

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

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UNITED STATES COAST GUARD  
Complainant

vs.

NEUELL NASH GRIFFITH,  
Respondent

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Docket Number: 02-0637  
CG Case No. 1686445

**DECISION AND ORDER**

**Issued: August 20, 2003**

**Issued by: Honorable Archie R. Boggs, Administrative Law Judge**

**Appearance:**

James A. Wilson, Assistant Senior Investigating Officer  
LTJG. Boris K. Towns  
United States Coast Guard  
Marine Safety Office  
800 David Drive, Room 232  
Morgan City, LA 70380-1304

**For the Coast Guard**

L. Stephen Cox, Esquire  
Courtenay, Hunter & Fontana, L.L.P.  
Texaco Center, Suite 1540  
400 Poydras Street  
New Orleans, Louisiana 70130-3245

**For the Respondent**

## PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard") initiated this administrative action seeking revocation of License Number 894821 issued to Respondent Neuell Nash Griffith. This administrative action was brought pursuant to the legal authority contained in 46 U.S.C. 7704 and its underlying regulations codified at 46 C.F.R. Part 5. The Coast Guard issued a Complaint on October 21, 2002, which charged Respondent Griffith with Use of or Addiction to the Use of Dangerous Drugs based on a positive drug test by urinalysis for cocaine metabolite.<sup>1</sup>

The dangerous drug charge against Respondent Griffith is supported by five (5) factual allegations, which read as follows:

1. On August 23, 2002, Respondent took a Post-Casualty drug test.<sup>2</sup>
2. A URINE specimen was Collected by TESSIE DUPRE.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.<sup>3</sup>
4. The urine specimen was collected and analyzed by Quest Diagnostics (Atlanta, GA.) using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for Cocaine metabolite.

The Respondent filed an Answer to the Coast Guard's Complaint and requested a hearing. More specifically, Respondent Griffith admitted all jurisdictional allegations contained

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<sup>1</sup> During the pendency of this case, the U.S. Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 Section 1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the agency

<sup>2</sup> Respondent Griffith requested leave from work to recover from a motorcycle accident. He was directed by his employer to take a urinalysis before he could return to duty.

in the Complaint, with the exception of the listed telephone number, and denied all factual allegations for lack of sufficient information.

On November 6, 2002, this case was assigned to the undersigned judge for adjudication. The hearing in this matter convened on January 15, 2003 at the Marine Safety Office in Morgan City, Louisiana before the Honorable Archie R. Boggs, Administrative Law Judge of the United States Coast Guard. The hearing was conducted in accordance with the Administrative Procedure Act as amended and codified at 5 U.S.C. §§ 551-559, and the Coast Guard procedural regulations located at 33 C.F.R. Part 20. Mr. James A. Wilson, Assistant Senior Investigating Officer, and Lieutenant Junior Grade Boris Towns represented the United States Coast Guard at the hearing. Respondent Griffith also appeared at the hearing accompanied by counsel, L. Stephen Cox, Esq. of Courtenay, Hunter & Fontana, L.L.P.

A total of four (4) witnesses, including Respondent Griffith, testified in this proceeding. At the hearing, the Coast Guard introduced six (6) exhibits into evidence; whereas, the Respondent introduced two (2) exhibits into evidence. The witness and exhibits are listed in Appendix A.

On February 14, 2003, the Coast Guard filed Proposed Findings of Fact. Rulings on the Coast Guard's proposed findings are in Appendix B. Respondent Griffith also filed a Post-Hearing Memorandum. However, rulings on the Respondents' Proposed Findings of Fact and Conclusions of Law are not rendered because the Respondents failed to enumerate such Proposed Findings of Fact and Conclusions of Law.

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<sup>3</sup> Although an employer-directed drug test is a non-federal drug test under 46 CFR Part 16 and 49 CFR Part 40, a Federal Drug Testing Custody and Control Form was used in the collection and analysis process.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has established by a preponderance of reliable and credible evidence that Respondent Griffith either used or is addicted to the use of a dangerous drug.

