

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD**

UNITED STATES COAST GUARD)	
Complainant)	
)	
vs.)	Docket Number: 99-0343
)	PA Number: 99002293
KARL E. GHARST)	
Respondent)	
_____)	

BEFORE: THOMAS E. MCELLIGOTT
 Administrative Law Judge

DECISION & ORDER

I

PRELIMINARY STATEMENT

This case began upon the service upon the Respondent of the "Complaint" dated November 3, 1999, by Investigating Officer (IO) Matthew I. Marlow, Chief Warrant Officer, stationed at the time at the Marine Safety Office Port Arthur, 2875 Jimmy Johnson Boulevard, Port Arthur, Texas 77640-2099.

The Investigating Officer issued a "Complaint" commencing an administrative proceeding and hearing against the Respondent's License and his Coast Guard issued Merchant Mariner's Document, under the statutory authority of 46 U.S. Code 7704(c) alleging use of or addiction to the use of dangerous drugs.

The jurisdictional allegations included that the Coast Guard alleged that the Respondent, Karl E. Gharst's address is as follows: 240 W. RR #3, Vidor, TX 77662, and his present telephone number is (409) 769-9583. Respondent holds the following Coast Guard-issued credentials: U.S. Merchant Mariner's Document number 335508473 and U.S. Coast Guard License number 760122.

The factual allegations are – Use of or Addiction to the Use of Dangerous Drugs. The Coast Guard alleged that on August 25, 1999, the Respondent took a pre-employment drug test. A urine specimen was collected from Respondent by Todd Lancon of the Bourgeois Medical Clinic. The Respondent signed a “Federal Drug Testing Custody and Control Form.” The urine specimen was collected and analyzed by the laboratory known as SmithKline Beecham, using procedures approved by the U.S. Department of Transportation. Respondent’s urine specimen subsequently tested positive for marijuana metabolite.

In response to this “Complaint,” the Respondent filed a formal “Answer” in which he stated that he was “unable to respond – request review all evidence that will be presented against me.” In effect, the Respondent denied all allegations in the Investigating Officer’s “Complaint.”

A “Notice of Hearing” was issued containing the schedule for lists of witnesses and exhibits for the hearing to be held on January 25, 2000 at 10:00 a.m. at the U.S. Attorney’s Office Hearing Room, 350 Magnolia Street, Suite 150, Beaumont, Texas 77701. Both sides were notified that any and all witness lists and exhibit lists must be filed by mail or fax with the undersigned Judge and each side by or before 15 calendar days before the court date.

In response to this “Notice of Hearing and Schedule Order,” the Respondent filed a letter dated December 17, 1999, received at the Judge’s Office on December 21, 1999, which was addressed to the Judge and stated:

“Dear Sir, I have received your notification for a hearing, scheduled, 25 January, at 10:00 AM, at U.S. Atty. Office, 350 Magnolia St., Beaumont, TX., and will attend.

Please send me a witness list and exhibit list including all evidence that will be presented against me. This can be mailed to 240 W. RR #3 Vidor TX 77662.

Thank you, Karl Gharst”

In response, the Judge sent a letter to the Respondent, Karl Gharst, dated January 6, 2000, with a copy to the Investigating Officer, Chief Warrant Officer M. Marlow. It stated:

“Dear Mr. Gharst: I received your recent letter where you asked to be sent a witness list and exhibit list including all evidence that will be presented against you. First of all, I have not received the witness or exhibit list yet. The lists that are to be filed are due by or before January 10, 2000. The Investigating Officer files his list of witnesses and exhibits with me and is to send

a copy to you. If you wish to call any witnesses, including yourself, you should make a list and file it with me and send a copy to the Investigating Officer. Also, include a list of any exhibits you wish to offer at the hearing to be held on January 25, 2000 at 10:00 a.m. at the hearing room in Beaumont, Texas.... I hope this clarifies the process for you.”

A copy of my letter and Respondent’s letter was sent to the Commanding Officer, Marine Safety Office Port Arthur.

The Respondent appeared at the hearing. After being advised of his rights by the Investigating Officer prior to the hearing and by the Judge at the commencement of the hearing, Respondent chose to represent himself *pro se*. The U.S. Coast Guard was represented by Investigating Officers, Matthew Marlow, Chief Warrant Officer, and Gregory Crettol, Lieutenant (Junior Grade), of the Marine Safety Office Port Arthur. The hearing was commenced and held as scheduled on January 25, 2000, at 10:00 a.m. in Beaumont, Texas.

