

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

UNITED STATES COAST GUARD

Complainant

VS

**JOHN J. BLUITT,**  
Respondent.

Docket Number CG S&R 03-0043  
CG Case No. PA 1728746

**DECISION AND ORDER**

**Issued: October 28, 2003**

**Issued by: Edwin M. Bladen, Administrative Law Judge**

**Appearances:**

**For the Coast Guard**

Dennis J. O'Mara, LTJG,  
Marine Safety Office  
110 Mt. Elliott Ave.  
Detroit, MI 48207

**For the Respondent**

John J. Bluitt, *Pro Se.*

**PRELIMINARY STATEMENT**

Respondent holds Merchant Mariner's Documents which authorize him to serve as an Able Bodied Seaman [unlimited] and a Wiper. Prior to serving as such for a particular marine employer, Respondent took a pre-employment drug test. The results of

that test were reported to the prospective employer and the Coast Guard, that the submitted urine specimen tested positive for a dangerous drug. As a result, a complaint was filed by the Coast Guard Marine Safety Office Detroit, Michigan on January 15, 2003 alleging the positive drug test result and requesting that Respondent's Merchant Mariner's Documents (MMD) be revoked as mandated by 46 USC § 7704(c).

Thus, under the authority of 46 USC § 7704, 46 CFR § 5.35 and 5 USC §§ 556-558, this proceeding was commenced.

Respondent did not file a written answer to the complaint. However, on February 12, 2003, Respondent submitted an Affidavit in connection with an assertion of a lost or missing document and the circumstances surrounding that loss.<sup>1</sup> Respondent asserted he mailed his documents to the Marine Safety Office in New York City. MSO New York has been unable to locate any such document.<sup>2</sup> He further asserted that he was notified of his positive drug test by a Medical Review Officer and thus made the submission as noted. He also attached a note declining a settlement offer and demanded a hearing.

A hearing was scheduled for July 22, 2003 in Detroit, Michigan. However, the Judge's Legal Assistant/Paralegal Specialist learned from the Investigating Officer (IO), LTJG Dennis O'Mara of Respondent's suggestion of his inability to personally appear at the hearing in Detroit, Michigan on July 22, 2003. In order to more fully understand that suggestion, and to determine the reasons for Respondent's failure to submit a formal written answer to the complaint, a telephonic pre-hearing conference was scheduled for 9:00 AM PDT on June 9, 2003. The IO advised he had communicated with Respondent who said he would be telephonically available for that pre-hearing conference. Contrary

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<sup>1</sup> See, Complaint file and Affidavit submitted to ALJ Docketing Center, February 19, 2003.

<sup>2</sup> See email communications between LTJG O'Mara and Mary Purfeerst, Legal Assistant/Paralegal Specialist to this Judge in complaint file.

to these representations to the IO, Respondent failed to appear for this pre-hearing conference and it was therefore not conducted.<sup>3</sup>

Because of the likelihood that Respondent could not personally appear at the hearing site in Detroit, Michigan on July 22, 2003, a telephonic hearing was determined to be most efficient to afford the Respondent the opportunity to appear, participate in the hearing, and hear the evidence on that date.

Otherwise, no *ex parte* communication was made to or with this judge during the course of this proceeding.<sup>4</sup>

A telephonic hearing on the complaint was convened on July 22, 2003 at 9:00 AM PDT (12:00 noon EDT). Respondent telephonically appeared for the hearing and fully participated. The hearing was transcribed.

The parties were afforded the opportunity to submit proposed findings of fact and conclusions of law as provided in the Administrative Procedures Act. The parties waived that filing and instead agreed to file written closing argument. The record was closed on July 22, 2003.

A transcript was filed on August 7, 2003. The parties filed their closing arguments. From a consideration of the entire record including the testimony of the witnesses, the documentary evidence presented, a review of the closing arguments of the parties permits this Judge to render the following decision and order in this matter.