### **FINDINGS OF FACT**

The Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, and the entire record as a whole.

1. On August 23, 2002, Respondent Neuell Nash Griffith submitted a urine specimen that subsequently tested positive for cocaine metabolites on a standard Department of Transportation ("DOT") drug-screen test. (*Entire Record*).
2. Respondent Griffith is the holder of U.S. Coast Guard License No 894821. He is authorized to operate steam or motor vessels of less than one hundred gross tons on inland waters and to act as mate aboard steam or motor vessels of less than two hundred gross tons on coastal waters. (*Transcript ("Tr.") 13*).
3. At the time of the events giving rise to this action, Respondent was an employee of Tidewater Marine Corporation. He had been a licensed seaman for five years. (*Tr. 169*).
4. During the month of August 2002, Respondent suffered severe back pain following an injury and requested leave from work. (*Tr. 133, 170*). Respondent sought medical attention for his injury at the Bourgeois Medical Clinic ("Clinic") in Morgan City, Louisiana. (*Tr. 129, 170*).
5. On August 23, 2002, Respondent Griffith took an employer-directed drug test as required by Tidewater Marine. (*Tr. 37, 171, Agency Exhibit 1*).

6. The Respondent reported to the Bourgeois Medical Clinic where Ms. Tessie Dupre, a certified drug screener and urine collector for the Clinic, identified Respondent Griffith by referring to his driver's license photo. (*Tr. 12, 22-23, Agency Exhibit 2*). Ms. Dupre verified the Respondent's social security number and directed him to furnish a urine specimen for the test. (*Tr. 22-23, 30, 33-34*).
7. Ms. Dupre treated the employer-directed test as though it were a post-accident drug test,<sup>4</sup> which is governed by the Department of Transportation ("DOT") drug testing procedures and regulations. In turn, Ms. Dupre filled out a Federal Drug Testing Custody and Control Form ("Custody and Control Form") and collected the Respondent's urine sample in accordance with DOT drug testing guidelines. (*Tr. 37-44*).
8. When the Respondent returned the sample, Ms. Dupre checked the temperature to ensure that it was between ninety and one hundred degrees Fahrenheit. (*Tr. 41-42*). Ms. Dupre then split the Respondent's urine sample by pouring the contents into two separate tubes. (*Tr. 41-42*). The sample bottles were sealed and dated in the Respondent's presence and, thereafter, packed for shipment with the required seals. (*Tr. 43-44*).
9. The Respondent's urine sample was given the specimen identification number 1897008, which followed the specimen throughout the screening system. (*Tr. 33- 34, Agency Exhibit 1, 3*).

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<sup>4</sup> Under Coast Guard drug testing regulations, mariners are required to submit to mandatory drug testing regulations following a serious marine incident. See 46 C.F.R. §§ 4.06-10 and 16.240. A serious marine incident is defined as: a marine casualty resulting in the death or injury requiring medical treatment beyond first aid of a person; a marine casualty involving damage to property in excess of \$10,000; a marine casualty involving actual or constructive loss of any inspected vessel or any self-propelled uninspected vessel of 100 gross tons or more; or a discharge of at least 10,000 gallons of oil or discharge of a hazardous substance into the navigable waters of the United States whether or not resulting from a marine casualty. 46 C.F.R. § 4.03-2. The Respondent's drug test did not qualify as a post-accident drug test within the context of 46 C.F.R. Part 16.