At the outset, the Respondent was twice provided with a detailed description of his rights under the U.S. Administrative Procedure Act, 5 U.S. Code 551 through 559 and the rules governing the procedures at 33 CFR Part 20.

The opening statements were presented by both sides. The Investigating Officer sponsored three (3) witnesses. Namely, the trained and experienced urine specimen collector, Mr. Todd Lancon, who carefully performed the collection on August 25, 1999. The second witness was from the U.S. tested and certified laboratory, Ms. Sara Wages, a certifying scientist with eighteen (18) years experience with SmithKline Laboratories. The third witness was Dr. Charles Parsiola, M.D., M.P.H., or Master of Public Health. Although the Respondent did not file a witness list as requested, the Judge allowed him to testify on his own behalf. After carefully observing the Respondent during his testimony under oath, as well as carefully listening to the other witnesses and comparing their testimony to the exhibits and evidence, I find

that the Respondent's credibility leaves much to be desired, whereas the other three (3) witnesses are found credible.

Of all of the exhibits offered by the Investigating Officers, eight (8) of the exhibits were admitted into evidence and marked exhibits one (1) through eight (8). See Appendix A, List of Witnesses and Exhibits.

Respondent donated his urine sample on 25 August 1999. Certifying Scientist, Sara Wages, of the certified laboratory, signed and certified the findings on 29 August 1999 of positive for the metabolite of marijuana being found in the Respondent's urine sample. The Medical Review Officer confirmed this finding on September 01, 1999 (IO's Exhibit 4).

The "Federal Drug Testing Custody and Control Form" was signed by the Respondent on the date of collection, August 25, 1999, and by the Collector; and also signed later by the Laboratory's Certifying Scientist and by the Medical Review Officer, Dr. Charles Parsiola, M.D., M.P.H.

II

FINDINGS OF FACT

1. The captioned Respondent, Karl Eric Gharst, was the holder of U.S. Coast Guard License number 760122 and U.S. Merchant Mariner's Document number 335508473 at all relevant times herein mentioned. This License and Document were issued to him by the U.S. Coast Guard. The License authorized the Respondent to serve as a "Chief Engineer of limited ocean motor vessels of any horsepower," dated the 10th of April 1995 to expire on the 10th of April 2000, unless renewed. The Respondent's Merchant Mariner's Document will expire on August 03, 2002. It shows he was born on October 21, 1960. His License states he was born in

Illinois. The said Document states he has blond hair, with blue eyes, weighs 220 pounds on the date of issue with a height of 70 inches.

2. The Investigating Officer proved by a preponderance of the reliable, probative and substantial evidence that the captioned Respondent was the holder of the said License and Merchant Mariner's Document and that he did provide a urine specimen which subsequently tested positive for the metabolite of marijuana on a standard U.S. Department of Transportation drug screen test and by a confirmatory test of Gas Chromatography/Mass Spectrometry (GC/MS). The combination of both of these tests is most reliable and accurate.

3. A witness testified credibly that the combination of these two tests is 100% accurate. These three witnesses helped to prove along with the admitted exhibits that the Respondent had used marijuana, a dangerous drug that was found in his urine specimen.

4. The Respondent had provided a urine specimen in accordance with the pre-employment testing requirements of 46 CFR Part 16, including 46 CFR Section 16.210. The Respondent's urine specimen was collected by trained and experienced Mr. Todd Lancon of Bourgeois Medical Clinic carefully and according to the rules. This urine specimen collector collected samples from only one (1) person at a time. He signed the "Federal Drug Testing Custody and Control Form" in the presence of the Respondent and had the Respondent sign his name, signature and date of birth on the day of collection on the "Federal Drug Testing Custody and Control Form."

5. This specimen was carefully and properly collected in accordance with the regulatory rules and procedures. It was sealed with tamperproof seals in the Respondent's presence as indicated by Mr. Gharst's signature on the "Federal Drug Testing Custody and Control Form."

