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

UNITED STATES COAST GUARD, Complainant,	)	
	)	Docket Number: 2023-0274
v.	)	
	)	MISLE Activity ID: 7719104
JOHN FRANCIS CALNAN, Respondent.	)	

DECISION AND ORDER

The United States Coast Guard (Coast Guard) initiated this administrative action against John Francis Calnan (Respondent), seeking to revoke his Merchant Mariner Credential (MMC) pursuant to 46 U.S.C. § 7704(b). Upon consideration of the record, and after conducting a hearing, I find the Coast Guard did **NOT PROVE** Respondent violated 46 U.S.C. § 7704(b). Accordingly, this matter is **DISMISSED** pursuant to 46 C.F.R. § 5.567.

I. PROCEDURAL BACKGROUND

On July 3, 2023, the Coast Guard filed a Complaint alleging Respondent took a non-46 C.F.R. Part 16 drug test (Non-Part 16 test) on January 26, 2023, and his hair specimen tested positive for cocaine metabolites. Respondent answered the Complaint on October 23, 2023, denying all the jurisdictional and factual allegations. This matter proceeded to a hearing on May 21, 2024, in Fort Myers, Florida. Andrew S. Myers, Esq., and CWO John Colon appeared on behalf of the Coast Guard. Respondent appeared with counsel, Liam T. O'Connell, Esq.

In its case-in-chief, the Coast Guard called four witnesses and offered ten exhibits. [1] See Attachment A. Respondent did not call any witnesses or offer any exhibits.

[1] The Coast Guard did not offer Exhibits 6 and 10 (Psychemedics' Lab Results and DISA Drug Test Results Certificate). The Coast Guard offered Exhibit 12 (Laboratory Litigation Package), but I did not admit this exhibit

At the conclusion of the hearing, I declined to retain Respondent's credentials after questioning whether the Coast Guard had established a prima facie case that Respondent committed an act or offense as described in 46 C.F.R. § 5.521.

After the hearing, I convened a post-hearing telephone conference to discuss outstanding discovery issues and other procedural matters. See Order dated July 25, 2024; Tr. 207-208. During the post-hearing conference, the parties declined my offer to allow additional discovery[2] and agreed the only exhibits that I should consider in this matter were CG-1-5; 7-9 and 11. Id. Thereafter, the Coast Guard and Respondent submitted post-hearing briefs on August 23, and September 23, 2024, respectively. The Coast Guard filed its reply brief on October 7, 2024. The record is now closed and the case is ripe for decision.

For the reasons set forth below, I find the Coast Guard did **NOT PROVE** Respondent is a user of dangerous drugs.

II. FINDINGS OF FACT

After carefully considering the exhibits, testimony, and the entire record, I find the following facts proved by preponderant evidence:

1. At all relevant times, Respondent held MMC number [redacted]. (CG-01);
2. In January 2023, Respondent was an employee of Otto Candies. (Tr. 23, 31-32; CG-02);

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because the Coast Guard provided it to Respondent after the discovery deadline. (Tr. 95-98). Furthermore, as admitted by the Coast Guard, it advised Respondent before the hearing it would not offer the exhibit. Id.

[2] During the hearing, Respondent raised an issue concerning a previous order I entered denying his request to extend discovery deadlines. (Tr. 6-7). Specifically, Respondent asserted he should have been granted an extension of my discovery schedule because of his counsel's late entrance into this matter. As I informed counsel during the hearing, I would not grant Respondent's motion to extend discovery because his request alleged the appropriate time frame to adjudge his request began when he *filed* a notice of appearance. However, because Respondent's written motion did not advise me when he actually *retained* his attorney, I did not find sufficient excuse supporting the extension request. During the hearing, however, Respondent's counsel advised he entered his appearance very close to the time he was retained. Given this new information, I informed Respondent I would consider additional discovery requests at the close of the hearing. After the hearing, Respondent and the Coast Guard declined my offer to reopen discovery in this matter.

3. Otto Candies had more than one drug testing program for its employees and potential employees, including pre-employment and pre-access testing. (Tr. 42);

4. Otto Candies set forth its drug testing program and policies in its Operations Integrity Manual. (CG-03; Tr. 25);

5. Otto Candies required new mariners to submit to a pre-employment Department of Transportation (DOT) urine test conducted in accordance with 49 C.F.R. Part 40. (Tr. 26, 42);

6. Some new hires were also required to submit to a pre-access hair test conducted by the drug consortium "DISA." (Tr. 26-27, 45-46, 64-65);

7. On January 5, 2023, Respondent took a pre-employment DOT urine test. (Tr. 30);

8. On that same date, Respondent submitted a hair specimen for chemical analysis as part of Otto Candies' Non-Part 16 drug testing program. (Tr. 61; CG-11);

9. Respondent's January 5, 2023, urine sample returned a negative result, but his hair sample was considered insufficient for testing. (Tr. 30-31, 61);

10. Thereafter, on January 26, 2023, Respondent submitted another hair specimen for chemical analysis and took another DOT urine test. (Tr. 61, 42-43, 167, 172-73);

11. Otto Candies uses Multi Management Services, Inc., (MMSI) to collect samples for the company's drug testing programs. (Tr. 26);

12. Dwight James is a DOT-certified collector (Collector) at MMSI trained to collect hair samples. (CG-04; Tr. 141-142, 144);

13. As part of the collection process on January 26, 2023, the Collector obtained supplies, such as scissors and razors, and prepared his cubicle. (Tr. 145). The Collector then reviewed the chain of custody form and asked for Respondent's identification. (Tr. 146-147). The Collector and Respondent each completed their sections of the Custody and Control Form (CCF). (Tr. 146; CG-05);