10. Ms. Dupre signed the Custody and Control Form certifying that the specimen was provided by Respondent Griffith and that it was collected, labeled, and sealed in accordance with federal requirements. Respondent Griffith also signed the Custody and Control Form attesting that the specimen was his, the information provided on the form was correct, and that the sample was sealed in his presence. *(Tr.44, Agency Exhibit 1, 3).*
11. Respondent's specimen sample was secured in a locked room until a courier was sent by Quest Diagnostics laboratory to collect the specimen and deliver it to their facility in New Orleans. *(Tr. 44-45, 66).*
12. Quest Diagnostics is a certified facility and medical laboratory that performs work place drug testing. *(Tr. 43-44, 59-60, 65, Agency Exhibit 1).*
13. The Respondent's specimen arrived intact at the laboratory and was carefully analyzed according to tested and approved procedures by the laboratory's scientists and computers. *(Tr. 77, Agency Exhibit 4).* The receipt of the specimen, as well as the handling and testing procedures, are documented on the laboratory's internal chain of custody. *(Agency Exhibit 4).*
14. An initial screen test of the Respondent's urine sample tested positive for cocaine. *(Tr. 70-71).* Another aliquot was taken from the original sample and a confirmatory test (gas chromatography/mass spectrometry) was conducted. *(Tr. 74).* That test result also revealed the presence of cocaine metabolite in excess of the DOT threshold. *(Tr. 70-71, Agency Exhibit 4).*
15. Quest Diagnostics forwarded the Respondent's test results to Dr. Melvin Bourgeois of the Bourgeois Medical Clinic, who was the acting medical review officer ("MRO") for Tidewater Marine. *(Tr. 11, 103-104, Agency Exhibit 5).*

16. Dr. Bourgeois treated the urinalysis as though it were a post-accident test, governed by the DOT drug testing procedures and regulations. In turn, Dr. Bourgeois completed the Custody and Control Form and verified the urinalysis results in accordance with DOT drug testing guidelines. *(Tr. 102-105)*.
17. Upon verifying that the urine sample was positive for cocaine metabolite, Dr. Bourgeois met with the Respondent to discuss the positive urinalysis results. *(Tr. 92, 94, 103-105, Agency Exhibit 4, 5)*.
18. Upon learning that he tested positive, Respondent immediately requested a retest of the split sample. Dr. Bourgeois documented the Respondent's request in the applicable medical review records. *(Tr. 113, 159-160, Agency Exhibit 6)*.
19. Despite Respondent's expressed desire to obtain a retest, Dr. Bourgeois concluded that Respondent actually sought another urine test. *(Tr. 119)*. This assumption was based on Dr. Bourgeois' past experience with patients who have requested a second urinalysis after testing positive for drugs. *(Tr. 119)*.
20. Dr. Bourgeois informed the Respondent that a retest was not a new urinalysis, but rather a retest of the original split sample specimen provided on August 23, 2002. *(Tr. 117-119)*. When a retest is performed, the lab only checks to see if the drug is present in the urine and whether the test was conducted properly. *(Tr. 117-119)*. More specifically, the split specimen retest is conducted qualitatively not quantitatively, and the cutoff limit is significantly lower than on the first test. *(Tr. 117-119)*.
21. Because a split specimen retest only determines whether a drug is present in the urine, Dr. Bourgeois considers it a waste of time and typically advises patients against seeking a retest even when they request it. *(Tr. 119, 152-154)*.

22. Dr. Bourgeois advised Respondent to discuss the retest with his employer, Tidewater Marine. If Respondent still wanted the split sample tested, he could call the Bourgeois Medical Clinic and request it again. *(Tr. 113, 119, Agency Exhibit 6)*.
23. The Respondent never notified Dr. Bourgeois of his decision to retest the split sample after the procedure was explained. *(Tr. 113, 119, Agency Exhibit 6)*. Dr. Bourgeois subsequently indicated in his MRO report that the Respondent was offered a retest but failed to respond after the retesting procedure was explained. *(Tr. 120, 155-156, 159, Agency Exhibit 6)*.
24. Dr. Bourgeois did not direct Quest Diagnostics to retest the split sample. *(Tr. 158)*.
25. Although the Respondent indicated he was taking prescribed medications, Dr. Bourgeois did not record these prescriptions in his report as he determined they would not interfere with the drug-screening test. *(Tr. 115, 139)*. Accordingly, Dr. Bourgeois did not confer with the Respondent's physicians to determine whether treatment for a back and shoulder injury could have resulted in a positive drug test for cocaine. *(Tr. 149-151, 164)*.
26. Dr. Bourgeois considered the type of drug test used by Quest Diagnostics to be virtually infallible. *(Tr. 151)*. In his opinion, the gas chromatography/mass spectrometry is the "gold standard for substance testing." As such, Dr. Bourgeois determined that none of the medications mentioned by the Respondent would give a false positive. *(Tr. 113-114, 151)*.
27. The Respondent claimed to be taking the prescribed medications Carisoprodol and Vicoprofen. Carisoprodol is a neurological blocking agent often used in sleep medication or as a muscle relaxant. *(Tr. 80)*. It is a synthetic derivative of the heroin poppy and resembles the activities of opiates. *(Tr. 81)*. Vicoprofen is a combination drug that contains Hydrocodone and Ibuprofen. It is a man-made synthetic opiate that is legally prescribed as a