The collection bottle was sealed in Respondent's presence and packaged for shipment in a

sealed and tamperproof envelope. In turn, that envelope and a copy of the "Federal Drug Testing Custody and Control Form" was sealed inside a shipping kit and picked up by a courier for delivery to the tested and certified laboratory. The Respondent's urine sample was collected on August 25, 1999 at 1:23 p.m. local time by the said Collector, Mr. Todd Lancon, employed then by Bourgeois Medical Clinic at 1201 Kenneth Drive, Morgan City, Louisiana. The laboratory received the collected sample bottle sealed and intact with all of the papers in proper order. Its scientists proceeded to test portions of the sample by both the initial screen test and the second test, the said GC/MS test mentioned above. Both tests showed a positive for the metabolite of marijuana. The metabolite of marijuana is left as a residual in the human body's urinary system after the human person has ingested marijuana into his body, usually by smoking it. The sample was properly and carefully sealed and sent to SmithKline Beecham Laboratories, now called Quest Diagnostics, Inc., at 3175 Presidential Drive, Atlanta, Georgia 30340. This laboratory is tested and certified by the U.S. Department of Health and Human Services and its subsidiary agency known as the Substance Abuse and Mental Health Services Administration (SAMHSA).

6. The Certifying Scientist, Ms. Sara Wages, credibly testified that Mr. Gharst's urine sample was properly sealed and documented when it arrived at the laboratory and analytically tested. This resulted in the positive final report of marijuana. The Medical Review Officer (MRO), Dr. Charles Parsiola, M.D., testified that he had reviewed the collection records and laboratory results and contacted Mr. Gharst to discuss and interview Respondent regarding the positive tests for marijuana. The Doctor could find no medical excuse for why the Respondent's urine sample contained marijuana. The Doctor confirmed the findings of the laboratory as a positive for marijuana. IO's Exhibit 4 shows the Doctor signed the finding of

positive on September 01, 1999, confirming the findings of the laboratory as a positive for use of marijuana by the Respondent. The Respondent's urine specimen was properly identified with identification number 4908263 and Respondent's Merchant Mariner's Document number 335508473 on the "Federal Drug Testing Custody and Control Form."

III

CONCLUSIONS OF LAW

1. The captioned Respondent and subject matter of this hearing are within the jurisdiction of the U.S. Coast Guard and the U.S. Administrative Law Judge under Title 46 U.S. Code Chapter 77, including 46 U.S. Code Section 7704.

2. The "Complaint" for "Use of or Addiction to the Use of Dangerous Drugs" under 46 U.S. Code Section 7704(c) and also violating 46 CFR 5.535 is found proved by a preponderance of the reliable, probative and substantial evidence.

IV

OPINION

The above Preliminary Statement, Findings and Conclusions are incorporated herein as if set forth in full.

The "Complaint" here served on Respondent is for the "Use of or Addiction to the Use of Dangerous Drugs," namely marijuana. These terms have their genesis in 46 U.S. Code Section 7704(c) which provides in pertinent part that if it is shown at a hearing before a U.S. Administrative Law Judge that the holder of a Merchant Mariner's License and Document has been the user of a dangerous drug, including marijuana, his license and document shall be revoked unless Respondent establishes that he is cured of drug use.

46 U.S. Code 7702 specifically authorizes the U.S. Secretary of Transportation and the U.S. Coast Guard to require the testing of U.S. Merchant Mariners by their marine employers for the use of alcohol and dangerous drugs.

The Coast Guard rules codified at 46 CFR Part 16, including 46 CFR 16.201(b), state that where an individual fails a chemical test for dangerous drugs “the individual will be presumed to be a user of dangerous drugs.”

The burden of proving the elements of the “Complaint” rests upon the Investigating Officer. In order to establish this presumption, the Investigating Officer must prove (1) that the Respondent was the individual who was tested for dangerous drugs; (2) that the Respondent failed the test; and (3) that the test was conducted in accordance with 46 CFR Part 16. See Appeal Decision 2560 (CLIFTON) (1993). If that evidence is convincing, a prima facie case for use of a dangerous drug is established. As the Commandant held in Appeal Decision CLIFTON, supra page 14:

“This proof established a prima facie case of use of a dangerous drug (i.e. a presumption of use of a dangerous drug), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the Administrative Law Judge, on the basis of the presumption alone, may find the charge of use of a dangerous drug proved. Appeal Decision Nos 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).”

The Commandant’s Appeal Decision further stated, however, that the presumption is not an irrebuttable one, but could be overcome by the respondent’s producing convincing contrary evidence (Id.):

“(1) that calls into question any of the elements of the prima facie case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or not knowing.”