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<sup>3</sup> The Judge was holding a hearing on another matter and interrupted this hearing in an effort to accommodate Respondent.

<sup>4</sup> See, 5 USC § 557(d)(1)(C).

## FINDINGS OF FACT

1. Respondent holds a Merchant Mariner's Document as an Able Bodied Seaman (Unlimited) and as a wiper.<sup>5</sup>
2. During an October 4, 2001, pre-employment drug test, Respondent appeared at a Seafarer's Union designated collection site for the purpose of submitting a split urine specimen.
3. Respondent signed a Federal Drug Testing Custody and Control Form showing specimen number 3534620.<sup>6</sup>
4. A urine specimen was collected by Debbie Biland at 2700 Point Tremble, Algonac, Michigan 48801.<sup>7</sup>
5. The collector, Ms. Biland has been employed as a medical assistant for six years, has collected about 100 specimens, but has no recollection of Respondent.<sup>8</sup>
6. The Federal Drug Testing Custody and Control Form is routinely filled out by the collector, Ms. Biland, with a donor's name and social security number, which information is taken from a chart and form she has when the donor appears at the site. The donor completes Step 5 of the form with the donor's signature, date of birth and phone number.<sup>9</sup>
7. The Drug Testing Custody and Control Form bearing specimen number 3534620 contained Respondent's name, social security number, signature, telephone number and date of birth.<sup>10</sup>

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<sup>5</sup> CG Exhibit 1

<sup>6</sup> CG Exhibit 4A

<sup>7</sup> CG Exhibit 4, page 6

<sup>8</sup> Transcript, 7/22/03 at pages 11 and 18

<sup>9</sup> Transcript, 7/22/03 page 23

<sup>10</sup> CG Exhibit 4A

8. The collector, Ms. Biland does not routinely or customarily request drug test donors for picture identification, but the identity of the donor is determined by comparing a signature on a form presented to the collector by the donor at the time of the testing and the signature ultimately inserted by the donor on the Custody and Control form.<sup>11</sup>
9. Once the donor returns the urine specimen to the collector, it is placed on a counter in the laboratory and then its temperature is determined to be within specification, transferred to separate control bottles, and then sealed with tamper evident seals, which are initialed by the collector, Ms. Biland with the donor's initials.<sup>12</sup>
10. The collector was trained to insert the donor's social security number in Step 1 from a chart or form, and not obtain picture identification or a social security number from the donor.<sup>13</sup>
11. The collector was trained to write the donor's initials on the tamper evident seals instead of the donor doing so.<sup>14</sup>
12. The urine specimen number 3534620 was placed in an overnight pouch and transmitted to, and analyzed by Quest Diagnostics, Schaumburg, IL a certified drug testing laboratory<sup>15</sup> using Enzyme Immunoassay and Gas Chromatography/Mass Spectrometry procedures approved by the Department of Transportation.<sup>16</sup>

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<sup>111</sup> Transcript, 7/22/03 at pages 23 ff

<sup>112</sup> Transcript, 7/22/03, pages 18-19

<sup>113</sup> Transcript, 7/22/03, page 19

<sup>114</sup> Transcript, 7/22/03, page 19

<sup>115</sup> CG Exhibit 3

<sup>116</sup> CG Exhibit 4 pp. 7ff

13. The specimen Number 3534620 was determined to be positive for the metabolite for Marijuana – 9 CARBOXY THC.<sup>17</sup>

14. A Medical Review Officer, David M. Katsuyama M.D. of Greystone Health Sciences Corporation interviewed Respondent and determined there was no medical reason or justification for a positive metabolite for marijuana, and therefore the test was a valid test and confirmed the positive result.

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

1. Jurisdiction is established in this matter by reason of Respondent's licensure. See, 46 U.S.C. §7704(c); NTSB Order No. EM-31 (STUART); *Appeal Decision (Fossani)* No. 2135.