painkiller. (*Tr.* 82-83). Neither of the prescriptions, either separately or combined, would cause the Respondent's urine sample to test positive for cocaine metabolite. (*Tr.* 81, 84).

**ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent Neuell Griffith and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7704(c) (West Supp. 2002); 46 C.F.R. Parts 5 and 16 (2002); and 33 C.F.R. Part 20 (2002).
2. At all relevant times, Respondent Griffith was the holder of U.S. Coast Card issued License No. 894821.
3. On August 23, 2002, Respondent Griffith voluntarily submitted to an employer-directed urinalysis for dangerous drugs.
4. The use of a Federal Drug Testing Custody and Control Form for a non-federal employer-directed drug test did not invalidate the results as the urinalysis was conducted under 49 CFR Part 40 procedures and the chain of custody remained intact.
5. Respondent's specimen sample was collected, labeled, sealed, and released to Quest Diagnostics Laboratory in Atlanta, Georgia in accordance with all chemical and urine testing rules, including 46 C.F.R. Part 16.
6. Respondent's urine specimen was examined, handled using chain of custody procedures, analyzed and reported in accordance with all chemical and urine testing rules, including 46 C.F.R. Part 16.
7. On August 28, 2002, Respondent's specimen tested positive for cocaine as it exceeded the DOT threshold for cocaine metabolite on both the initial and confirmation tests.

8. The Respondent failed to present a legitimate medical explanation that would account for the presence of cocaine metabolite in his urine sample.
9. The charge of “**Use of or Addiction to the Use of Dangerous Drugs**” against the Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.

### DISCUSSION

In a suspension and revocation proceeding, the Coast Guard carries the burden of proving an alleged violation by a preponderance of the evidence. See 5 USC § 556(d); see also, 33 CFR §§ 20.701 and 20.702; Appeal Decision 2485 (YATES); Appeal Decision 2635 (SINCLAIR). However, when a mariner is specifically charged with the use of a dangerous drug, the governing regulations allow a presumption of drug use if the individual provides a urine sample and fails a chemical test conducted in accordance with 46 C.F.R. Part 16, which incorporates the DOT drug testing regulations codified at 49 C.F.R. Part 40 by reference. See 46 C.F.R. § 16.201(b). When the Coast Guard seeks to rely upon the regulatory presumption, all of the elements of the case must be shown by substantial evidence of a reliable and probative nature. See Appeal Decision 2603 (HACKSTAFF); see also, Appeal Decision 2592 (MASON). Therefore, 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. Part 16. See, Appeal Decision 2603 (HACKSTAFF); see also, Appeal Decision 2614 (WALLENSTEIN), Appeal Decision 2592 (SHAKESPEARE).

A chemical test falls within the scope of 46 C.F.R. Part 16 if the urinalysis was issued for one of the five (5) following reasons: pre-employment, periodic, random, serious marine

incident, and reasonable cause testing. See 46 C.F.R. §§ 16.210 – 16.250. If the urinalysis does not fall within one of the five categories specifically delineated in 46 CFR Part 16, the presumption of drug use does not attach. However, that fact alone does not preclude the test results from being admissible in determining whether the Respondent used a dangerous drug. Appeal Decision 2633 (MERRILL). Moreover, any fact that sheds light on the proof or falsity of a charge may properly be considered for what it's worth. See Appeal Decision 2252 (BOYCE); see also, Appeal Decision 2542 (DEFORGE). Therefore, the Coast Guard may offer evidence from any source that establishes drug use in violation of 46 U.S.C. § 7704. In turn, the Administrative Law Judge may consider any relevant and material evidence of drug use, including a chemical test that was not performed in strict adherence to the procedures of 46 C.F.R. Part 16 and 49 C.F.R. Part 40. See Appeal Decision 2542 (DEFORGE).