If the evidence is sufficient to rebut the original presumption and the Investigating Officer's evidence, then the burden of presenting further evidence returns to the Coast Guard Investigating Officer. Thus, the Investigating Officer at all times retains the burden of proof.

The Commandant concluded in Appeal Decision CLIFTON supra, that presumptions in hearings governed by the U.S. Administrative Procedure Act (5 U.S. Code 551 through 559) are permissible unless they are unreasonable, arbitrary or invidiously discriminatory. Commandant found this presumption permissible.

The Respondent testified in his own behalf and made a self-serving statement that he did not knowingly ingest marijuana before this test. He stated that if he had ingested marijuana, he was smart enough to delay the test, since it was a pre-employment test, until his body would be cleared of the substance or he states that he could have used something to mask the use of such a drug. Respondent testified at the hearing that he went to a picnic or a party on a beach either the weekend before he gave his urine sample or the second prior weekend before his test. He claimed he ate some brownies at this beach party together with other people. One of his friends at the party gave a wild speculation as to perhaps somebody put marijuana in the brownies. However, the Respondent did not bring in his friend to so testify and as it shows in IO's Exhibit 8 on the second page, under item 3, Respondent "admits to being 'around drug use', when (written in) yesterday." Those are the periods that the Respondent told the Medical Review Officers that he was around marijuana "yesterday," then at the hearing he changed it to the one or two weekends before he gave his drug specimen. These contradictions also indicate Respondent's lack of credibility.

Importantly, both the Collector and the captioned Respondent signed the appropriate certification on the "Federal Drug Testing Custody and Control Form" (DTCCF). The captioned

Respondent certified as follows when he signed this collection form on which he printed and signed his name on the date of collection, August 25, 1999: "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each specimen bottle is correct." The Respondent signed it in Step 4 and the Collector signed it and completed Steps 1, 2, 3, and 5. The Collector certified on that same day: "I certify that the specimen identified on this form is the specimen presented to be by the donor providing the certification on Copy 4 of this form, that it bears the same specimen identification number as that set forth above, and that it has been collected, labelled and sealed as in accordance with applicable Federal requirements." It was signed by the Collector, Todd Lancon of the Bourgeois Medical Clinic, 1201 Kenneth Drive, Morgan City, Louisiana 70380, when and where the Respondent's urine specimen was collected (IO's Exhibits 4 and 7).

I find that the procedures followed at the collection site were proper. The Collector complied with the U.S. Department of Transportation (DOT) and the U.S. Coast Guard urine collection requirements codified at 49 CFR Part 40 and 46 CFR Parts 4, 5 and 16. Moreover, the Respondent himself certified that the urine collected was his, that the specimen was sealed in his presence and that the information on the seal on the bottle and on the form was correct.

With regard to the testing process, the evidence shows that this certified laboratory is a U.S. Department of Health and Human Services tested and certified laboratory authorized to engage in urine drug testings under the U.S. Department of Transportation and Coast Guard rules. The certified scientist testified in detail regarding the process whereby the incoming urine sample, such as the Respondent's, is examined, aliquoted, or samples taken from it, handled,

tested, realiquoted, re-tested, stored and finally, reported. The urine sample here and its collection records were examined at this laboratory when received. The screening test and the GC/MS test were both conducted under strict quality control conditions. The results exceeded the U.S. DOT minimal threshold levels for marijuana. The U.S. DOT threshold level on the GC/MS test for the metabolite of marijuana is at least 15 nanograms per milliliter (ng/ml).

The Respondent admitted on the stand that he had smoked marijuana approximately fifteen (15) years ago, everyday for three (3) years when he was in the U.S. Marine Corp. Then he states he was given an honorable discharge. He claimed that he has not used marijuana in the last fifteen (15) years. Thus, the Respondent became familiar with the effects of marijuana on himself and his body when he smoked it daily for about three (3) years. Yet he states that he did not notice any effect of any marijuana on the day he was on the beach with some friends eating brownies and other foods. I do not find the wild speculation by the Respondent or his claimed friend, Dennis Welch, construction worker, that perhaps somebody put something in the brownies as credible, convincing evidence. Especially when weighed against the witnesses and exhibits of the Investigating Officer.