2. Respondent has submitted a lost document affidavit in response to the complaint, a demand for a hearing, fully participated in the hearing of this matter, and filed closing arguments all of which are construed as an answer to the complaint and will not be considered as an admission of the facts as provided in 33 CFR § 20.608(d).

3. The collector's and collection facility's routine failure to obtain positive picture identification from donors and thus Respondent fails to comply with the mandate in 49 CFR § 40.61(c).

4. The collector's practice of comparing the donor's signature contained on a form provided to the collection facility with the signature placed by the donor on the Federal Drug Testing Custody and Control Form in Step 5 does not constitute a substantially sufficient alternative compliance with the mandatory positive identification

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<sup>17</sup> CG Exhibit 4, p. 38.

requirements in 49 CFR § 40.61, Department of Transportation Urine Specimen Collection Guidelines, for the U.S. Department of Transportation Workplace Drug Testing Programs.

5. The collector's routine insertion of a donor's initials on the tamper evident seals, instead of the donor or Respondent doing so fails to comply with the requirements in 49 CFR § 40.71(b)(7).

6. Substantial, reliable and probative evidence exists showing that a urine specimen was placed into two separate test vials, sealed with tamper evident seals containing Respondent's initials, and the unique control number, but there is a lack of substantial, reliable and probative evidence showing that this was done in the physical presence of the Respondent, and thus was not in substantial compliance with 49 CFR § 40.71.

7. All of the training requirements a collector must meet specified in 49 CFR § 40.33 were not met by the collector or likely the collection facility used in this case.

8. As a result, there is a lack of substantial, reliable and probative evidence showing the Coast Guard has proved the Respondent was the person who was tested for dangerous drugs, or it was the Respondent's urine specimen which failed the test.

9. The Coast Guard's complaint is thus found not proved.

### DISCUSSION

In these cases the Coast Guard must prove its case against the mariner charged on the basis of reliable, probative and substantial evidence. 46 CFR § 5.63. This substantial evidence standard has been determined to be the equivalent of the preponderance of the

evidence standard. *Appeal Decision(Gardner) No. 2472 and Steadman v. United States*, 450 US 91 (1981) which concluded that the preponderance of evidence standard shall be applied in administrative hearings governed by the Administrative Procedures Act, such as this.

For some time now, the Coast Guard has brought cases charging use of a dangerous drug under 46 USC § 7704(c) based solely upon the results of chemical testing by urinalysis. 46 CFR § 16.201(b) provides that one who fails a chemical test for drugs under that part will be presumed to be a user of dangerous drugs. In turn, 46 CFR § 16.105 defines "fail a chemical test for dangerous drugs" to mean that a Medical Review Officer reports as "positive" the results of a chemical test conducted under 49 CFR § 40. In other words, 46 CFR § 16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 CFR § 40 chemical test of a merchant mariner's sample or specimen was reported positive by an MRO. This presumption, however, does not dispense with the obligation to establish the elements leading to the presumption by the same standard of proof, *i.e.*, the elements of the case must be proven by a preponderance of the evidence. The elements of a case of presumptive use are.

First, the Respondent was the person who was tested for dangerous drugs. Second, the Respondent failed the test. Third, the test was conducted in accordance with 49 CFR Part 40.

Proof of these three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, presumption of drug use) which then shifts the burden of going forward with the evidence to the Respondent to rebut the presumption. If the rebuttal fails then this



Judge may find the charge proved solely on the basis of the presumption. See, *Appeal Decisions* 2592 (*Mason*) 2584 (*Shakespeare*); 2560 (*Clifton*).

#### Application of The Evidence to the Elements

On October 4, 2001, Respondent appeared at a collection facility sponsored by the Seafarers International Union for a pre-employment drug test. A urine specimen was collected by Debbie Biland of Dr. Tae Hong Chung's office. The Respondent signed a Federal Drug Testing Custody and Control Form. The urine specimen was collected and analyzed by Quest Diagnostics of Schaumburg, IL using procedures approved by the Department of Transportation. That specimen subsequently tested positive for marijuana metabolite.

