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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. MERCHANT MARINER LICENSE and MERCHANT MARINER'S DOCUMENT Issued to: RANDAL D. MERRILL	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2668

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order on Remand (hereinafter "D&O on Remand") dated January 13, 2003, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, revoked Mr. Merrill's (hereinafter "Respondent's") license and document upon finding proved a charge of *use of or addiction to the use of dangerous drugs*. The specification found proved alleged that Respondent tested positive for cocaine metabolite as part of a drug screening conducted on November 11, 1999.

PROCEDURAL HISTORY

By a Decision and Order (hereinafter "D&O") dated November 1, 2000, an ALJ of the United States Coast Guard at New Orleans, Louisiana, dismissed the Coast Guard's complaint against Respondent after finding not proved a charge of *use of or addiction to the use of dangerous drugs*. In his decision, the ALJ concluded that because

the injury which resulted in the drug testing of Respondent could not properly be categorized as either a "marine casualty" or a "serious marine incident," Respondent's drug testing was "not in accord with U.S. Coast Guard regulations for chemical testing of mariners as set forth in 46 Code of Federal Regulations, Part 16." [D&O at 4] As a result, the ALJ determined that Respondent's employer lacked the authority to require Respondent to submit to a drug test. [D&O at 7] In addition, the ALJ found that both Respondent's employer and the Medical Review Officer (MRO) failed to comply with the applicable Department of Transportation (hereinafter "DOT") regulations governing reporting and review of drug test results. As a result, the ALJ found the complaint not proved and dismissed the case. [D&O at 12]

The Coast Guard appealed the ALJ's D&O. On appeal, via a decision dated September 3, 2002, the ALJ's order was vacated and remanded, expressly stating that the ALJ should determine whether Respondent voluntarily submitted to the drug test at issue in the instant proceedings and, if found in the affirmative, whether that determination would be sufficient to alter the outcome of the case. Appeal Decision 2633 (MERRILL). That decision was based upon a conclusion that, irrespective of the requirements set forth in 46 C.F.R. Part 16, the Coast Guard could properly rely on the results of a voluntary drug test as the basis for suspension and revocation proceedings.

On remand, the ALJ reopened the hearing. The reopened hearing was held at New Orleans, Louisiana, on December 11, 2002. Respondent was present at the hearing and was represented by professional counsel. During the hearing, no new testimony or exhibits were entered into the record and the ALJ limited discussion to the sole issue of whether Respondent had voluntarily submitted his urine for drug testing.

After the hearing, the ALJ issued his D&O on Remand on January 13, 2003. In the decision, the ALJ held that "[t]he record clearly shows that Mr. Merrill had no objection to taking the drug test and his submission of a urine specimen was entirely voluntary on his part" and ordered the revocation of Respondent's license and merchant mariner document. [D&O on Remand at 2]

On February 11, 2003, Respondent filed, through his counsel, a Notice of Appeal in the matter, via facsimile, with the ALJ Docketing Center. Thereafter, on March 11, 2003, Respondent requested an extension of time within which to file his Appellate Brief. On March 13, 2003, the Coast Guard's Chief ALJ granted the extension and ordered that Respondent's Appellate Brief be filed by March 27, 2003. Respondent perfected his appeal by properly filing his Appellate Brief on March 27, 2003. The Coast Guard filed a Reply Brief on April 21, 2003. Therefore, this appeal is properly before me.

APPEARANCE: Troy G. Ingram, Attorney for Respondent, 2065 First Street, Suite 102, Slidell, Louisiana. The Investigating Officers were LT Sharif Abdrabbo, LT Chris Dougherty, and CWO David Cornett, Marine Safety Office New Orleans, Louisiana.

FACTS

For the sake of clarity, I will reiterate the findings of fact that were set forth in Appeal Decision 2633 (MERRILL). Those findings of fact are as follows:

At all times relevant herein, Respondent held the license and merchant mariner document captioned above, issued to him by the United States Coast Guard. Respondent's license authorizes him to serve as Master of steam motor vessels of not more than two hundred gross tons upon or near coastal waters.

