020 collection, was his use of hemp oil containing CBD. (Tr. at 30-31, 45, 87, 96-97, 127, 129-130, 139, 156-179; Exs. R-A, R-B, R-D, R-E, R-F).

Respondent testified his doctor recommended the use of hemp oil to relieve his knee pain and produced a letter from Robert D. Kramberg, MD, on Rehabilitation Medicine Center of NJ letterhead, dated August 24, 2020, stating, "I have recommended that Mr. Jennings use CBD oil to help decrease the pain at his bilateral knees." (Tr. 169, 174; Ex. R-F). The letter was typed and unsigned. (Ex. R-F). Respondent said he bought a spray bottle of hemp oil from the Vitamin Shoppe the day before the drug test and sprayed the product on his knee. (Tr. at 174, 177). Respondent produced a receipt showing the purchase of "3MG CBD HEMP SPRAY PEPPERMINT" made on August 17, 2020, and four photographs of a bottle labeled "Plus +CBD oil Full Spectrum Hemp Extract." (Exs. R-A, R-B).

The evidence also shows Respondent told MROs, Dr. Oakes and Dr. Khella, during the verification phone calls, that he had used hemp oil and questioned the doctors as to whether use of hemp oil could have caused the positive drug test result. (Tr. at 117-123; Exs. CG-20A, CG-20B, and CG-20C). Dr. Oakes stated to Respondent during one of the calls that the level of



marijuana metabolite detected by the drug test, 19 nanograms, was indicative of use of a CBD product. (Tr. at 119; Ex. CG-20A). However, Dr. Khella, during the hearing, explained the level of marijuana metabolite found by the drug test could not be used to determine the source of the metabolite, whether from illicit drug use or use of a legal CBD product. (Tr. at 135-136). Both Dr. Oakes and Dr. Khella stated a product marketed as a legal CBD product could contain amounts of THC that could be detected by a drug test. (Tr. at 118, 129).

The Coast Guard relied on a DOT Office of Drug and Alcohol Policy and Compliance Notice (“DOT Notice”) and a USCG Marine Safety Advisory to support their assertion that CBD products may cause a positive drug test. Both documents state products marketed as CBD products may contain enough THC to cause a positive drug test result, and that the use of hemp or CBD products is not an acceptable excuse for a positive drug test result for THC. However, the Coast Guard did not present a proper basis for proposed Exhibits 16 or 17 for official notice, therefore the ALJ only admitted the DOT Notice into evidence. (Tr. at 22-24, 148, Ex. CG-016).

As discussed in the Commandant’s decision in USCG v. MMC issued to Robert Kelvin Cook III, it is well-settled that marijuana is considered a “dangerous drug” for purposes of 46 U.S.C. § 7704(b). Appeal Decision 2729 (COOK) (2020) at \*3. Further, the changes in state laws regarding marijuana-derived products have had no effect on federal drug laws, or the Coast Guard’s enforcement of federal drug testing requirements. Id. As stated in COOK, even if a mariner claims that use of a CBD product, and not illicit drugs, caused a positive drug test result, “such use would provide no defense to a positive drug test result.” Id. at \*4 (comparing Administrator v. Siegel, NTSB Order No. EA-5838 at 11, 2018 WL 2733938 at 5).

In this case, Respondent asserted he used a hemp oil spray marketed as a legal CBD product the day before his drug test. (Tr. at 30-31, 45, 87, 96-97, 127, 129-130, 139, 156-179;

Exs. R-A, R-B, R-D, R-E, R-F). Dr. Oakes' statements to Respondent during the verification phone call, discussing the low level of marijuana metabolite in the positive result, also supports Respondent's argument that his use of a CBD-containing product caused him to test positive for marijuana metabolites (THC). (Tr. at 119; Ex. CG-020A). As noted above, Dr. Khella's testimony provided a contrary view on whether the positive result may have been from drug use. (Tr. at 135-136). Even though I find Respondent's testimony, combined with the comments from Dr. Oakes, persuasive regarding his use of a CBD product, I am bound by prior Commandant decisions and the regulatory requirements of positive drug test cut-off levels. In accordance with COOK, *supra*, claimed use of a legal CBD product cannot be accepted as a defense to a positive drug test result. 46 C.F.R. § 5.65; Appeal Decision 2729 (COOK) (2020) at \*4. Therefore, Respondent's evidence and arguments are not sufficient to overcome the presumption of drug use arising from the *prima facie* case made by the Coast Guard.

#### **IV. SANCTION**

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, revocation of all Coast Guard issued licenses, documents, and other credentials is the appropriate sanction unless cure is proven. 46 U.S.C. 7704(b); 46 C.F.R. § 5.59; Appeal Decision 2535 (SWEENEY) (1992). Under SWEENEY, cure is a two-step process which consists of 1) successful completion of a bona fide drug abuse rehabilitation program, and 2) demonstration of complete non-association with drugs for a minimum period of one year following completion of the rehabilitation program, including participation in random, unannounced drug tests during that year. Id. at \*3-4.

Here, the Coast Guard proved by a preponderance of reliable, probative, and credible evidence Respondent was a user of dangerous drugs. Respondent presented some evidence of pursuit of the first step in the cure process, in the form of an evaluation and letter from a LCSW/SAP (Substance Abuse Professional), and notes from a session with an addiction counselor. (Ex. R-D, R-E). However, at the time of the hearing, Respondent's evidence regarding efforts to accomplish cure were not demonstrated to be sufficient in keeping with Coast Guard policy for proof of cure. At the conclusion of the hearing, the Coast Guard moved that Respondent be required to deposit his credentials with the Coast Guard because the Coast Guard had presented a *prima facie* case of use of a dangerous drug. The ALJ granted that motion pursuant to 46 C.F.R. § 5.521(b), and Respondent subsequently submitted his credentials to the Coast Guard.