The record also shows the signed Federal Drug Testing Custody and Control Form (CCF) displayed specimen ID No 3534620 and accession control number 9726195S.

The testimony, regarding the collector's and facility's regularly used collection procedures, have significant portions which raise sufficient ambiguity to call into question whether Respondent is the person tested and whether it was his urine specimen was the one tested positive for the metabolite for marijuana.

The collector said she has no recollection of the Respondent. She sees many donors. She claims to have performed about 100 tests during her tenure as a collector.

The collector testified she was trained in the following collection procedures: First, she routinely fills out the upper half (this is Steps 1 thru 5) of the Federal Drug Testing Custody and Control form (CCF) with the donor's name, social security number.

This information is taken from a form contained in the donor's medical chart.<sup>18</sup> The record is short on substantial evidence showing the Respondent is the person who brought the form to the collection facility identified by the collector.

The collector said she never asks a donor for picture identification to compare with the information taken from the form or chart. The collector has no recollection of Respondent. However, the collector routinely compares a signature on a form contained in a chart with the signature the donor places on the CCF. The collector says that is their way of identifying the donor is the person to be tested.

The collector routinely puts the donor's initials on the tamper evident seals at the time of the collection, not the donor. When the donor returns the urine specimen after voiding into the collection container, the specimen is checked for temperature, and is then separated into two separate vials or test bottles, sealed with the already initialed tamper evident seals and the specimen number.

I do not doubt the credibility of Ms. Biland. She was forthright in admitting to her training and customary collection procedures.

Thu, in making this determination, the interest and integrity of the drug testing system will be taken into consideration. See, *Appeal Decision 2631 (Sengel) (2002)*.

A comparison of the questioned collection procedures routinely used by Ms. Biland and those mandated by 49 CFR § 40.61 - § 40.73 is therefore necessary to resolve this dilemma.

And, once this comparison is completed, I must answer these questions: Do any variations amount to such serious violations or fatal flaws as to cast doubt on the identity

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<sup>18</sup> The CCF does not contain a date of birth section in Step 1. That information is conveyed in Step 5 which is to be completed by the Donor.

of the donor, and doubt on whether the specimen tested positive was indeed the specimen provided by the Respondent. In other words, are they merely technical lapses which may be dismissed?

I start with an inquiry into those collection procedures relevant to the identity of the donor thus connecting that identity to the particular urine specimen tested.

At the outset, I must note that strict adherence to the procedures set out in 49CFR Part 40 is not required. See *Appeal Decision 2542 (Deforge)*. Minor technical violations of the drug testing regulations that do not result in a breach of the chain of custody or violate the specimen's integrity does not invalidate the drug test. *Appeal Decision 2541 (Raymond); 2537 (Chatham)*. Nevertheless, a finding that the Coast Guard has proved its case must still be supported by substantial, reliable, and probative evidence. *Appeal Decision 2603 (Hackstaff)*.

The identity of the person providing the specimen for drug testing is an essential element of the Coast Guard's prima facie case. *Hackstaff at p.8*. Whether the collector adequately identified the Respondent as the donor of the urine sample is a question of fact for the Administrative Law Judge to determine. *Appeal Decision 2542 (Deforge)*.

In *Hackstaff* the Commandant stated that proof that the respondent was the person who was tested for dangerous drugs "necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample under or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample." *Hackstaff* at p 6.

In that respect then, Section 40.61(c) requires the employee-donor provide positive identification. The collector must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (e.g., a driver's license) identification document.

The collector did not require Respondent provide such positive ID. She was never trained to do so. However, she did compare the signature on the chart or paper she possessed with the signature placed by the donor on the CCF.<sup>191</sup><sup>191</sup> In this way she says the donor is satisfactorily identified as the person to be tested. I am troubled by this procedure for the following reasons.

An examination of the Department of Transportation Urine Specimen Collection Guidelines, for the U.S. Department of Transportation Workplace Drug Testing Programs<sup>20</sup> reveals the following regarding appropriate identification.