14. Respondent put on gloves and opened the hair sample packet, which included a piece of aluminum foil for the hair. (Tr. 146-147). The Collector wiped the scissors and cut hair from Respondent's head. (Tr. 146, 109, 115);

15. The Collector placed the hair onto the aluminum foil and folded it, then placed the foil inside an envelope and sealed the envelope. (Tr. 146, 149-150). Both Respondent and the Collector initialed the envelope containing the hair, and the Collector dated it. (Tr. 146-147). Then they both signed the CCF. (Tr. 147; CG-05);

16. The collector placed the sealed envelope and the CCF into another plastic bag, and sealed that plastic bag. (Tr. 147, 150-151);

17. Respondent's hair sample was sent to Psychemedics Corporation (Psychemedics) for analysis. (Tr. 80);

18. Psychemedics conducted the chemical drug test of Respondent's second hair sample and reported the test positive for cocaine metabolites. (Tr. 33, 60-61, 135, 180; CG-08, CG-11);

19. Psychemedics washed Respondent's hair sample and assigned it an internal accession number of 217038430. (Tr. 83-86, 89-90; CG-05);

20. Respondent's hair sample was screened by Enzyme ImmunoAssay (EIM) and the screening indicated a presumptive positive result for cocaine metabolites. (Tr. 83-84). The sample was sent back to the accessioning department where it was re-weighed in preparation for confirmation testing. (Id.);

21. Psychemedics conducted confirmatory liquid chromatography/mass spectrometry testing, which confirmed the presence of cocaine metabolites in Respondent's hair at a level of 15.7 nanograms per 10 milligrams. (Tr. 84-86; 123);

22. Psychemedics uses a confirmation cutoff of 5 nanograms of cocaine per 10 milligrams of hair and considers any results at or above this level positive for cocaine. (Tr. 181-182). A positive result also requires the metabolite Benzoylecgonine (BE) at a level of 0.5 nanograms per 10 millimeters of hair. (Tr. 180);

23. A certifying scientist at Psychemedics (Certifying Scientist) certified Respondent's hair sample as positive for cocaine. (Tr. 91);

24. The Certifying Scientist did not know what an Enzyme ImmunoAssay test was, but did know the purpose of the test was to find all presumptive positive samples. (Tr. at 84);

25. The Certifying Scientist received approximately two months of on-the-job training, though she had worked in her role as a certifying scientist for thirteen years. (Tr. at 82-83);

26. The Certifying Scientist knew of no other way cocaine would be present in hair other than if the cocaine was used by the specimen donor. (Tr. at 182);

27. Dr. Barry Sachs is a certified Medical Review Officer (MRO) employed by University Services. (Tr. 103; CG-07);

28. On February 1, 2023, Dr. Sachs interviewed Respondent regarding his positive hair sample. (Tr. 108-109, 115-116; CG-08, CG-09);

29. Dr. Sachs certified the positive test result. (CG-08, CG-09; Tr. 109-111); and

30. Dr. Sachs knew Psychemedics set the cutoff levels for hair testing, but did not testify as to how Psychemedics set those levels. (Tr. at 135).

III. DISCUSSION

A. Jurisdiction

To prevail in a suspension or revocation case, the Coast Guard bears the burden of proving jurisdiction. U.S. Coast Guard v. Schwieman, 2019 WL 8643835 at *3 (ALJ Decision Sept. 13, 2019). Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001), 2001 WL 34080159, at *2. Even where a mariner admits jurisdictional facts, the question of jurisdiction remains. Appeal Decision 2677 (WALKER) (2008), 2008 WL 5765846, at *2. Furthermore, a complaint must include sufficient factual allegations to form a basis for jurisdiction. Id.

Relevant case law outlines two types of jurisdiction in Coast Guard cases: 1) when the mariner simply holds an MMC, referred to as a "holder offense;" and 2) when a mariner holds the credential and commits an offense while acting under the authority of his credential, referred to as an "acting under the authority offense." See Appeal Decision 2668 (MERRILL) (2007), 2007 WL 3033593; see also 46 U.S.C. § 7703 (distinguishing offenses that require a mariner to be acting under the authority of the MMC with those that simply require a mariner to "hold" the license); see also 46 U.S.C. § 7704 (identifying a user of or addiction to dangerous drug charge as a holder offense). Jurisdiction alleging a holder offense is proper no matter what the mariner is doing—the mere possession of an MMC, whether the mariner is on land or sea, at work or not, will confer jurisdiction over the credential. Id. For example, if a credentialed mariner is accused

of using dangerous drugs, no matter the circumstance, the Coast Guard will have jurisdiction to bring a claim against that credential. Id.

Here, the Coast Guard proved Respondent was a holder of an MMC at the time he submitted to the chemical testing at issue and when the test purportedly returned a positive result. CG-01. Accordingly, I have jurisdiction to adjudicate this matter.

B. Burden of Proof

Pursuant to 46 U.S.C. § 7702(a), title 5 U.S.C. §§ 551-559 of the Administrative Procedure Act (APA) applies to Coast Guard suspension and revocation proceedings. The APA authorizes sanctions if, upon consideration of the entire record, the charges against a respondent are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). The standard of proof in Coast Guard administrative proceedings such as these is the "preponderance of the evidence" standard. See 33 C.F.R. § 20.701; Appeal Decision 2477 (TOMBARI) (1988), 1988 WL 1024602. Under this standard, a party must prove "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981).