On November 11, 1999, Respondent was in the process of reporting to duty when he parked his car in the Mobro Marine, Inc., parking area in Jacksonville, Florida. [D&O at 3] He subsequently cut his left hand as he was "cutting...[his]...bags open from the flight from Seattle." [Transcript (Tr.) at 180] At the time of his injury, Mr. Merrill had not yet reported to work but was scheduled to work that day as an "at-the-bank" employee. [Tr. at 53]. In that capacity, he was not scheduled to work on a vessel in an "underway status" but rather, was working in a "non-specific position, essentially a caretaker status." [Tr. at 53-54] Upon cutting his hand, Mr. Merrill reported to the company's office and informed Mr. Paul Westcott, the company Safety and Compliance Coordinator, of his injury. [Tr. at 147, 180; D&O at 3]

Upon viewing Mr. Merrill's injury, Mr. Westcott offered to "take care of" Mr. Merrill's injury. [Tr. at 180] Mr. Merrill was informed that if Mobro paid for his medical treatment, he would be required to submit to a urinalysis test. [Tr. at 70-71] Mr. Westcott concluded that, based on the circumstances of the incident, a urinalysis test was required under Federal regulation because he classified the test as a "post injury chemical tests." [Investigating Officer (hereinafter "IO") exhibit 2]

Mr. Merrill allowed Mobro to pay for his medical treatment and was transported to Magnolia Urgent Care Center in Green Cove Springs, Florida, where his wound was treated with 7 nylon skin sutures and where he submitted to a urinalysis test. [Tr. at 67; IO exhibit 5] Dr. William A. Jacobs, the Medical Review Officer (MRO) employed by Magnolia Urgent Care Center verified the report of Mr. Merrill's urinalysis test and the chain of custody of his specimen. [Tr. at 112-118; IO exhibit 3] The results of Mr. Merrill's urinalysis test indicated that his urine had tested "positive" for the presence

of cocaine metabolites. [IO exhibit 3] The MRO notified the Coast Guard of Mr. Merrill's positive test result on December 29, 1999, following significant difficulty in contacting Mr. Merrill regarding the results. [Tr. at 155-161; IO exhibit 7]

BASES OF APPEAL

This appeal has been taken from the order, on remand, imposed by the ALJ, which found that Respondent had voluntarily submitted to a drug test and which revoked Respondent's mariner credentials. Respondent's bases of appeal are summarized as follows:

I. *The Coast Guard lacked jurisdiction to institute the suspension and revocation proceeding against Respondent because Respondent was not acting under the authority of his credential at the time of his injury.*

II. *Respondent was not assigned to an identifiable vessel or fleet of vessels; alternatively, if Respondent was assigned to the M/V EL PUMA GRANDE, said vessel had been withdrawn from navigation and was undergoing major repairs and, therefore, Respondent was not required to work under his license as a condition of employment.*

III. *The ALJ erred in failing to address the jurisdictional issue in the original proceeding and erred again in refusing to consider the jurisdictional issue during the proceedings on remand.*

IV. *Regardless of whether Respondent voluntarily submitted to the drug screen, the ALJ erred when he failed to consider whether Respondent's Constitutional rights to due process and privacy rights had been violated as a result of the MRO's failure to comply with Coast Guard regulations.*

OPINION

I.

I will begin by concurrently discussing Respondent's first three bases of appeal. Respondent contends that the Coast Guard lacked jurisdiction to initiate suspension and revocation proceedings against Respondent's mariner credentials because: 1) Respondent was not acting under the authority of his mariner credentials at the time of his injury, 2) Respondent was not required to work under the authority of a mariner credential at the

time of his injury because he was either not assigned to an identifiable vessel or because he was assigned to a vessel that was withdrawn from navigation, and, 3) because the ALJ erred by not addressing the jurisdictional issue concerning whether Respondent was acting under the authority of his merchant mariner credential. For the reasons set forth below, I find Respondent's first three bases of appeal to be without merit.