The Coast Guard has declined to accept any lesser standard of accomplishing the cure process, as the requirements to establish cure are set through Commandant policy, as noted in the regulations (46 C.F.R. § 5.901) and through binding authority in SWEENEY and other Commandant Decisions on Appeal. See e.g., Appeal Decision 2667 (THOMPSON) (2007) and Appeal Decision 2638 (PASQUARELLA) (2003).

The Coast Guard has in the past been somewhat flexible with regard to the evidence necessary to demonstrate cure, in that it has accommodated a mariner's health concerns by allowing the mariner to attend support meetings virtually, to minimize potential COVID-19 exposure. However, as of the date of this decision, the Coast Guard has not indicated consideration of any potential changes to the requirements of proving cure with regard to mariners who have claimed an inadvertent THC positive drug test due to CBD use, despite an increasing number of mariners apparently testing positive because of CBD use.

Respondent has raised concerns arising from the use of CBD, which is not prohibited by law and has been advertised for use in pain relief. Since this appears to be a recurring issue in S&R proceedings,<sup>4</sup> the Coast Guard could consider some modification of the current cure standard to a lesser time period, with additional testing requirements, if a mariner can demonstrate use of CBD as the likely basis for a positive drug test result. However, the ALJ's authority is constrained by the regulations and the binding authority of Commandant Decisions on Appeal, including SWEENEY and COOK, *supra*. See 46 C.F.R. § 5.65. Any policy change is beyond the authority of the ALJ. Therefore, Respondent's request to avoid the sanction of revocation or to modify the Coast Guard's cure requirement must be denied. Accordingly, in keeping with 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.59, the appropriate sanction is **REVOCATION**.

However, in keeping with the regulations, Respondent remains entitled to seek administrative clemency and apply for a new credential prior to the three-year assessment period if he can show 1) successful completion of a bona fide drug rehabilitation program, 2) complete non-association with drugs for a minimum period of one year following completion of the rehabilitation program, and 3) active participation in a bona fide drug abuse monitoring program. See 46 C.F.R. § 5.901(d).

### **ORDER**

**IT IS HEREBY ORDERED**, Merchant Mariner Credential No. [REDACTED], and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent Nathaniel Tyrone Jennings, are **REVOKED**.

**PLEASE TAKE NOTICE**, within three (3) years of the date of this decision and order, Respondent may file a motion to reopen this matter and seek modification of the order of

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<sup>4</sup> See e.g., Appeal Decision 2729 (COOK) (2020).

revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirements of good discipline and safety at sea. The revocation order may be modified upon a showing that Respondent:

- (1) has successfully completed a bona fide drug abuse rehabilitation program;
- (2) has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and
- (3) is actively participating in a bona fide drug abuse monitoring program.

See 33 C.F.R. § 20.904(f); 46 C.F.R. § 5.901(d). The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY) (1992).

**PLEASE TAKE FURTHER NOTICE**, service of this decision and order on the parties and/or parties' representative(s) serves as notice of the appeal rights set forth in 33 C.F.R. 20.1001 – 20.1004. (See Attachment B).



Michael J. Devine  
US Coast Guard Administrative Law Judge

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**Michael J. Devine**  
**Administrative Law Judge**  
**United States Coast Guard**

Done and dated June 2, 2022  
Baltimore, MD

## ATTACHMENT A

### Coast Guard's Witnesses

1. Jason Campbell
2. [REDACTED]
3. William Collie
4. Dr. Hani Khella
5. David Barnes

### Coast Guard's Exhibits

- |             |  |
|-------------|--|
| Ex. CG-001: | MMC data summary (admitted)  |
| Ex. CG-002: | CCF collector copy (admitted)  |
| Ex. CG-003: | CCF laboratory copy (admitted)   |
| Ex. CG-004: | CCF MRO copy (admitted)  |
| Ex. CG-005: | Collector DOT training certificate (admitted)                              |
| Ex. CG-006: | MRO certificate (admitted)   |
| Ex. CG-007: | MRO notes of phone call with donor (admitted)                              |
| Ex. CG-008: | MRO report of initial analysis (admitted)                                  |
| Ex. CG-009: | MRO report of split test (admitted)  |
| Ex. CG-010: | List of HHS-certified laboratories (85 Fed. Reg. 46681) (admitted)         |
| Ex. CG-011: | Great Lakes drug and alcohol policy (admitted)                             |
| Ex. CG-012: | Great Lakes policies and procedures w/ employee acknowledgement (admitted) |
| Ex. CG-013: | AMS notice of random selection (admitted)                                  |
| Ex. CG-014: | Crew list spreadsheets (not admitted)                                      |
| Ex. CG-015: | Laboratory litigation package (admitted)                                   |

- Ex. CG-016: Feb. 18, 2020 DOT notice re: CBD use (admitted)
- Ex. CG-017: Feb. 10, 2020 USCG marine safety advisory re: CBD use (not admitted)
- Ex. CG-018: Medtox final report (admitted)
- Ex. CG-019: Split testing report (admitted)
- Ex. CG-020: Three (3) audio recordings of MRO calls with Respondent (only portions played into record admitted)

**Respondent's Witness**

1. Nathaniel Jennings

**Respondent's Exhibits**

- Ex. R-A: Hemp oil purchase receipt (admitted)
- Ex. R-B: Four (4) photos of hemp oil bottle (admitted)
- Ex. R-C: August 29, 2020 drug test results (not admitted)
- Ex. R-D: SAP evaluation and letter (admitted)
- Ex. R-E: Addiction counselor notes (admitted)
- Ex. R-F: Letter from Dr. Robert Kramberg (admitted)

## ATTACHMENT B

### Notice of 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.