The Coast Guard bears the burden of proof regarding the charges it levies against a respondent, and the respondent bears the burden of proving any affirmative defenses. See 33 C.F.R. § 20.702. Here, the Coast Guard must prove by a preponderance of the evidence Respondent is the user of or addicted to the use of a dangerous drug, as alleged in the Complaint. See 46 U.S.C. § 7704(b). Having discussed the parties' respective burdens, I turn to the specific allegations against Respondent.

C. Use of or Addiction to the Use of a Dangerous Drug

The Coast Guard's Complaint asserts Respondent "has been the user of a dangerous drug" as prohibited by 46 U.S.C. § 7704(b). To prove this allegation, the Coast Guard's primary

evidence comes in the form of a Non-Part 16, employer-ordered hair test, which the Coast Guard asserts tested positive for cocaine on or about January 30, 2023.

Generally speaking, there are two types of drug tests the Coast Guard may rely on to prove a charge of use of, or addiction to the use of dangerous drugs—tests ordered pursuant to 46 C.F.R. Part 16 (Part 16 drug tests), and those not ordered pursuant to 46 C.F.R. Part 16 (Non-Part 16 drug tests). Appeal Decisions 2668 (MERRILL) (2007), 2007 WL 3033593; 2625 (ROBERTSON) (2002), 2002 WL 32061801; 2545 (JARDIN) (1992), 1992 WL 12008778; 2704 (FRANKS) (2014), 2014 WL 4062506. The regulations require a mariner to submit chemical testing in the following circumstances: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Testing resulting from serious marine incidents; and 5) Reasonable cause testing. See 46 C.F.R. §§ 16.210-16.250. Commandant Decisions on Appeal (CDOA) often refer to these Part 16 tests as "government-ordered tests" because when the employer requires testing under these five circumstances, the employer acts as an agent of the government. Appeal Decision 2704 (FRANKS) (2014), 2014 WL 4062506.

The Coast Guard may also rely on Non-Part 16 tests as evidence of use or addiction to the use of dangerous drugs. Id. Employers normally order Non-Part 16 tests for reasons other than the regulatory five reasons noted above, usually a reason stated in the employer's handbook and/or drug testing policies.[3] These "employer ordered tests" are not ordered by the government, and therefore, the employer is presumably not acting as a government agent.

When the employer acts as a government agent in a Part 16 ordered test, the regulations trigger extra measures to protect the mariner. These extra protections include the requirement for urine specimens to be tested pursuant to the DOT regulations in 49 C.F.R. Part 40. 46 C.F.R.

[3] This decision does not address whether an employer may order only a Non-Part 16 test, such as a hair test, when a Part 16 incident occurs.

§ 16.201. Conversely, in Non-Part 16 tests, there is no requirement to comply with the procedures in Part 40 because the employer is seemingly not acting as a government agent. However, if the Part 40 procedures are not followed in a Non-Part 16 test, the administrative law judge (ALJ) must ensure the specimen test results are reliable. Appeal Decision 2704 (FRANKS) (2014), 2014 WL 4062506. And when the Coast Guard relies on a Non-Part 16 test to prove a mariner is a user of dangerous drugs, the positive test results, alone, are not enough. FRANKS makes clear that in addition to the positive result, the Coast Guard must show "modest additional evidence to prove that the presence of metabolite . . . means that the mariner used dangerous drugs." Id; see also Appeal Decision 2575 (WILLIAMS) (1996) 1996 WL 33408496 (noting the mariner was required to provide evidence corroborating the positive hair test). Finally, when the Coast Guard brings a claim relying on a Non-Part 16 drug test, the Commandant requires the ALJs to subject the Complaint "to close scrutiny to ensure that Part 16 has not been circumvented." FRANKS.

The key difference between the Coast Guard relying on Part 16 tests versus a Non-Part 16 test is whether the respondent will be presumed to be a user of dangerous drugs based solely on the positive drug test. 46 C.F.R. § 16.201(b). Under Section 16.201(b), the Coast Guard can obtain a presumption that the respondent is a user of dangerous drugs **if and only if** the Coast Guard proves the employer ordered the tests for one of the reasons in Part 16 (the why) and the test was conducted in accordance with Part 40 (the how). See FRANKS (discussing the "why" and "how" under Part 16 tests). On the other hand, the presumption never applies when the Coast Guard relies on an employer-ordered, Non-Part 16 test, or relies on testing/collection procedures not done in accordance with Part 40. Having outlined these key differences, I turn to the case at bar.

Here, because the Coast Guard relies on an employer-ordered, Non-Part 16 test, the Coast Guard must prove: 1) Respondent participated in an employer ordered chemical drug test and Part 16 was not circumvented; 2) Respondent tested positive for dangerous drug(s) as described in 46 C.F.R. § 16.105; and 3) the chemical test conducted is reliable because it was conducted in accordance with procedures and safeguards demonstrating the reliability to the ALJ. I address each of these elements in turn, below.

1. Respondent Participated in an Employer-Ordered, Non-Part 16 Chemical Test and Part 16 was not Subverted.

The record shows in January 2023, Otto Candies had several drug testing programs in place. (Tr. 26, 42). One such program, referred to as "pre-access" testing, was a hair testing requirement separate from, but including the Coast Guard-mandated drug testing program. (Tr. 26-28, 44-46, 64-65). This "pre-access" testing is required by some of Otto Candies' customers, such as Shell Oil, before an employee can report to the customers' facilities. (Id.).

The record shows Respondent participated in "pre-access" testing procedures as required by his prospective employer, Shell Oil. Under these procedures, Respondent submitted to two chemical tests—a Part 16 urine test and a Non-Part 16 hair test—on or about January 5, 2023. (Tr. 30, 63). Respondent's urine test returned a negative result, but his hair test returned as inconclusive. (Tr. 30-31, 61).