In asserting that the Coast Guard lacks jurisdiction to initiate the instant proceedings, Respondent contends, based upon the application of 46 C.F.R. § 5.57, that respondent was not "acting under the authority" of his mariner credentials at the time of his injury and because he was not required to have mariner credentials to perform the tasks assigned to him at that time. Respondent's reliance on 46 C.F.R. § 5.57 is misplaced. Irrespective of whether Respondent was "acting under the authority" of his mariner credentials at the time of the incident, pursuant to 46 U.S.C. § 7704(c), "[i]f it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate or registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." Indeed, as stated in Appeal Decision 2560 (CLIFTON), Respondent's "status aboard the vessel does not matter as it is his status as the **holder** of a merchant mariner's document [or license or certificate of registry] that establishes jurisdiction for purposes of suspension and revocation when use of a dangerous drug is charged." [Emphasis added]

The record shows that, at the time of the incident, Respondent was the holder of Coast Guard license number 796883 and a merchant mariner document. [Tr. at 4; D&O at 3] Therefore, because the instant case was taken pursuant to 46 U.S.C. § 7704(c) and the Coast Guard properly charged Respondent with "use of or addiction to the use of

dangerous drugs," Respondent's status as the holder of the above-captioned mariner credentials, in and of itself, affords the Coast Guard jurisdiction to institute the instant suspension and revocation proceeding. Accordingly, I find Respondent's first three bases of appeal to be without merit.

II.

Regardless of whether Respondent voluntarily submitted to the drug screen, the ALJ erred when he failed to consider whether Respondent's Constitutional rights to due process and privacy rights had been violated as a result of the MRO's failure to comply with Coast Guard regulations.

Respondent's final argument is, in effect, that his rights to fundamental fairness and due process were violated as a result of regulatory infractions that were committed by the MRO and his employer during the mandatory review of his positive drug test. Respondent asserts that the MRO's failure to discuss Respondent's positive test result with him prior to verifying the test result as positive and his employer's failure to ensure that Respondent contacted the MRO prior to that verification "was a fatal flaw, warranting dismissal of the complaint." [Appellate Brief at 10-16] After a thorough review of the record, I do not agree.

For a charge of use of or addiction to the use of dangerous drugs to be found proved, the Coast Guard must establish a *prima facie* case of use of a dangerous drug by the mariner. A *prima facie* case of use of a dangerous drug is shown when (1) a party is tested for use of a dangerous drug, (2) test results show that a party has tested positive for the presence of a dangerous drug, and (3) the drug test is conducted in accordance with 49 CFR Part 40. Appeal Decisions 2584 (SHAKESPEARE), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF), 2598 (CATTON) and 2583 (WRIGHT). If the Coast Guard establishes a *prima facie* case, a presumption of use of a dangerous drug arises,

and the burden then shifts to the Respondent to produce persuasive evidence to rebut the presumption. Appeal Decisions 2584 (SHAKESPEARE), 2379 (DRUM), 2589 (MEYER), 2592 (MASON) and 2603 (HACKSTAFF). If the Respondent fails to rebut the presumption, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 584 (SHAKESPEARE), 2266 (BRENNER), 2174 (TINGLEY), 2589 (MEYER), 2592 (MASON) and 2603 (HACKSTAFF).

In the instant case, the record shows both that Respondent was tested for use of a dangerous drug, the urine test results were positive for cocaine metabolite, and that the technical and physical testing of his specimen was conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. What is less clear, and is indeed the focus of Respondent's final assertion of error, is whether, in light of the procedural and notification regulatory infractions committed by the MRO and Respondent's employer, it is proper to conclude that his test result was positive for the presence of a dangerous drug or, stated more succinctly, whether the Coast Guard has established a *prima facie* case for use of a dangerous drug. For the reasons stated below, I do not find that the ALJ erred in considering Respondent's positive drug test result in concluding that the Coast Guard established a *prima facie* case for use of a dangerous drug.

A.