In this case, the Respondent agreed to take the employer-directed drug test following a leave of absence to recover from a back injury. A review of the record reveals that the Respondent did not object to his employer's request and voluntarily took the test, as he understood it was merely a part of the company's policy before a mariner could return to work after taking an extended leave of absence. (*Tr. 171*). As such, the evidence shows that the Respondent made an independent decision based on his own free will to take the drug test. In turn, it has been repeatedly held that revocation of a mariner's license can be predicated upon a voluntarily submitted urine sample that tests positive for an illegal drug. See Appeal Decision 2635 (SINCLAIR); see also Appeal Decision 2545 (JARDIN); Appeal Decision 2633 (MERRILL). Summarily, the Respondent's voluntary sample can be used as the basis for a charge of dangerous drug use.

It should be noted that even if the urinalysis was not voluntary, it might still be considered relevant evidence of drug use, as an employer has the right to request a non-federal test. According to Louisiana case law, an employer's policy of compulsory drug testing does not abuse the rights of its employees if the rule is reasonable and directly related to its goal of providing a safe place for its workers. See Chiles Offshore, Inc. v. Dept. of Employment Sec., 551 So.2d 849 (La App. 3 Cir. 1989); see also Casse v. Louisiana General Services, Inc., 531 So.2d 554 (La App. 5 Cir. 1988). In the instant case, Tidewater Marine Corporation has a legitimate interest in maintaining a drug-free work environment by instituting a drug-testing policy before an employee returns to work after an extended leave of absence. Thus, the Respondent's rights were not abused by the imposition of a mandatory urinalysis.

Although a technical violation of the regulations occurred when both the collection site and the laboratory used the Federal Drug Testing Custody and Control Form for a non-federal test, the error did not invalidate the urinalysis results. It is important to note that the applicable regulations require DOT tests be completely separate from non-DOT tests in all respects. See 49 C.F.R. § 40.13(a). In particular, an employer is prohibited from using the Custody and Control Form for non-federal urine collections. See 49 C.F.R. § 40.47(a). However, the regulations also provide that the use of the incorrect form does not automatically cancel the test, but rather is deemed a correctable flaw. See 49 C.F.R. § 40.47(b).

While the technical error in the present case was not corrected by the MRO, case law has repeatedly held that a positive test result of an individual's urinalysis sample may still be considered substantial evidence as long as the record indicates the actual chain of custody has been maintained. See Appeal Decision 2606 (SWAN); see also Appeal Decision 2541 (RAYMOND), Appeal Decision 2603 (HACKSTAFF), Appeal Decision 2541 (RAYMOND).

Therefore, tests that contain technical errors or minor infractions of the regulations, which do not affect the integrity of the sample, will still support the inference of drug use. Appeal Decision 2606 (SWAN), Appeal Decision 25555 (LAVALLAIS), Appeal Decision 2627 (SHAFFER).

In this case, the evidence and testimony adduced at the hearing fully support the integrity of the chain of custody and provide sufficient proof that the urinalysis is scientifically valid. In particular, the urinalysis specimen was collected and analyzed by trained, experienced and qualified persons using carefully approved procedures and rules that govern chemical urinalysis drug testing. To begin with, Ms. Tessie Dupre collected the Respondent's urine sample at the Bourgeois Medical Clinic and assigned an appropriate identification number, which followed the sample throughout the screening process. (*Tr. 33-34, Agency Exhibit 1, 3*). The specimen was placed in an appropriate container and sealed with a tamperproof seal in the Respondent's presence. (*Tr. 43-44*). In addition, both Ms. Dupre and the Respondent signed the Custody and Control Form certifying that the specimen was in fact submitted by the Respondent, that the information provided on the form was correct, and that the sample was collected, labeled and sealed in accordance with federal regulations. (*Tr. Tr. 44, Agency Exhibit 1, 3*).