On January 26, 2023, Respondent submitted to a second round of testing, again donating a urine and hair specimen for chemical analysis as part of this employer-mandated drug testing program. (Tr. 61, 64). A collector at MMSI collected Respondent's urine and a sample of hair from Respondent's head. (Tr. 61, 42-43, 167, 172-73). During the collection, the Collector verified Respondent's identification and followed the procedures outlined in the custody and control form accompanying the specimen sample. (CG-4; Tr. at 153-154).

Based on the foregoing evidence, I find Respondent submitted to both a government ordered test for preemployment and an employer-ordered hair test on January 5, 2023. Because Respondent's initial Non-Part 16 hair specimen was insufficient to test, Respondent submitted to a second round of testing on or about January 26, 2023, as a result of his employer's testing policies and procedures. Given these facts, I find nothing in the record indicates subversion of the Part-16 testing. Instead, I find compliance with both Part 16 procedures and Respondent's employer's policies. See FRANKS (noting that Part 16 testing requirements are the minimum standards, procedures, and means to be used to test for the use of dangerous drugs, and a marine employer may require further drug testing under its own rules).

2. Respondent tested positive for dangerous drug(s) described in 46 C.F.R. § 16.105.

Having determined Respondent's hair test constitutes an employer-ordered chemical drug test, I turn to the next element in the prima facie case, i.e., whether Respondent tested positive for dangerous drug(s) described in 46 C.F.R. § 16.105. Here, the record shows Respondent's test results were returned by Psychemedics as positive for cocaine. (Tr. 91). At hearing, the Coast Guard called Psychemedics' Certifying Scientist to testify concerning the positive result and the procedures used for testing. (Tr. 81-91). The Certifying Scientist testified Psychemedics conducted an initial screening of Respondent's hair sample by Enzyme Immunoassay, which indicated Respondent's sample was presumptively positive for cocaine. (Tr. 83-84, 91). She also stated confirmatory testing by liquid chromatography/mass spectrometry (LC/MS) confirmed the presence of cocaine in Respondent's hair at a level of 15.7 nanograms per 10 milligrams of hair, which was higher than Psychemedics' cutoff level of 5 nanograms of cocaine per 10 milligrams of hair. (Tr. 83-86, 135, 180). She did not offer any testimony regarding the presence or non-presence of Benzoylecgonine (BE) in Respondent's hair sample, though she did

testify the presence of BE was necessary for a positive cocaine result. (Tr. at 180-81). Ultimately, however, the Certifying Scientist certified the sample as positive for cocaine.[4]

Accordingly, based on the foregoing, I find Respondent's hair specimen tested positive for cocaine under Psychemedics' standards.

3. The chemical test conducted is a reliable test because it was conducted in accordance with procedures and safeguards demonstrating its reliability to the ALJ.

As noted above, when the Coast Guard offers a Non-Part 16 test as proof that mariner is a user of or addicted to the use of dangerous drugs, a positive drug test alone is not enough to carry its burden. FRANKS makes clear, when relying on a positive hair test, the Coast Guard must also offer modest additional evidence showing the metabolite's presence shows drug use. FRANKS, at *9 (reliance on a non-Part 16 test requires "modest additional evidence to prove that the presence of metabolite in a non-Part 16 test means that the mariner used dangerous drugs"); See also WILLIAMS (additional corroborating evidence is required to prove the reliability of a hair test).

Although Coast Guard case law does not define "modest additional evidence," previous CDOAs and ALJ decisions have elaborated on how the Coast Guard can carry its burden, as discussed below.

i. History of Hair Testing in Coast Guard Suspension and Revocation Proceedings

The use of hair tests in Coast Guard suspension and revocation proceedings is not new. The first CDOA to address hair testing appears to be Appeal Decision 2575 (WILLIAMS) (1996), where, curiously, it was the mariner who offered a hair test as evidence he was not a user

[4] The Certifying Scientist only testified that to have a positive result for cocaine under Psychemedics' cutoffs, the metabolite BE must be present in the hair at a level of 0.5 nanograms per 10 milliliters of hair. (Tr. 180-181).

of dangerous drugs. There, the ALJ refused to admit the evidence of a negative radioimmunoassay hair (RIAH) analysis during the hearing because the judge apparently considered its reliability "unproven." On appeal, the Commandant, critical of the ALJ excluding the RIAH evidence, noted it "may have been improperly excluded."[5] However, stopping short of holding the hair test inadmissible, the Commandant considered the hair test unpersuasive because Respondent did not carry his burden to prove the reliability of the test, i.e.: 1) the sample was properly obtained; 2) the laboratory technique was sound; and 3) the laboratory technique was accurate. WILLIAMS at fn. 3. And in what appears to be the seminal underpinning of FRANKS, the Commandant reasoned:

> Appellant relies on a 1990 court decision where RIAH analysis was accepted as some proof of evidence of drug use. United States v. Medina, 749 F. Supp. 59 (E.D.N.Y. 1990). His reliance is misplaced for several reasons. First, Medina is distinguished from this case because in Medina, a positive RIAH analysis was used to prove drug use. Medina does not indicate whether a negative RIAH analysis may refute a positive urine drug test in an effort to prove non-use. Second, the Medina court required several threshold determinations before allowing the RIAH analysis. Appellant offered no evidence to support these threshold determinations in this case. Finally, even though the Medina court allowed the RIAH evidence, it also required **additional corroborating evidence before reaching the conclusion the defendant used cocaine**. Thus, it was apparent that the District Court concluded that RIAH analysis has not reached the level of trustworthiness to stand on its own as proof of cocaine use. The scientific community obviously agrees because it continued to question the reliability of RIAH analysis even after the Medina decision. [Investigating Officer Exhibit 10]..