In the instant case, the MRO verified Respondent's positive drug test without first discussing the positive test result with Respondent, which is not in accord with the standard MRO procedures set forth in 49 C.F.R. Part 40. In his initial decision, the ALJ noted as follows:

> The specimen was furnished on 11 November 1999 and the Medical Review Officer's notes show that he...attempted to contact Mr. Merrill on 15, 16, 17, 18, 19 and 22 November 1999.
>
> On 22 November 1999 the Medical Review Officer was informed by Mr. Merrill's employer "Date: 11-22 PT unavailable for medical review of Drug Screen despite intense efforts to contact donor for past 7 days—results of drug screen will be reported to employer as is."
>
> On 20 November 1999 Mr. Merrill commenced a voyage on one of his employer's vessels, the M/V EL PUMA GRANDE, from Jacksonville, FL to Bath, Maine.
>
> Mr. Merrill was not informed of his drug test results until 14 December 1999 when he was told by Mr. John Hall, the company's general manager, that his test was positive. Mr. Merrill continued to work for the company.
>
> He was not advised that he was ineligible to work under authority of his license until he was so informed by the Coast Guard Investigating Officer on 4 January 2000.

[D&O at 8] As was discussed previously, in his first D&O, the ALJ dismissed the case because he concluded that the testing of Respondent was not in accord with Coast Guard regulation and because the MRO did not comply with the applicable regulations. [D&O at 4, 11-12] On remand, the ALJ determined that Respondent had voluntarily submitted to his drug test and that, therefore, the Coast Guard could rely on the results of that test to initiate suspension and revocation proceedings. While the ALJ's subsequent decision was silent as to the procedural flaws committed by the MRO, the ALJ found the Coast Guard's charge proved and ordered the revocation of Respondent's mariner credentials. [D&O II at 2-3]

I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff.* NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344

(KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). For the reasons stated below, I do not find that the ALJ erred in finding that the Coast Guard had established a *prima facie* case for use of a dangerous drug.

49 C.F.R. § 40.33(c)(5) (1999) allows an MRO to verify a test without communicating directly with the employee in three specific circumstances.[1], [2] The record shows that none of those circumstances were present in the instant case. Instead, after the MRO tried to contact Respondent five times over the course of seven days, he concluded that he would not be able to contact Respondent and, accordingly, certified Respondent's drug test as positive. [Tr. at 112-118] Although none of the circumstances set forth in 49 C.F.R. § 40.33(c)(5) were met in this case prior to the certification of Respondent's positive test result, the record does show that the MRO discussed Respondent's positive test result with Respondent on January 4, 2000. [Tr. at 117] During the hearing, the following testimony was heard with respect to that discussion:

EXAMINATION BY LT. ABDRABBO:

---

[1] The regulations in 49 C.F.R. Part 40 were significantly amended in December, 2000, after the initiation of this case. In accordance with customary procedure and past practices, this opinion will refer to the version of the regulations in effect at the time that the events giving rise to these proceedings—the administration of Respondent's urinalysis test—occurred.

[2] 49 C.F.R. § 40.33(c)(5) (1999) states:

> (5) The MRO may verify a test as positive without having communicated directly with the employee about the test in three circumstances:
>
> (i) The employee expressly declines the opportunity to discuss the test;
>
> (ii) Neither the MRO nor the designated employer representative, after making all reasonable efforts, has been able to contact the employee within 14 days of the date on which the MRO receives the confirmed positive test result from the laboratory;
>
> (iii) The designated employer representative has successfully made and documented a contact with the employee and instructed the employee to contact the MRO…and more than 5 days have passed since the date the employee was successfully contacted by the designated employer representative.

Q. Dr. Jacobs, this is Lieutenant Abdrabbo again. On your notes and in your testimony you also indicated that on the 4th of January the patient contacted you. Is that correct?

A. Yes, sir.

Q. Okay. On the 4th of January, when the patient contacted you, did he request a re-analysis of his specimen at that time?

A. No, he did not.

Q. Doctor, when Mr. Merrill contacted you on the 4th of January, did he offer any possible alternative explanation as to the positive test results?

A. Mr. Merrill told me at that time that, you know, he did not, you know, use, you know, cocaine, and he had no idea how this could possibly have occurred. You know, he asked me a question if the Lidocaine they used to numb him up for a laceration repair could do this, and I told him it would not. But again, Mr. Merrill did point out, I mean, you can – someone can slip you stuff without your knowledge that can happen, and does happen. But, I mean, that's not part of what I do, or even what you guys do. You know, that's just part of things out there and you have to try to stay away from places that do that.

