

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

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UNITED STATES OF AMERICA *
UNITED STATES COAST GUARD *
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vs. *
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*
GARY R. KIRK, JR. *
Respondent *
* * * * *

**Docket No. 99-0014
CG Case No. PA99001299**

DECISION AND ORDER

**PETER A. FITZPATRICK
Administrative Law Judge**

APPEARANCES:

FOR THE COAST GUARD

LT Eric Westerberg, SIO
MSO Huntington
1415 6th Avenue
Huntington, WV 25701-2420

FOR THE RESPONDENT

J. G. McGuire, Esq.
Suite 1400, Coal Exchange Building
P.O. Box 1035
Huntington, WV 25719

I.

PRELIMINARY STATEMENT

This case began with the filing of the Complaint on June 28, 1999 which alleged that the Respondent tested positive for Marijuana Metabolite in a random drug test on June 10, 1999. The Coast Guard seeks the revocation of Mr. Kirk's Coast Guard License.

An Answer to the Complaint was filed on July 12, 1999 denying various allegations; requesting a hearing, and seeking dismissal of the Complaint.

The case was assigned to this Judge on July 13, 1999 and the hearing was set for August 25, 1999 at Huntington, West Virginia.

On August 6, 1999, the Investigating Officer submitted his list of witnesses and documents. On August 10, 1999, counsel filed the Respondent's Disclosure of Witnesses and Exhibits. Subsequently, Respondent's counsel filed a motion to exclude evidence but it was denied on August 16, 1999.

The hearing was conducted as scheduled and the Respondent, his counsel, Mr. McGuire and the Investigating Officer were present. At the outset, Mr. Kirk was provided with a detailed description of U.S. Department of Transportation (DOT) and Coast Guard regulations governing drug testing codified at 49 C.F.R. 40 and 46 C.F.R. 16 were described. Additionally, the impact of 46 U.S.C. 7704(c) on this proceeding was emphasized.

The Coast Guard sponsored seven (7) witnesses and offered ten (10) exhibits. They are described on Attachment I.

At the conclusion of the session, I took the case under advisement. It is now rife for decision.

II.

FINDINGS OF FACT

1. Gary R. Kirk is the holder of Merchant Mariner's License No. 848723 issued by the United States Coast Guard authorizing him to serve in pertinent part aboard U.S. vessels as Operator of Uninspected Towing Vessels upon Western Rivers. The license was issued on May 15, 1998 at Memphis, TN.
2. On June 10, 1999, the crew serving aboard the M/V PAUL D. BLAZER were selected on a random basis to undergo random drug tests. The Respondent was serving as Pilot under the authority of his Coast Guard License No. 848723.
3. The vessel was owned and operated by the Respondent's employer, Marathon Oil Company. The urine drug test was administered to the entire crew aboard the vessel at the port of Catlellsburg, KY on the Ohio River.
4. The collection was conducted by Michael Zornes. He collected urine samples from the entire crew including the Respondent. Zornes was stationed in the crew lounge at a desk where the appropriate papers were filled out and the samples sealed. The collector gave each mariner a collection cup which they carried to the head located across the passageway from the lounge. Neither the toilet nor the faucets in the head were secured, blueing was not put into the toilets, and the collector could not see the donor enter or leave the head. (IO-10).
5. Mr. Kirk was the last crew member to provide a sample. On the first attempt he failed to provide a sufficient quantity of urine. Accordingly, the collector instructed him to drink

- fluids and return to fill the container. Mr. Kirk left the partially filled container with the collector and went to the galley where, over the next hour, he drank various fluids.
6. The urine sample collected was placed on the television set in the lounge where Mr. Wright was present the entire time. Additionally, Mr. David Wright (Personnel Coordinator) at Marathon Oil was present with Mr. Zornes in the lounge the entire time. Neither he or Mr. Zornes saw anyone approach the partially filled collection cup although other members of the crew may have passed through the lounge.
 7. After about one hour, Mr. Kirk returned, carried the same collection cup to the head and provided the necessary amount to the urine previously collected.
 8. The Respondent executed the Drug Testing Custody and Control form (DTCCF) certifying that the specimen bottle was sealed in his presence and that the urine specimen was his (Resp B). The DTCCF was also signed by the collector.
 9. The sample was sent to Compuchen Laboratories, Inc., an appropriately authorized and licensed drug testing facility. The sample was properly tested and the results were positive for marijuana metabolite.
 10. The results were transmitted to the Medical Review Officer, Dr. Matthew Hughes. Dr. Hughes interviewed Mr. Kirk and advised him of the test results. During that interview, Mr. Kirk requested that the sample be tested again. Accordingly, on June 12, 1999, at the Doctor's instructions), a portion of the original sample (Bottle B) was sent by Compuchen to Lab-Corp Occupational Testing Services, NC. There it was tested again and the presence of "Cannabinoids" was confirmed (IO-12).
 11. The Medical Review Officer concluded that the test results on the original sample was Positive. He executed the DTCCF on June 21, 1999.

12. Mr. Kirk was removed from his position on the vessel on June 16, 1999 and terminated by the company on June 24, 1999.

III

CONCLUSIONS OF LAW

1. The Respondent and the subject matter of this proceeding are within the jurisdiction of the Coast under Sections 7702 and 7704, Title 46, United States Code.
2. The Complaint alleging the Use of Dangerous Drugs is not supported by a Preponderance of the Evidence and is **DISMISSED**.