Next, the initial screening and scientific analysis of Respondent's urine sample indicated the presence of cocaine metabolite. A confirmation test and additional analysis were achieved through a gas chromatography/mass spectrometry test in accordance with the guidelines established in 49 CFR 40.29(f). (*Tr. 70-71, Agency Exhibit 4*). The test results were forwarded to the MRO, Dr. Melvin Bourgeois of the Bourgeois Medical Clinic, who reviewed the results and conducted an interview with the Respondent. (*Tr. 92, 94, 103-105, Agency Exhibit 4 and 5*). Thereafter, the MRO confirmed that the laboratory test results were positive. (*Tr. 92, 94, 103-105, Agency Exhibit 4 and 5*).

The record indicates that the chemical tests and procedures followed by Quest Diagnostics were conducted in accordance with 46 C.F.R. Part 16. Dr. Edward A'Zary, the laboratory's Scientific Director, verified that Quest Diagnostics is a certified facility and medical laboratory. (*Tr. 43-44, 59-60, 65, Agency Exhibit 1*). Through credible testimony, Dr. A'Zary described the procedures followed once the specimen arrived at the laboratory. More specifically, after ensuring the specimen arrived intact, the sample was carefully analyzed according to tested and approved procedures by the laboratory scientists and computers. (*Tr. 77, Agency Exhibit 4*). Moreover, the receipt of the specimen, as well as the handling and testing procedures, are documented on the laboratory's internal chain of custody. (*Agency Exhibit 4*).

Substantial evidence of a reliable and probative nature exists in the record to support a determination that Respondent Griffith used a dangerous drug. Although the Respondent failed to produce any evidence to sufficiently rebut the accuracy or validity of the test, he raises two affirmative defenses. First, the Respondent contends that the Medical Review Officer ignored an explicit request to retest the urine specimen, which denied the Respondent an opportunity to refute the validity of the test results. Second, the Respondent argues that the MRO failed to conduct a thorough medical investigation to determine whether the Respondent's use of prescription medicine interfered with the screening results. For the reasons stated herein, all of the Respondents' arguments are rejected.

I. The Medical Review Officer did not Invalidate the Test Results by Failing to Honor the Respondent's Request to Retest the Urine Sample

Respondent Griffith asserts that the absence of a retest denied him the opportunity to refute the validity of the test and the ability to prove he never used cocaine. Having been denied the necessary exculpatory evidence, Respondent argues that he was severely prejudiced and the

integrity of the drug screening process was compromised. As such, Respondent contends that the laboratory test results indicating the presence of cocaine metabolites are invalid.

The federal drug screening regulations are in place not only to ensure a system of checks and balances during collection and analysis of specimens, but also to protect the integrity of the drug screening process. See Appeal Decision 25555 (LAVALLAIS). The regulations governing these proceedings provide that an employee has a right to obtain a retest of a split urinalysis sample upon notification of a positive result. See 49 C.F.R. § 40.171(a). The applicable regulations further provide that the request may be verbal or in writing. See Id. However, once the request is made, the MRO must immediately provide written notice to the testing laboratory, directing the facility to forward the split specimen to a second certified laboratory. See 49 C.F.R. § 40,171(c).

In this case, Respondent immediately requested a retest of the split specimen upon learning that he tested positive for cocaine. Although Dr. Bourgeois documented this request in the medical review records, he ignored the Respondent's initial request and failed to instruct Quest Diagnostic to forward the sample onto a second laboratory for retesting. Dr. Bourgeois testified that he assumed Respondent actually sought another urine test rather than a split sample retest. (*Tr. 119*). This conclusion was based on Dr. Bourgeois' past experience with patients who've requested a second urinalysis after testing positive for drugs. (*Tr. 119*). Dr. Bourgeois further testified that he considers the retest "a waste of time" and typically advises patients against seeking a retest even when they request it. (*Tr. 119, 152-154*). Accordingly, Dr. Bourgeois advised Respondent to discuss the retest and its financial cost with his employer, Tidewater Marine. If Respondent still wanted the split sample tested, he could call the Bourgeois Medical Clinic and request it again. (*Tr. 113, 119, Agency Exhibit 6*).