WILLIAMS at *1 (emphasis added). And the Commandant did not stop there. WILLIAMS goes on to criticize the mariner for failing to show "evidence of reliability of RIAH analysis."

[5] The Commandant also noted the impropriety of the ALJ relying on treatises and professional articles not offered by either party in the record. Finding clear error, the Commandant noted the ALJ should have given the parties an opportunity to contest the evidence afforded by 5 U.S.C. § 556(e) and 46 C.F.R. § 5.541.

For example, the Commandant criticized the mariner's assertion that the hair test indicated a 90-day lookback period, which overlapped his urinalysis positive result. In the Commandant's view,

> Appellant offered no evidence to prove that he meets the definition of an average person for the purposes of RIAH analysis. Additionally, Appellant offered nothing to prove that RIAH analysis is not affected by the application of external chemical treatments to the hair.

Id. at *1. Ultimately, the Commandant held "there are too many uncertainties in Appellant's RIAH evidence to convince me that it is reliable and that the time period covered by his RIAH analysis actually overlaps with the urinalysis screening." Id. at *1.

After WILLIAMS, the Honorable Michael J. Devine, administrative law judge (ret.), appears to be the first Coast Guard ALJ to consider whether a hair test could be used as evidence that a mariner is a user of dangerous drugs. United States Coast Guard vs. Lockwood, 2011 WL 13202919 (ALJ Decision 2011). In Lockwood, the Coast Guard alleged the mariner was a user of or addicted to the use of marijuana, relying on a positive hair test conducted by Psychemedics. In that case, the Coast Guard asked Judge Devine to accept Psychemedics' cutoff level for marijuana metabolites, which the company set at 1 pg/10mg of hair. Conversely, Respondent offered evidence that the appropriate cutoff level was at 3pg/10mg of hair, as used by Omega Laboratories. Id. at *3, 10. Because Lockwood's hair test showed metabolites at 1.8pg/10mg of hair, the respondent's sample was positive under Psychemedics' cutoff and negative under Omega's cutoff.

At hearing, several witnesses offered testimony regarding the lack of uniformity in cutoff levels, and the witnesses offered differing opinions as to the reliability of the respondent's hair test. Id. at *8-11.[6] But in a holding very similar to WILLIAMS above, Judge Devine stopped

[6] In support of the cutoff level used in Lockwood, the Coast Guard also introduced documentary evidence related to proposed revisions to the Mandatory Guidelines for Workplace Drug Testing Programs. Id. at *6, 10-11. Further, at

short of holding hair tests unreliable as evidence of drug use. Instead, Judge Devine concluded "hair testing is an appropriate and scientifically supported method of testing and the evidence regarding hair testing for dangerous drug use is admissible in these proceedings." Lockwood at *9. However, while Judge Devine acknowledged that hair testing is generally admissible, he rejected the hair test at issue, not due to "the scientific validity of hair testing" in general, but rather "the sufficiency of the evidence in regard to an appropriate cutoff level" used by Psychemedics and Omega. Id. In other words, Judge Devine was willing, like the Commandant in WILLIAMS, to consider a hair test as evidence, but required the reliability to be proven by the Coast Guard—the party proponent of the hair test. Based on that premise, Judge Devine noted the Coast Guard's witnesses, Dr. Linder and Dr. Schaffer, were unable to identify any publications supporting Psychemedics cutoffs, and the Coast Guard's witnesses were unsure how Psychemedics set their cutoff levels at all. Without this evidence, Judge Devine believed the Coast Guard could not ensure the offered test could exclude the potential for false positives.[7] Ultimately, while Judge Devine noted the competing evidence from the respondent in that case, he acknowledged it was the Coast Guard that bears the burden to prove the respondent is the user of or addicted to the use of dangerous drugs, and because the Coast Guard could not prove the reliability of the cutoff level it offered, it failed to meet that burden.[8]

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the Coast Guard's request, and with no objection from the respondent, the ALJ also took official notice of matters published in the Federal Register regarding drug testing procedures. Id. at *2.

[7] Although not explained in Lockwood, various other agencies have identified "false positives" as tests that show the presence of a drug, but at a level where actual "use" may not be the cause. As explained by one expert cited by the National Transportation Safety Board, cutoff levels were established to protect against false positive results from innocent or inadvertent ingestion. FAA v. Strickler, 2020 WL 3001572, at *6 (NTSB 2020).

[8] I acknowledge Judge Devine heavily considered the counter evidence offered in Lockwood. But even assuming Respondent did not offer contradictory evidence, the judgment would have been the same. This is because the Coast Guard did not meet its burden to prove the cutoff levels were appropriate in the Psychemedics testing. Thus, even though Judge Devine considered the evidence a "tie", a "tie" is not good enough in a suspension and revocation proceeding – the Administrative Procedure Act requires the Coast Guard to bear the burden that a fact is more likely than not, which the Coast Guard ultimately did not do in that case.

Approximately one year after Lockwood, the Coast Guard again sought to introduce a hair test to show that the respondent was a user of dangerous drugs. USCG v. Carroll, 2012 WL 12985457 (ALJ Decision 2012). There, the Honorable Dean Metry, administrative law judge, rejected the evidence outright. Noting the serious reliability issues with the respondent's hair test, and citing to Lockwood, Judge Metry concluded "neither the reliability of the test itself nor the acceptable cutoff levels for positive results have been conclusively established." 2012 WL 12985457, at *1.