#### **SECTION 5. EMPLOYEE IDENTIFICATION**

The employee must provide appropriate identification to the collector upon arrival at the collection site. Acceptable forms of identification include:

1. A photo identification (e.g., drivers license, employee badge issued by the employer, or any other picture identification issued by a Federal, state, or local government agency), or
2. Identification by an employer or employer representative, or
3. Any other identification allowed under an operating administration's rules.

Unacceptable forms of identification include:

<sup>191</sup> Transcript 7/22/03 at page 23

<sup>20</sup> See [http://www.dot.gov/ost/dapc/prog\\_guidance.html](http://www.dot.gov/ost/dapc/prog_guidance.html) (last accessed September 29, 2003)

1. Identification by a co-worker.
2. Identification by another safety-sensitive employee.
3. Use of a single non-photo identification card (e.g., social security card, credit card, union or other membership cards, pay vouchers, voter registration card), or
4. Faxed or photocopies of identification document.

Note: If the employee cannot produce positive identification, the collector must contact a DER to verify the identity of the employee. The collection should not proceed until positive identification is obtained. However, if an owner/operator or other self-employed individual does not have proper identification, the collector should record in the remarks section that positive identification is not available. The owner/operator must be asked to provide two items of identification bearing his/her signature. The collector then proceeds with the collection. When the owner/operator signs the certification statement, the collector compares the signature on the CCF with signatures on the identification presented. If the signatures appear consistent, the collection process continues. If the signature does not match signatures on the identification presented, the collector makes an additional note in remarks section stating "signature identification is unconfirmed."

This guideline points out that the use of items containing a signature is limited to Owner/Operators and does not suggest that an alternative identification procedure, such as signature comparison, is permitted with respect to an employee or prospective employee such as Respondent.

Since the reason for Respondent's drug test was as a pre-employment test, the conclusion can only be that Respondent is not an Owner/Operator but an employee. From my inquiry of the collector, Ms. Biland, I seriously doubt she was aware of this difference, because when asked about picture identification she maintained she doesn't ask for any because that is the way she was trained.

For me, then, the question is whether the failure to follow the applicable rule or the guideline is sufficient reason to say there is serious doubt as to the chain of custody or identity of the specimen tested it was one that belonging to the Respondent. Of particular significance, this guideline directs, if there is a failure to positively identify the donor as the one to be tested, then the collection must not proceed. The only positive ID allowed for an employee drug test is picture Identification or someone in authority vouching for the donor's identity.

The Coast Guard has expressly adopted the Department of Transportation's drug testing rules and policies, which include the DOT guidance documents. See 46 CFR § 16.113(a) [drug testing programs must be conducted in accordance with 49 CFR Part 40 Procedures for Transportation Workplace Testing Programs]

It is a cardinal principal of administrative law, founded on the need for orderly, uniform and predictable decision making, that this judge is bound to apply an agency's legislative or interpretive rules including its statement of policies. See, *Gray Lines Tour Co. of Southern Nevada v. ICC*, 824 F.2d 811, 814 (9th Cir. 1987); *National Latino Media Coalition v. FCC*, 816 F.2d 785, 789 (DC Cir. 1987). I am thus bound to apply the DOT regulations, and policies regarding specimen collection procedures.

Next, section 40.63(a) requires the collector complete Step 1 thru 4 of the CCF. The only part of Step 1 for the Collector to complete is the insertion of the donor's social security number or other ID number, such as an employee ID number. The collector completed Step 1 but did so from information taken from that included in a chart or form and not from that supplied by the donor or any positive ID provided to the collector

Step 5 in the CCF is filled in by the donor which includes the place where a date of birth is supplied. There is no dispute that the Respondent filled in his date of birth in Step 5 of the CCF . There is also no dispute that the CCF was signed by the Respondent.