The urine specimen collection reports and the test results from the certified and tested laboratory were sent to the Medical Review Officer who interviewed the Respondent. The Doctor testified that the mariner denied his use of marijuana, as is often the reaction. The Doctor concluded, however, that no convincing medical explanation or excuse was provided to explain the presence of the drug in the Respondent's body and urine. I find that the Collector, laboratory and Medical Review Officer properly performed their duties in accordance with the rules, regulations and statutes. The results and findings are found to be accurate.

I have concluded that the Investigating Officers successfully proved their case by a preponderance of the reliable, probative and substantial evidence. Respondent's denial of use is not sufficient to overcome the preponderance of the substantial evidence of this properly conducted drug test and its results.

When considering the three (3) factors set out by the Commandant in the Appeal Decision 2560 (CLIFTON) (1993), there is not adequate evidence submitted here by the Respondent which convincingly "calls into question" of the propriety of the collection, testing and medical review process. Nor has an "alternative, acceptable, medical explanation for the positive test result been advanced." Respondent's references to possibly someone putting something in a brownie are rejected as not credible nor convincing. The Respondent is advised of his right to appeal in accordance with 33 CFR Subpart J, Sections 20.1001 through 20.1004, attached herein.

If Respondent goes to and enrolls in a proper drug rehabilitation program for cure of drug use, then he would have an opportunity to get his captioned document and license back in approximately twelve (12) to fourteen (14) months. Thus, if Respondent, within thirty (30) days of the date of this "Decision and Order" is mailed to him, advises the Senior Investigating Officer, in writing, with documents from the rehabilitation program as proof that Respondent has already entered or enrolled to start a proper drug rehabilitation program, with a letter from the administrator or coordinator of that program, the Administrative Law Judge will modify this Order accordingly. Otherwise, the Order will be one of "revocation" of Respondent's captioned U.S. Merchant Mariner's Document and License. Respondent can telephone the investigating officers at the Marine Safety Office in Port Arthur for more information on these local rehabilitation programs, by calling (409) 723-6509.

If Respondent fails to enroll in a proper drug rehabilitation program within (30) days from the date this "Decision and Order" is mailed to him, then the order will be as follows:

V

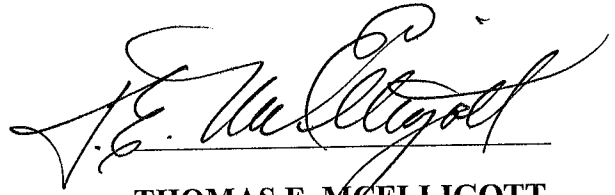
ORDER

The Investigating Officers stipulated the Respondent had a clear prior record with the U.S. Coast Guard before failing his drug test for marijuana.

Accordingly, it is ORDERED that the Respondent's U.S. Coast Guard issued Merchant Mariner's Document and License issued to him by the U.S. Coast Guard are hereby REVOKED

This Revocation includes all duplicates of his document and any other U.S. Coast Guard Licenses or Documents that have been issued to him by the U.S. Coast Guard and that have not expired. The Respondent's said U.S. License and Document should now be deposited by Respondent Gharst by mail with the Commanding Officer or the Senior Investigating Officer of the U.S. Coast Guard Marine Safety Office Port Arthur, 2875 Jimmy Johnson Boulevard, Port Arthur, Texas 77640-2099, telephone number (409) 723-6509, extension 239.

Procedures are provided by which a person, or a Respondent, whose U.S. Merchant Mariner's License and Document have been revoked, may apply to any Commanding Officer of any Marine Safety Office of the U.S. Coast Guard, such as the one in Port Arthur, Texas, for the issuance of a new license or document. This is known as applying to "The Coast Guard Administrative Clemency Review Board." These rules and conditions are found in 46 CFR Subpart L and are referred to as the Coast Guard's Clemency Procedures. They are found within 46 CFR sections 5.901, 5.903 and 5.905 entitled "Issuance of New Licenses, Certificates or Documents After Revocation or Surrender," and in the Coast Guard's Marine Safety Manual, Volume V, Chapter II (Commandant Instruction M16000.10).



THOMAS E. MCELLIGOTT
Administrative Law Judge

Dated: 29 February 2000

Copy:
MSO Port Arthur, Attn: CWO Marlow
Karl E. Gharst, Respondent
CCGD08(m)