Considering a mariner's livelihood is at stake, Dr. Bourgeois should have taken the time to diligently listen and communicate with the Respondent. This would include, at the very least, a display of civility and consideration towards the Respondent during the interview. Instead, Dr. Bourgeois leapt to a brash and incorrect assumption. The Respondent testified that he specifically requested a split sample test, with the knowledge that another aliquot of the original sample would be retested. (*Tr. 188*). In fact, the Respondent's knowledge of his rights regarding the retesting process was detailed in the information provided at the Bourgeois Medical Clinic. (*Tr. 189*). Yet, despite Respondent's explicit request, Dr. Bourgeois improperly directed the Respondent to first discuss the matter with his employer before contacting the Clinic with a second request. A thorough review of governing regulations reveals that there are no such additional requirements that must be fulfilled before a mariner may request a split specimen test.

Although the MRO's failure to honor the initial request for retest constitutes clear error, it did not invalidate the test results. There was substantial evidence in the record corroborating the integrity of the specimen. Moreover, the record as a whole reflects that sufficient safeguards and procedures were employed to ensure a proper chain of custody and an unadulterated specimen. As such, the error is not fatal.

It should be noted that a number of times throughout the course of the hearing, the Administrative Law Judge extended the opportunity to retest the split sample of Respondent's urine. (*Tr. 156, 160, 191*). However, Respondent repeatedly rejected this offer. (*Tr. 156, 160, 191*). As such, the Respondent's argument that he was severely prejudiced by the inability to retest the urinalysis is without merit.



II. The Medical Review Officer's Inquiry into Respondent's use of Prescription Medication was Complete

Respondent Griffith asserts that Dr. Bourgeois failed to adequately interview him regarding his medical history or afford him the opportunity to present a legitimate medical explanation. More specifically, Respondent alleges that Dr. Bourgeois erroneously believed the Respondent initially tested positive for marijuana rather than cocaine. Because Dr. Bourgeois was confused as to the nature of the drug detected, he prematurely dismissed the possibility that Respondent's prescription medication could cause a false positive. Respondent states that he was undergoing treatment for a back and shoulder injury that he sustained a few months prior to the drug test. As such, Dr. Bourgeois was required by federal regulations to thoroughly review the Respondent's medical history and contact his primary care physician to determine whether treatment for this injury was a potential cause for a positive test result.

The applicable regulations provide specific guidelines to assist Medical Review Officers through the verification process. See 49 C.F.R. Part 40. In particular, the regulations provide that the MRO normally verifies a confirmed positive test after interviewing the employee. See 49 C.F.R. § 40.133(a). During the medical interview, the MRO must review the employee's medical history and any other relevant factors presented by the employee. See 49 C.F.R. § 40.141(a). However, the employee carries the burden of proving that a legitimate medical explanation exists. See 49 C.F.R. § 40.137(c).

If the employee asserts that prescription medication interfered with the screening process, the MRO must review and take reasonable steps to verify the authenticity of all medical records provided by the employee. See 49 C.F.R. § 40.141(b). In addition, the MRO may contact the employee's physician if he believes further information is necessary. See 49 C.F.R. § 40.141(b).

On the other hand, if the employee fails to present a legitimate medical explanation for the presence of drugs in his system, the MRO must verify the test result as positive for drugs. See 49 C.F.R. § 49.137(a).