IV

OPINION

The charge here is *Use of Dangerous Drug* and that term has its genesis in 46 U.S.C. 7704 (c) which provides in pertinent part that if it is shown (at a hearing) that the holder of a merchant mariner's license or document has been the user of a dangerous drug, the mariner's credentials "shall be revoked unless the holder provides satisfactory proof that the holder is cured." In such case the burden of proving the elements of the charge rests upon the Investigating Officer. (46 C.F.R. 5.539). The standard of proof which must be established is that the charge must be proved by substantial, reliable, and probative evidence. That term, as described in Appeal Decision 2603 (HACKSTAFF) (1998) is the same as the preponderance of the evidence standard. See Steadman v. SEC, 450 US 91 (1981).

In a case involving the charge *Use of Dangerous Drug* where the charge is founded solely on the results of chemical testing by urinalysis, the presumption set out at 46 C.F.R. 16.201(b) is

applicable. That rule provides that where a mariner fails a chemical test for dangerous drugs, “the individual will be presumed to be a user of dangerous drugs.” As the Commandant recently stated in Hackstaff (Id. at 5):

“...46 C.F.R. § 16.105 defines “fails a chemical test for dangerous drugs” to mean that a Medical Review (MRO) reports as “positive” the results of a chemical test conducted under 49 C.F.R. § 40.

In other words, 46 C.F.R. § 16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show a 49 CFR § 40 chemical test of a merchant mariner’s sample was reported as positive by an MRO.”

In order to successfully invoke the presumption above, the Investigating Officer must show (1) that the Respondent was the person who was tested; (2) that the Respondent failed the test; and (3) that the test was conducted in accordance with 46 C.F.R. § 16 (Id.). If all three elements are proven the burden of going forward with the evidence shifts to the Respondent who must rebut the presumption. (Id.).

The analysis below will focus on the requirement that the test be conducted in accord with the regulations set out at 46 C.F.R. Part 16. Specifically, 46 C.F.R. 16.301 require that drug testing program must be conducted in accordance with 49 C.F.R. Part 40. It is my opinion that the collection of Mr. Kirk’s urine sample was not properly accomplished. Indeed, the collector violated the express provisions of the regulation; additionally, the collection was poorly performed with a number of violations of the regulations. Those errors compromised the integrity of the sample and fatally flawed the results.

1. The Specimen Collection Procedures to be followed in a Department of Transportation drug test, as here, are governed by 49 CFR 40.25. Subsection (f) entitled “Integrity and identity of specimen “sets out the minimum precautions” which shall be taken to ensure that unadulterated specimens are obtained and correctly identified. 49 CFR

40.25(f)(10)(iv)(A)(2) requires that where an individual “has not provided the required quantity of urine, the specimen shall be discarded.” (emphasis supplied). That subsection goes on to state that the individual will be given up to three hours to provide a new urine specimen (emphasis supplied).

2. Moreover, 49 CFR 40.25(f)(17) provides that “Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled.

Clearly, these regulations were violated in the collection here.

I am aware that Mr. Wright was also present at all times while the partially filled collection cup was left on the TV in the lounge with the Collector. This situation is fraught with great potential for abuse of the integrity of the sample and is specifically prohibited by the regulations. It is not a minor procedural error as in Appeal Decision 2606 (SWAN).

Moreover, the entire collection procedure was properly conducted and may have violated other provisions of the regulations. I am particularly concerned with the security of the restroom used here (See 49 CFR 40.25(9)(b)).

In sum, the collection of Mr. Kirk’s urine sample was fatally flawed and resulted in a compromise of the integrity of the sample. Accordingly, it cannot provide the basis for the potential of the Respondent’s career as a merchant mariner. The serious consequences of a positive drug test require that the sample used be properly collected. That is not the case here.

ORDER

The Complaint is DISMISSED.

Peter A. Fitzpatrick
PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on the Second day of November, 1999
Norfolk, Virginia

Copy:
MSO Huntington, Attn: LT Eric Westerberg, SIO
J. G. McGuire, Esq., Counsel for Respondent
CCGD08(m)

ATTACHMENT I

IO EXHIBITS:

- (1) Complaint
- (2) Acknowledgment & Receipt for Marathan Ashland Petroleum LLC's Drug & Alcohol Policy dtd 4/17/99
- (3) Marine Time & Payroll Receipt dtd 31MAY99
- (4)
- (5) Federal Drug Testing Custody and Control Form (Copy 4)
- (6) Notification to USCG from Marathon Ashland of Resp's Positive Drug Test, dtd 24JUN99
- (7) Curriculum Vitae – Charles John Hanna
- (8) Federal Register, Vol. 64, No. 105, Jun 2, 1999, HHS Current List of Labs
- (9) Lab-Corp's Documentation Package, dtd 28JUL99
- (10)
- (11) Hand-Drawn Layout of Lounge aboard vessel
- (12) NWT Drug Testing Package

RESP'S EXHIBITS:

- (1) Affidavit of Gary Kirk dtd 1212AUG99
- (2) Compuchem Laboratories, Inc. (Copy 5) Collection Form
- (3) Laboratory Corporation of America Drug Testing Report dtd 18JUN99

ALJ EXHIBIT:

- (1) Copy of Respondent's License # 848723

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by First Class Mail:

Commanding Officer
USCG Marine Safety Office, Huntington
Attn: LT Eric Westerberg, SIO
1415 6th Avenue
Huntington, WV 25701

J. Grant McGuire, Esq.
Suite 1400, Coal Exchange Building
P.O. Box 1035
Huntington, WV 25719

Dated at Norfolk, this Second day of November, 1999.

Peter A. Fitzpatrick