After Lockwood and Carroll, the Coast Guard appears to have made a course correction. My research shows the Coast Guard thereafter successfully demonstrated the reliability of hair tests in a number of suspension and revocation cases. But a careful perscrutation of these cases shows the Coast Guard offered very specific evidence concerning hair testing, including FDA approved procedures, accreditations utilized by the laboratories, explanations of cutoff levels utilized when testing hair samples, and expert witnesses who could explain why the test results indicated use. These cases guide my hand here.

In USCG vs. McPherson, the Coast Guard alleged the mariner was a user of cocaine based on a hair test conducted by Omega Laboratories (Omega). 2015 WL 13501488 (ALJ Decision 2015). The Coast Guard offered testimonial evidence concerning cutoff levels, which showed 500 picograms per milligram, had been approved by the FDA and published in the Federal Register. Reflecting on the evidence presented at the hearing, the Honorable Judge George Jordan, administrative law judge, noted:

> The cutoff level was established by a large clinical study of individuals at rehabilitation clinics who were still using cocaine. To reach the cutoff, an individual must use cocaine on multiple occasions in a month, and this is true whether head hair or body hair is analyzed. All three labs cleared to conduct hair testing - Psychemedics, Omega, and Quest - use this cutoff level, though the way they report the results varies.

A review of McPherson shows the Coast Guard marshalled two sterling witnesses before Judge Jordan, both offering testimony concerning the reliability of the hair test. There, the Coast Guard called the Laboratory Director of Omega Labs, who held a Ph.D. and a master's degree in chemistry; and the Senior Scientific Advisor and Deputy Lab Director for Psychemedics Corporation, who held a Ph.D., and a higher degree of Doctor of Science in Toxicology. These witnesses specifically testified about Omega's cutoff for cocaine under the Enzyme-Linked Immunosorbant Assay, and how the laboratory established its cutoff levels. Id. Based on this mountain of evidence, Judge Jordan found the hair test reliable evidence showing the mariner was a user of dangerous drugs.[9]

Shortly after McPherson, the Coast Guard again brought an action against a mariner's credentials and, relying on a positive hair test, asserted the mariner was the user of or addicted to the use of marijuana. See United States Coast Guard v. Dickerson, 2016 WL 9331442 (ALJ Decision 2016). Like McPherson, the Honorable Bruce Smith, administrative law judge (ret.) considered the hair test reliable, in part, because the Coast Guard offered evidence that hair tests have been "cleared by the FDA, 'meaning that [the tests] provide accurate results . . . and are able to distinguish a positive from a negative." Dickerson at * 1, fn 4. Judge Smith also found that Psychemedics, in that case, was accredited by the ANSI-ASQ National Accreditation Board/FQS and met the requirements of international standard ISO/IEC 17025:2005 demonstrating competence in the field of forensic hair testing. Id.[10]

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[9] The ALJ heard sufficient testimony to conclude that the "initial stage of hair testing, ELISA, has been cleared by the FDA, and multiple accrediting institutions consider CG/MS to be a reliable way of determining the presence of drugs from hair samples." Id.

[10] My research also revealed a decision in 2016, where the Coast Guard proved its case regarding a positive hair test result. However, the decision memorializes a bench decision, and did not specifically delineate the evidence offered at the hearing. See USCG v. Lewis, 2016 WL 9331441, at *1. But a review of Lewis hearing transcript shows Judge Devine received evidence concerning an FDA approved process and a thorough discussion of how cutoffs

More recently, in USCG v. Hill, the Coast Guard again met its burden to show the reliability of the hair test at issue. 2019 WL 8643830 (ALJ Decision 2019). There, the Coast Guard called Dr. Thomas Cairns[11] to testify before the Honorable Brian J. Curley, administrative law judge, concerning the cutoff levels used by Psychemedics when testing the mariner's hair sample. Dr. Cairns very pointedly explained the mariner's test results indicated "multiple ingestions of marijuana." Id. at *11. In Dr. Cairns view, to achieve the levels at issue—levels almost 50 times above the cutoff level, a person would have to smoke several marijuana joints every week. Id. Thus, Judge Curley received very specific evidence showing the test results revealed the mariner used dangerous drugs in that case.

Against this backdrop, I turn to the case at bar.

ii. The Coast Guard Did Not Offer "Modest Additional Evidence"

After considering the testimony and documents offered at hearing, I find the evidence presented here aligns more with Williamson, Lockwood, and Carroll, but pales in comparison with that offered in McPherson, Dickerson, and Hill. The only evidence offered in this case concerning the reliability of the hair test came from Psychemedics' certifying scientist, who holds a Bachelor of Science in Biology with a minor in Chemistry, and who spent the majority of her career certifying test results only for Psychemedics. (Tr. 79, 81, 86).[12] Indeed, she admitted that her primary education to perform drug test certifications came from Psychemedics' on-the-job training, which, would last around "a month or two" depending on the drug. (Tr. at 82-83).

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levels are set to show actual use. Lewis Tr. at 31. Based on this evidence, Judge Devine found the hair test reliable. A comparison of the evidence in Lockwood and Lewis reveals contrasting evidence and contrasting results.

[11] A review of Hill shows Dr. Thomas Cairns was the Senior Scientific Advisor for Psychemedics and he held a Bachelor of Science, Doctor of Philosophy in Analytical Chemistry and Biochemistry, and a Doctorate of Science in Toxicology from the University of Glasgow. Dr. Cairns was also licensed to practice forensic toxicology by the State of New York and was a published scholar of approximately 25 scientific papers regarding hair testing for the presence of drugs.