In this case, Dr. Bourgeois made a determination that the type of prescription medication taken by the Respondent would not interfere with the urinalysis results. According to the testimony of both the Respondent and Dr. Bourgeois, the Respondent was given the opportunity to present a legitimate medical explanation for testing positive. More specifically, when the Respondent replied that he had never used drugs or been around drug use, Dr. Bourgeois inquired about possible prescription medication. (*Tr. 114-115, 176, 186*). However, Dr. Bourgeois determined that none of the medications mentioned by the Respondent would give a false positive because the type of confirmation test used by Quest Diagnostics is virtually flawless. (*Tr. 151*). Dr. Bourgeois testified that the gas chromatography/mass spectrometry is the “gold standard for substance testing” because there are no known medical prescriptions that will interfere with the results. (*Tr. 113-114, 140, 151, 164-165*). In fact, Dr. Bourgeois stated that the only medical explanation for a specimen to test positive for cocaine is a legitimate medical prescription for cocaine. (*Tr. 113-115, 151, 164-165*).

Based on the information provided by the Respondent, Dr. Bourgeois determined that there was no verifiable legitimate medical explanation for the positive test result. As Dr. Bourgeois was satisfied with this determination, additional information regarding the Respondent’s medical history and records was not necessary. Accordingly, Dr. Bourgeois was not required to extend his investigation into the Respondent’s entire medical history or even confer with the Respondent’s other physicians.

Upon review of the documentary evidence and the record as a whole, I find that the Respondent has not presented a legitimate medical explanation that would account for the presence of cocaine metabolite in his urine sample. The Respondent claimed to be taking the prescribed medications Carisoprodol and Vicoprofen. According to the testimony of Dr. Edward A'Zary, the Scientific Director at Quest Diagnostics, neither of the prescriptions, either separately or combined, would cause the Respondent's urine sample to test positive for cocaine. (*Tr. 81, 84*). More specifically, Carisoprodol is merely a neurological blocking agent often used in sleep medication or as a muscle relaxant. (*Tr. 80*). It is a synthetic derivative of the heroin poppy that resembles the activities of opiates. (*Tr. 81*). Similarly, Dr. A'Zary explained that Vicoprofen is a man-made synthetic opiate that is legally prescribed as a painkiller. (*Tr. 82-83*).

The Respondent's mere assertion of prescription drug use was not sufficient to meet his burden of producing a legitimate medical explanation for the presence of cocaine in his system. At the hearing and throughout these proceedings, the Respondent declined to produce any evidence and/or expert testimony to demonstrate how those specific prescription drugs would interfere with the urinalysis or create a false positive for cocaine. In short, the Respondent failed to produce persuasive evidence to rebut the inference of illicit drug use.

### **SANCTION**

Once the charge of dangerous drug use is found proved, all licenses and documents shall be revoked unless the Respondent establishes satisfactory proof of cure. See 46 U.S.C. § 7704(c); see also 46 C.F.R. § 5.59(b); Appeal Decision 25555 (LAVALLAIS); Appeal Decision 2527 (GEORGE). In this case, the drug in issue is cocaine and the Respondent did not provide any satisfactory evidence of cure. Accordingly, an outright revocation of Respondent's license is mandatory. WHEREFORE,

**ORDER**

**IT IS ORDERED** that U.S. Coast Guard License No. 894821, issued to the Respondent is hereby REVOKED. Respondent is ordered to immediately surrender his License to the Investigating Officers at U.S. Coast Guard Marine Safety Office Morgan City, Louisiana. It is hereby further,

**ORDERED** that the service of this Decision on the Respondent's counsel will serve as notice to the Respondent of his right to appeal, the procedure for which is set forth in 33 C.F.R. 20.1001-20.1003. (Attachment A)



**ARCHIE R. BOGGS**  
**Administrative Law Judge**  
**U.S. Coast Guard**

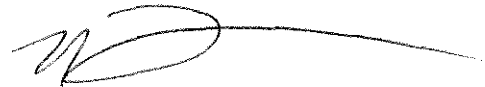
Dated this 20th day of August, 2003  
New Orleans, Louisiana

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon the following parties  
(or their designated representative) to this proceeding at the addresses indicated by Federal  
Express.

James A. Wilson, Assistant Senior Investigating Officer  
LTJG. Boris K. Towns  
United States Coast Guard  
Marine Safety Office  
800 David Drive, Room 232  
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