Section 40.71 sets out specimen preparation procedures. This section includes procedures regarding sealing of the specimen bottles. It provides in relevant part:

- (7) *You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the "Remarks" line of the CCF (Step 2) and complete the collection process. [emphasis supplied].*

The record demonstrates, and there is no dispute that the collector took the urine specimen temperature, poured the specimen into two bottles and sealed them with the tamper evident seals containing Respondent's initials, and the date of the collection.

However, the record is ambiguous at best showing substantial evidence that the collector poured the urine specimen into the bottles and sealed them *in the physical presence of the donor* or in this case the Respondent.

While the collector's training is extraordinary and clearly inconsistent with the mandate of section 40.71, the lapse of who initialed the tamper evident seals cannot be overcome unless the process was done in the physical presence of the donor. This is a fatal flaw and a failure to substantially comply with section 40.71.

In sum, the Coast Guard's burden of proof is problematic because: 1) the collector has no recollection of Respondent; 2) the collector does not routinely identify the donor by picture identification, instead the identity of the donor is determined by comparing the donor's signature on a form held by the collector with the signature

inserted by the donor on the Custody and Control Form; 3) the tamper evident seals placed on the control bottles were initialed by the collector instead of the Respondent.

These listed circumstances call into question the first and third prong of the prima facie case of use of dangerous drugs.

Consequently, I must find there is a lack of substantial, reliable and probative evidence in the record showing that it was Respondent's urine that was tested for dangerous drugs. The first and third elements are found not proven.

I am therefore unable to rely upon the presumption in finding the Coast Guard's complaint is proved.

#### **SANCTION**

The governing statute mandates a mariner's license or document must be revoked where it is proven that person is a user of a dangerous drug. See 46 USC § 7704(c). Since I have found the complaint not proved, no sanction can be imposed.

#### **ORDER**

IT IS THEREFORE ORDERED the complaint is **DISMISSED**.

IT IS FURTHER ORDERED, Respondent's Merchant Mariner Documents are to be returned, or if unavailable, substitute or replacement documents are to be issued as required by regulation in such case made and provided.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

Dated: October 28, 2003.



Edwin M Bladen  
Administrative Law Judge



## ATTACHMENTS

### Witness and Exhibit List

#### Witnesses for the Coast Guard:

Ms. Debbie Biland, Specimen Collector, for Tae Hons Chung, Seafarers International Union Contractor, 2700 Pte Tremble, Algonac, Michigan.

1. Darlene Manolovski, Senior Certifying Scientist, Quest Diagnostics Laboratory, Schaumburg, IL
2. David M. Katsuyama, MD, Medical Review Officer, Greystone Health Science Corporation, La Mesa, CA.

#### Exhibits offered by the Coast Guard and admitted into evidence:

1. CG-1 Respondent's Application for Duplicate Merchant Mariner's Document and Affidavit for Loss of MMD.
2. CG-2 Affidavit of John J. Bluitz notifying Coast Guard of the loss of his Merchant Mariner's Document.
3. CG-3 Federal Register notice, Volume 66, No. 171, Tuesday, September 4, 2001 showing current list of certified drug testing laboratories.
4. CG-4 Drug Litigation Package from Quest Diagnostics.
- 4A. Federal Drug Testing Custody and Control Form Specimen No. 3534620 [Specimen No. 3534620]

#### Witnesses and Exhibits for the Respondent:

Respondent offered no witnesses or exhibits.

Certificate of Service

I hereby certify that I have this day delivered foregoing Order upon the following parties and limited participants (or designated representatives) in this proceeding, at the address indicated as follows:

Marine Safety Office, Chicago  
Attn: LT Dennis O'Mara  
Investigations Department  
110 Mt. Elliot Avenue  
Detroit, MI 48207  
(Federal Express - Gov't Overnight)

Mr. John Bluit



ALJ Docketing Center

Dated at Seattle, WA this 28<sup>th</sup> day of October, 2003.

*Mary Purfeerst*  
MARY PURFEERST  
Paralegal Specialist to  
Administrative Law Judge