[12] Aside from two years as an extraction chemist at the start of her career, followed by eight months in the Mass Spectrometry Department, she has been a certifying scientist for approximately thirteen years. (Tr. 81).

Notwithstanding her credentials and background, the Certifying Scientist appeared not to have a complete understanding of the entire testing process at Psychemedics, nor of the reasons for the laboratory's methodologies and how the laboratory realized positive results. During direct examination, she was pointedly questioned whether she knew what an Enzyme ImmunoAssay test was. Her response was startling:

> I don't have that knowledge for that . . .
> . . .
>
> Yeah, I don't, I don't have the exact knowledge for that. I just know that in screening the samples come from accessioning. And screening will process the samples and their data will reveal which samples are presumptive positive.

(Tr. at 84). Thus, while she could testify to the process and how the data is moved throughout Psychemedics, she could not testify to how that data was realized. She was also unable to answer who established the cutoffs used by Psychemedics, did not know how Psychemedics set its cutoff levels, could not say how Psychemedics's cutoff levels compared to cutoff levels in the hair testing community, did not know whether there was an industry standard for cutoff levels, could not even testify whether Psychemedics was certified by the Department of Health and Human Services (HHS), and did not testify if Psychemedics was accredited by or complied with any standards from the Food and Drug Administration (FDA), or any other accrediting body. (Tr. 181, 94). When pressed on whether a reading below Psychemedics cutoff levels of 5 nanograms per milliliter indicated use of cocaine, she testified that she did not "know that there's any other way other than using cocaine to have that in your system." (Tr. 182). Thus, she had no knowledge of whether Psychemedics cutoff levels were set to detect false positives, passive ingestion, or when a reading might be created by other types of exposure rather than use. See fn. 7, supra.

A close reading of the Certifying Scientist's testimony reveals she is very capable at her position, specifically her role to review a sample's chain of custody, certify the chromatography results from mass spectrometry, and certify whether a test result is positive or negative using Psychemedics' levels and procedures. (Tr. 86-87, 90-91). Other than that, however, the witness was not competent to provide testimony as to how or why Respondent's positive test results are valid and reliable. She could only testify to a cursory overview of Psychemedics' scientific testing process and her role in certifying the results. (Tr. 81). Thus, to the extent her testimony lends some support to the notion that Respondent's test result shows actual use in this case, I find it not persuasive.

On balance, I find the Certifying Scientist's testimony insufficient to carry the Coast Guard's burden of proving the reliability of the hair test in this case; the testimony does not amount to modest additional evidence showing why the presence of the metabolite indicates use. Appeal Decision 2560 (CLIFTON) (1995); FRANKS. Again, there is no evidence concerning how Psychemedics cutoff levels were set, whether Psychemedics still complies with industry standards, whether Psychemedics complies with federal standards from the FDA, HHS, or any other accrediting body, and no testimony concerning what amount of use would result in Respondent's test results in this case.

I pause to note that while it might be tempting for a finder of fact to conclude Respondent's test result, being 15.7 nanograms per 10 milligrams of hair, to indicate use, I could only reach that conclusion by consulting evidence admitted in other litigations. Without actual evidence presented in this case, I cannot do so. And as explained below, were I to extract evidence offered elsewhere and apply it to the case at bar, I may indeed be able to find this case proved. But considering evidence from other cases is not the best course of action, let alone the

fairest, in Coast Guard suspension and revocation proceedings, particularly given the post-hearing posture of this case.

iii. Taking "Official Notice" of Scientific Evidence and Cutoff Levels for Hair Tests

Having determined the Coast Guard offered insufficient evidence at the hearing concerning the reliability of Psychemedics' hair test in this case, I now turn to an issue I directed the parties to brief after the hearing—whether I may take official notice of scientific evidence concerning the cutoff levels for hair tests from other authorities. In its post-hearing briefs, the Coast Guard contends detailed scientific evidence is not required because cutoff levels for tests have been routinely litigated and determined in prior cases. (CG Brief, at 16-18; CG Reply, at 5-6). The Coast Guard asks me to consult these prior decisions addressing cutoff levels for hair testing, take official notice of facts established in those cases, and apply them to Respondent's case here. (CG Reply, at 5-6). In so doing, the Coast Guard argues, I can conclude Respondent's hair test provided reliable, credible, and sufficient evidence to prove Respondent is a user of dangerous drugs as described by 46 U.S.C. § 7704(b). I disagree.

In suspension and revocation proceedings, an ALJ "may take official notice of such matters as could courts, or of other facts within the specialized knowledge of the Coast Guard as an expert body." 33 C.F.R. § 20.806. The regulation also provides when all or part of a decision rests on the official notice of a material fact not appearing in the record, "the decision must state as much" and a party "upon timely request, shall receive an opportunity to rebut the fact." Id. Use of official notice in lieu of the exchange of documents in discovery, however, "is contrary to the proper construction of the rules for these proceedings." See Appeal Decision 2773 (SCHWIEMAN) (2020), 2020 WL 7060225 (ALJ did not abuse discretion when denying the Coast Guard's request for official notice of its internal policy documents, noting the "simple

remedy" in future suspension and revocation proceedings would be to provide documents during discovery); see also Appeal Decision 2507 (WEIS) (1990), 1990 WL 10011232 (ALJ did not abuse discretion when denying Appellant's request for official notice of the vessel's logbook because, as a matter of procedural fairness, the forum for presenting evidence is at the hearing).