Q. Right. We understand that, Doctor. But to emphasize – rephrase my question, did the patient give you an explicit alternative or possible alternative? Did he make some sort of statement to you that may have indicated some other possible source of this cocaine to have been introduced into his body or into his system?

A. As far as a specific source or anything, no. I mean, you know, he told me, you know, that he might have gotten something at a party or something like that. But no, he did not give me a specific source. And, you know, at that time – I neglected to write it down, but at that time I did ask him whether he had nasal surgery or anything of that nature in the ensuing few days, and he told me no, he hadn't. And again, as I stated before, he told me that he did not use cocaine, you know, but it showed up positive on the drug screen.

Q. Okay. But, Doctor, just to further clarify, when you spoke with the patient, he did not offer a possible date and time and/or location where he may have been accidentally exposed or something may have caused a positive test result?

A. No.

* * *

EXAMINATION BY MR. MERRILL:

Q. Doctor, I remember the conversation, but I don't remember. Did you offer to have the sample, the split sample, tested at another facility or inform me that that was my right and my option?

A. At that time, you know, I asked, and, you know, I explained that that is an option to have it tested at another facility.

Q. I don't remember that part. I'm not saying you didn't, I just don't remember.

A. That's one of the things that I always do. Now, they hold these things for some time, but not forever.

Q. I don't remember that part.

A. The thing I usually tell people at that same time is that the odds of it being overturned are miniscule.

Q. Yes, I remember you telling me unless I could come up from [sic] absolute proof.

A. There is -- you know, in a case of cocaine, there really isn't a whole lot, you know, ways out of it, like I say, unless you just had some nasal surgery and the surgeon used cocaine. Other than that, or you had a laceration repaired someplace that uses that, and that would have to be within the last day or so. Those are really the only plausible explanations that you can put your hand on and say, "Hey, this happened and this is why it should be reported negative as opposed to positive."

[Tr. at 141-145] Based upon this discussion, the record does not support a conclusion that, had the MRO fully complied with the regulations, the result would have been any different for Respondent. Respondent did not ask to have his sample retested and could not offer any conclusive reason for the positive test.

I have held that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's

integrity. Appeal Decisions 2575 (WILLIAMS), 2522 (JENKINS), 2537 (CHATHAM), 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994); Appeal Decision 2546 (SWEENEY); *aff'd sub nom* NTSB Order No. EM-176 (1994); *Cf. Gallagher v. National Transportation Safety Bd.*, 953 F.2d 1214 (10th Cir. 1992) (holding that where there was no evidence that the integrity of a blood sample was actually compromised by a procedural error that occurred during sample collection, results derived from the sample could properly be relied upon to support the revocation of a pilot's airman certificate). The regulatory failure here, that the MRO verified Respondent's test result as positive after attempting to contact Respondent for seven days, rather than waiting the fourteen-day period required by 49 C.F.R. § 40.33(c)(5), is clearly a technical error that did not breach the chain of custody or violate the integrity of Respondent's urine specimen. Accordingly, I find no infringement of Respondent's due process rights by the MRO.

For the same reason, I do not find Respondent's assertions with respect to the actions of his employer to be persuasive. 49 C.F.R. § 40.33(c)(3) states, in relevant part, that "[i]f, after making all reasonable efforts and documenting them, the MRO is unable to reach the individual directly, the MRO shall contact a designated management official who shall direct the individual to contact the MRO as soon as possible." In the instant case, the record shows that the MRO contacted Respondent's employer in an attempt to reach Respondent to discuss his drug test result, but was unable to do so. [Tr. at 125] However, as the ALJ noted in his initial decision, "[t]he evidence shows that the employer made no effort to place the Medical Review Officer in contact with his employee, Mr. Merrill." [D&O at 8] Again, the record does not support a conclusion that the outcome of this case would have been different if Respondent's employer had

taken the necessary steps to ensure that Respondent contacted the MRO. Therefore, since the regulatory infraction did not breach the chain of custody or violate the integrity of Respondent's urine specimen, I do not find that Respondent's due process rights were violated by the actions of Respondent's employer.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Because competent, substantial, reliable, and probative evidence existed to support the ALJ's Decision and Order on Remand, I find Respondent's bases of appeal to be without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on January 13, 2003, is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 30th day of August, 2007.