In support of its argument for official notice, the Coast Guard cites a decision from the United States Court of Appeals for the Ninth Circuit. Castillo-Villagra v. I.N.S., 972 F.2d 1017 (9th Cir. 1992). (CG Reply, p. 6). In Castillo-Villagra, the Ninth Circuit noted the scope of notice afforded to administrative hearings is broader than in a civil or criminal trial. Reasoning that a case before an administrative agency "is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases ... [which] often involve fact questions which have frequently been explored by the same tribunal," the Ninth Circuit concluded that a "tribunal learns from its cases." 972 F.2d at 1026-1027 (internal citations omitted). In its discussion of official notice, the court distinguished between adjudicative and legislative facts. Id. at 1026. It explained adjudicative facts concern the immediate parties, whereas legislative facts help a tribunal determine law and policy and ordinarily do not concern the immediate parties. Id. at 1026-1027. Legislative facts, in the court's view, are generally not debatable and "it would be a waste of time to allow evidence regarding them." Id. The Ninth Circuit considered adjudicative facts, on the other hand, "roughly the kind of facts that go to a jury in a jury case." Individual Reference Servs. Grp., Inc. v. F.T.C., 145 F. Supp. 2d 6, 45 (D.D.C. 2001), aff'd sub nom. Trans Union LLC v. F.T.C., 295 F.3d 42 (D.C. Cir. 2002).

The Ninth Circuit acknowledged that while notice of adjudicative facts is restricted in criminal and civil courts, it is broader in administrative proceedings. Recognizing this as true, the Ninth Circuit adopted a "rule of convenience" where an ALJ should take notice of

adjudicative facts whenever the ALJ "knows of information that will be useful in making the decision." Castillo-Villagra, 972 F.2d at 1027-1028 citing Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981). The court warned, however, that an "essential concomitant of a rule of convenience is a fair opportunity to respond," and the agency's discretion "must be exercised in such a way as to be fair in the circumstances." Id at 1027-1028.[13]

Analyzing the facts of this case in the light of Castillo-Villagra, I find the reliability and validity of Respondent's hair test and subsequent positive result are adjudicative in nature. They concern the immediate party, Respondent. Furthermore, whether Respondent's actual test results show use of a drug is also a question of fact, which relies on the cutoff levels Psychemedics avers is the appropriate measurement. These are "roughly the kind of facts that go to a jury" in civil cases. Individual Reference Servs. Grp., 145 F. Supp. 2d at 45.

While I note that notice of adjudicative facts is broader in administrative proceedings, I decline to take official notice in this case. As a preliminary matter, the number of Coast Guard cases discussing cutoff levels for cocaine in hair tests cases does not rise to the level of a "mass of related cases" as contemplated by the Ninth Circuit. Castillo-Villagra, 972 F.2d at 1026-1027. Furthermore, I also considered the issue of fairness to Respondent, as directed by Castillo-Villagra. The Coast Guard first raised the issue of official notice in its post-hearing Reply brief at my request. It did not actually ask for me to take official notice of the testing procedures or cutoff levels at hearing or during discovery, and during the post-hearing telephone conference, the Coast Guard declined to seek additional discovery. See Order dated July 25, 2024.

[13] The issue before the Ninth Circuit in Castillo-Villagra dealt with administrative notice before the Immigration and Naturalization Service, Board of Immigration Appeals. Finding the petitioner was denied a fair opportunity to rebut, the court rejected the Board of Immigration Appeals' use of official notice and remanded the case for proceedings where the asylum applicants could "be heard on the appropriateness of notice and introduce evidence regarding the facts of which notice is taken." Id. at 1031.

Furthermore, policy considerations militate against taking official notice in this case. To take official notice of evidence supporting the reliability of Psychemedics' testing from other cases would, in essence, place Psychemedics' procedures on par with the regulations controlling Part 16 testing, without subjecting the hair-testing standards to notice-and-comment rulemaking under the APA. See Appeal Decision 2704 (FRANKS) (2014), 2014 WL 4062506. That is to say, applying official notice here would permit me, and indeed any ALJ, to look to prior Coast Guard decisions and afford facts found in those cases the same weight as if they were established in the hearing before me. In other words, I would be perpetuating a regulatory standard from the bench through the use of prior decisions. I decline to do so particularly because the Coast Guard, should it desire to regulate hair tests, could promulgate regulations setting forth standards applicable to hair testing.

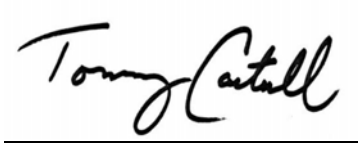
When relying on Non-Part 16 drug tests, the burden rests with the Coast Guard to offer modest evidence that the test and its associated positive result are valid and reliable. See Appeal Decision 2720 (ARGAST) (2018), 2018 WL 8244642; see also FRANKS, 2014 WL 4062506. I hold as a matter of law the Coast Guard must carry this burden in every such case. Until the Commandant, the NTSB, or an Article III court holds otherwise, I find it improper to incorporate by official notice evidence of reliability established in other suspension and revocation cases.

Considering the foregoing, I find the Coast Guard did not prove, by a preponderance of the evidence, that Respondent is a user of dangerous drugs. I do not find the Non-Part 16 test result, alone, enough to carry its burden under 46 U.S.C. § 7704(b). When relying on Non-Part 16 tests, the Coast Guard must say more.

Because I find the Coast Guard did not meet its burden of proof, I need not consider the remaining issues raised by the parties. All outstanding motions are **DENIED** as **MOOT**. Case **DISMISSED**. 46 C.F.R. § 5.567.

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

SO ORDERED.



TOMMY B. CANTRELL
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD