UNITED STATES OF AMERICA

U.S. DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

ERIC D. TART

Respondent.

Docket Number CG S&R 04-0182
CG Case No. 2037881

DECISION AND ORDER

Issued: December 13, 2004

Issued by: Thomas E. P. McElligott, U.S. Administrative Law Judge

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Appearances:

Investigating Officers:
Command Senior Chief and Marine Science Technician John I. Brown, and
First Class Petty Officer and Yeoman Tariq Abdul-Rasheed, YN1,
both Investigating Officers stationed at the time at the U.S. Coast Guard Marine Safety Office for the ports of Houston to Galveston, 9640 Clinton Drive, Houston, Texas 77029

For the Coast Guard

Eric D. Tart, pro se

For the Respondent

PRELIMINARY STATEMENT

This is a hearing before a U.S. Administrative Law Judge brought under 46 U.S. Code 7704 and 46 Code of Federal Regulations (CFR) Part 5. The specific statutory authority is 46 U.S. Code 7704(c)(1)(A). The regulatory authority is 46 CFR 5.35 (use of dangerous drugs). The captioned Respondent prior to and at the time of the hearing was a resident of Texas and held a U.S. Coast Guard issued Merchant Mariner's Document (MMD), which the Respondent stated at the hearing has now expired and he has not been able to renew it because of this case. The Investigating Officer's Complaint alleged Respondent Tart was a holder of a U.S. Merchant Mariner's Document (MMD) and a user of dangerous drugs, in that he was drug tested and found positive for cocaine use. On or about April 5, 2004, Investigating Officer Tariq Abdul-Rasheed, YN1, U.S. Coast Guard, served the Complaint upon the Respondent at his last known residence address by certified mail, return receipt requested. In the Complaint, the U.S. Coast Guard sought revocation of Respondent's U.S. Merchant Mariner's Document, which was issued to him by the U.S. Coast Guard, in accordance with 46 U.S. Code 7704.

In the Respondent's formal written Answer to the Investigating Officer's Complaint, the Respondent denied the jurisdictional and factual allegations. Respondent signed the Answer to this Complaint on April 22, 2004.

The matter proceeded to hearing on July 29, 2004, in the hearing room, in Houston, Texas, before U.S. Administrative Law Judge (ALJ) Thomas E. P. McElligott. The Investigating Officers representing the U.S. Coast Guard were Command Senior Chief John I. Brown, MSTCS, and First Class Petty Officer Tariq Abdul-Rasheed. The Respondent was represented pro se.

Prior to the hearing, the U.S. Coast Guard filed their third Witness and Exhibits List – Amended, in which they listed four (4) witnesses whom they called to testify under oath and ten (10) exhibits. The U.S. Coast Guard called all four (4) witnesses. The Respondent listed numerous witnesses, but Respondent then chose to only call himself as his witness and four (4) character witnesses, namely Mr. Frank Spears, Mr. Paul Miller, Mr. Robert Louis Troy and Mr. Joseph Julius Colomb. Robert Louis Troy is the Port Agent for the Seafarers International Union and the merged National Maritime Union. See attached list of witnesses and exhibits.

FINDINGS OF FACT

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

1. Respondent is a holder of a Coast Guard Merchant Mariner Document.

2. On December 10, 2003, Respondent tested positive for cocaine metabolite during a pre-employment drug test at Methodist Hospital. (Tr. 5, 7).

3. Respondent consented to the drug test when he signed the consent form. (Tr. 15-16, IO Ex. 3). By signing the consent form, Respondent gave his approval to the collection process. (Tr. 41).

4. Respondent was given a collection container and was not observed giving the sample. (Tr. 20). A Quest Diagnostic Laboratories collection container (also referred to as a "specimen cup") was used. (Tr. 19).

5. Respondent's specimen was collected by Mr. Ala Pourmahram ("the collector"), a Department of Transportation certified collector. (Tr. 13 & 16, IO Ex. 2).

6. The collector unsealed the specimen container in the presence of Respondent prior to giving it to Respondent for collection. (Tr. 26). The collector wore gloves during the collection process. (Tr. 38).

7. After Respondent gave the specimen cup to the collector, Mr. Pourmahram split the sample into two bottles and sealed the bottles. (Tr. 20-21). Respondent initialed the labels verifying that they were sealed and no contamination took place. (Tr. 21, 30-31).

8. The collector then completed the chain of custody forms. (Tr. 21). Respondent signed the chain of custody forms after giving the sample to the collector, thereby authorizing his approval of the collection procedure. (Tr. 114).

9. The sample was then delivered to the testing laboratory, Quest Diagnostic Laboratories. (Tr. 19, 34).

10. Five months after the test was performed, Respondent was notified that he tested positive for cocaine metabolite. (Tr. 75, 100). The general practice is to notify a merchant mariner within one month of the test date, but there are no strict rules regulating notification. (Tr. 155).

11. Respondent then requested that the split sample be tested. (Tr. 98). The split sample, tested by Kroll Laboratories, also tested positive for cocaine metabolites. (Tr. 99, Resp't Ex. 2).

12. Respondent argued that the specimen cup was not sealed when it was handed to him. (Tr. 8). Other merchant mariners who participated in the pre-employment test with Respondent argued the same point, but their tests came out negative for any use of dangerous drugs. (Tr. 133). Additionally, the specimen cup is always

unsealed by the collector before handing it to the person who will give the sample. (Tr. 159).

13. Respondent also attempted to argue that he was taking over-the-counter medication at the time of the drug test. (Tr. 103-104, 163). After the results were reported and Dr. Katsuyama, asked if Respondent was taking any medication, Respondent failed to mention any use of over-the-counter medication. *Id.*

14. Respondent admitted to prior use of cocaine during the 1980's. (Tr. 107). He denied using cocaine in December 2003 or any time just prior to taking the drug test. (Tr. 108-109).

15. Respondent attempted to argue that his fourteen years of prior negative drug tests should be admitted as evidence of his lack of use of a dangerous drug. (Tr. 109). The ALJ did not admit this into evidence, stating that he knows that the Respondent did not use drugs during that period because if he did, then he would have been charged with use of a dangerous drug at an earlier date as a result of an earlier test. *Id.*

16. Respondent's Merchant Mariner Document expired on May 18, 2004, and he has been unable to work under the license since that time because he cannot get the license back until a decision is issued in this case. (Tr. 112).

17. On the date of the collection of the Respondent's urine specimen, December 10, 2003, Respondent held or possessed a U.S. Coast Guard issued credential known as a U.S. Merchant Mariner's Document (MMD). The Respondent's MMD contains his left thumbprint and according to the Respondent, expired this year, 2004.

18. On Wednesday, December 10, 2003, the captioned Respondent gave his urine sample for a pre-employment drug test.

19. Respondent's urine specimen was collected by a trained and experienced urine sample collector, Mr. Ala Pourmahram, of the Methodist Health and Wellness Center, affiliated with or a part of the Methodist Hospital, in the Houston Medical Center on Fannin Street in Houston, Texas.

20. On the date of collection, the Respondent signed the usual and proper "Federal Drug Testing Custody and Control Form". At no time during the entire collection process and procedures of collection of Respondent's urine specimen, did Respondent make any claims or written notations that the plastic collection cup and two (2) smaller plastic collection bottles were improperly unsealed. The Respondent did not complain to the Collector, either orally or in writing, at the time of the collection that they were unsealed. The Collector testified credibly that they were not unsealed and if they were unsealed, he would have thrown them in the trash and used sealed new ones. There were plenty of sealed unused ones there for the Collector's use.

21. After watching carefully all who testified at the hearing and listening carefully to all witnesses, I find the testimony credible of the Collector, the Lieutenant who testified on behalf of the Coast Guard, the Laboratory Director and the Medical Review Officer (MRO). With regard to Respondent's witnesses, I find his four (4) character witnesses credible, but I do not find Respondent's testimony credible.

22. The urine specimen was received from the Respondent and properly sealed and then sent to two designated, tested and certified drug-testing laboratories.

23. The Respondent's urine specimen was collected using a urine sample collection kit. IO's exhibit 4 is an example of the kit that was used, which includes the plastic bag that sealed the collected urine specimen collected from Respondent and the plastic cup that Respondent deposited his urine in before it was poured into the two split sample bottles, which are smaller than the collection cup. These items were sealed properly by the Collector for delivery to the first testing laboratory. The Collector credibly testified that prior to this collection, he washed his hands and then put on rubber gloves to handle this entire matter with the Respondent. During this collection, the Collector was dealing with only one urine specimen donor at a time, namely the Respondent, Mr. Eric D. Tart.

24. The collection plastic cup and the two (2) bottles sealed by the Collector were then sent in the Quest Diagnostics collection kit, again sealed, to Quest Diagnostics Laboratory. Quest Diagnostics Laboratory is a tested and certified drug-testing laboratory, so tested and certified by the U.S. Government, namely the U.S. Department of Health and Human Services (HHS). This particular Quest Diagnostics Laboratory is located in Irving, Texas, a Dallas, Texas suburb.

25. The Respondent delivered at least 60 milliliters of urine to the Collector in the collection cup, as he was directed to do by the Collector and as Respondent had already done many times during about the last 10 to 12 years in his career as a U.S. Merchant Mariner and Seaman. The Collector explained and showed to the Respondent at the time of collection how much and to what level Respondent

would have to fill the collection cup, to provide at least 60 milliliters of urine. The Collector at the hearing showed with his hands the amount of urine, as he had done for Respondent. The amount of urine would be approximately an inch high as designated on the outside of the collection cup in milliliters, for the minimum of at least 60 milliliters of Respondent's urine sample.

26. The Collector, after he received at least 60 milliliters of urine from the Respondent in the cup, broke the seal on the two other little bottles from the collection package and filled them with at least 30 milliliters of urine each to be sent to the first tested and certified laboratory in Irving, Texas, near Dallas, Texas.

27. After the Collector filled the two (2) little bottles of urine with at least 30 milliliters of urine from the Respondent, he sealed those two bottles and put the collection cup and those bottles in a sealed bag. The Collector then had Respondent initial the seals on the bag. After the bag was sealed and initialed by Respondent Tart, the Collector then put the sealed bag into a collection box that they keep at or near his collection site and locked up the box. Later a courier did pick up these two bottles and the others in there and deliver them to his company for delivery to the tested and certified laboratory, in Irving, Texas. The type of rubber gloves used by the Collector was made part of IO's exhibit 4, in addition to the collection kit. The collection kit does say "Quest Diagnostics" in at least two places on the front side of the sealed plastic bag. The Collector credibly testified that the Quest Diagnostics collection kit and cup seals were not broken on them before he used them. If they had been he testified he would have discarded them

in the trash and gotten another Quest Diagnostics urine specimen collection kit. There were plenty available to the Collector if he needed another collection kit.

28. When the sealed collection kit and Respondent's urine arrived at Quest Diagnostics Laboratory, in Irving, Texas, it was found to be properly sealed and closed. As stated on the collection document, known as the "Federal Drug Testing Custody and Control Form", the specimen bottles were released to the Quest Diagnostics courier for delivery to the Quest Diagnostics Laboratory, in Irving, Texas. The collection kit has directions in bold black letters "Place chain of custody form in large pouch. Place specimen in small pouch. Remove release liner from flap. Fold blue adhesive flap to cover black cross hatch opening." The bottom has a blocked out section where it says "place destination label here".

29. As stated above, the collection took place in Houston, Texas, at the Methodist Hospital Health and Wellness Center, on December 10, 2003. The Collector credibly testified that Respondent's urine sample was properly collected in accordance with 49 CFR Part 40.

30. Following the testimony of the first witness, the Collector, the second witness called by the U.S. Coast Guard Investigating Officers was Lieutenant George Tobey, another U.S. Coast Guard Investigating Officer who testified credibly that he inspected the collection site or place of Methodist Hospital, in Houston, Texas and its facilities, policies and procedures are all in compliance with 49 CFR Part 40 and the required collection procedures.

31. The third witness called by the Investigating Officers was Dr. Romeo Solano, Ph.D., M.S., B.S., the Laboratory Director at Quest Diagnostics Laboratory, in

Irving, Texas. He gave credible testimony that Respondent's urine sample was properly tested at the laboratory by the two required test methods and Respondent's urine sample tested positive for cocaine by the tested and approved laboratory and these tests were performed in accordance with the proper procedures and 49 CFR Part 40. Two required tests were performed, first the initial drug screen test on a certain amount of Respondent's urine sample, which showed a positive for cocaine. Then the second test was performed on Respondent's urine sample using the Gas Chromatography/Mass Spectrometry (GC/MS) test, which is a very definitive test. It again resulted in a positive for cocaine metabolites in Respondent's urine sample. The combination of the two tests is considered by the scientific and medical communities as a definite proof positive of laboratory findings of the remnants or metabolites of cocaine in Respondent's urine sample. The initial test level at the first laboratory, Quest Diagnostics Laboratory, has to be at least 300 nanograms per milliliter for a positive test of cocaine use. Under the GC/MS confirmatory test level, it has to be at least 150 nanograms per milliliter for cocaine use. At both times, the tests returned a positive for cocaine metabolites at or above the required minimums. It was reported as a positive for cocaine by the Quest Diagnostics certified laboratory, located at 4770 Regent Boulevard, Irving, Texas 75063. The Laboratory Director testified that he has been a Laboratory Director for approximately 10 to 12 years.

32. On the "Federal Drug Testing Custody and Control Form", on the Collector's copy, Respondent Eric Tart printed his name, signed his signature and the date of

collection as December 10, 2003. Respondent also gave his daytime telephone number and date of birth. The Respondent did not make any claims or notations on the form on the day of collection that he saw the collection bottle or the collection kit unsealed. The Respondent only came up with this claim after he was advised by the Medical Review Officer (MRO) on a later date that Respondent was found and reported positive for cocaine use by the first testing laboratory. The first laboratory signed the collection document, known as the "Federal Drug Testing Custody and Control Form" as it states on the top of the form and reported a positive on Respondent's urine sample collected on December 11, 2003. The official procedures list at the collection site contains seven (7) pages of instruction for the Collector, which he followed. On page 3 of 7, in paragraph E, it says, "Collector instructs donor [Respondent Tart] to wash and dry his/her hands", which the Collector testified he did in this case. In addition, the Collector testified he washed his own hands beforehand and then put on rubber gloves to perform this entire collection. The rubber gloves are now part of IO's exhibit 4. The Collector read the temperature of Respondent's urine specimen before accepting it. It was within the proper 4 minutes and it was within the proper temperature ranges for normal human urine.

33. Respondent's urine sample was received at the first laboratory on December 11, 2003, and dated and signed for by the laboratory's accessioner, with the accessioner's signature, Romona McClinton. The laboratory reported on the "Federal Drug Testing Custody and Control Form", by and through one of its certifying scientists who worked on this testing, Adelaide Bodnar, who signed it

on December 11, 2003. She reported after the two required tests a positive for cocaine. It was then sent to the Greystone Health Sciences Corporation, which then employed several MROs, located at 7777 Alvarado Road, # 606, La Mesa, California 91941. The "Federal Drug Testing Custody and Control Form" laboratory copy contains the address of the Greystone Health Sciences Corporation, which employed the MRO who handled this matter. The MRO in this particular case was Dr. David M. Katsuyama, M.D., admitted to practice medicine in California, an MRO who has testified credibly in many prior cases before me while he was with the Greystone Health Sciences Corporation for many years, before they were taken over recently by another company or corporation. They have been taken over or bought out by First Advantage Company, prior to or as of the date of the report, on or about December 19, 2003. This was reported by the President of Greystone Health Sciences Corporation, George M. Ellis, Jr., where he reported the positive cocaine findings and the date of interview of the Respondent by the interviewing MRO, Dr. David M. Katsuyama. Dr. Katsuyama interviewed Respondent and found no credible medical or other excuse for the Respondent to have tested positive for cocaine use at the Quest Diagnostics Laboratory. Dr. Katsuyama affirmed the finding of a positive for cocaine use by Respondent Eric D. Tart on or about December 19, 2003, on or about the date this MRO interviewed the Respondent. Because the Respondent questioned the validity of the test after he was told he had a positive for cocaine use by Dr. Katsuyama and by the first laboratory; and the Doctor found no valid medical excuse for the positive, Respondent Tart argued that there must be some mistake

or something to that effect. So the Respondent's urine sample was then sent to a second tested and certified laboratory, known as Kroll, in Louisiana. The second laboratory is located at 1111 Newton Street, Gretna, Louisiana 70053. This second laboratory again tested other portions of Respondent's urine sample. They reported after the retest that this specimen is or was positive for the following drugs: cocaine metabolites. The confirmation method is reported as the GC/MS test. This was signed by the second Certifying Scientist from the Kroll Laboratory, by a Kroll Laboratory Specialist and Certifying Scientist, John Lizarraga, and so reported positive for cocaine on January 14, 2004. Neither laboratory received the Respondent's name, just his donor's identification by his social security number or Merchant Mariner's Document number. This was a second positive report on the split urine sample finding cocaine by at least a third test performed by the second laboratory, Kroll Laboratories, of Gretna, Louisiana.

34. When it came time for Respondent to present his case, he chose to testify in his own behalf and called four other character witnesses. Respondent was sworn in and took the stand and testified in his own behalf. Respondent alleged that the collection kit was unsealed before the Collector starting using it. I do not find this credible after carefully observing and listening to the testimony of the Respondent, the Collector and all witnesses who testified at this hearing in Houston, Texas. During Respondent's testimony, he was asked if he had ever used cocaine. Respondent Tart admitted that he had used cocaine. He testified and showed knowledge of its use and that he had "snorted up" two rows of cocaine into his nose at a party, but then claimed it was many years ago,

approximately 10 to 12 years ago. Respondent Tart claimed he had not done it since. The Respondent denied getting a high or recalling getting any high or any reaction at all to the taking of the cocaine. This testimony also brings into question his credibility because many people who try cocaine go back to trying it or using it because of the big high they apparently get from using cocaine. If they didn't remember it, they would not be so tempted to go back and reuse and reuse until they could hardly afford it any more. The Respondent's four character witnesses testified that they didn't believe Respondent would take cocaine and that they had never seen him take cocaine. None of them testified they were with Respondent twenty-four hours per day and seven days per week.

35. The finding is that Respondent failed a drug test by two certified laboratories following his proper and careful urine collection. It is found that Respondent did use cocaine and it was found in his urine sample on these dates above. Respondent tested positive for cocaine use from a urine sample collected from Respondent on or about December 10, 2003.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was a holder of a U.S. Coast Guard issued Merchant Mariner's Document on the date of collection of Respondent's urine sample, December 10, 2003.

2. The Complaint alleged, "Use of a dangerous drug", namely cocaine, this is in violation of 46 U.S. Code 7704(c), and is found proved by a preponderance of the credible, reliable, probative and substantial evidence.
3. It is found that Respondent did violate the statute known as 46 U.S. Code Section 7704, including 7704(c)(1)(A) and the regulatory authority of 46 CFR Part 5, including 46 CFR 5.35, (use of dangerous drugs), as alleged in the Complaint served on Respondent by an Investigating Officer.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1998). The burden of proving a claim by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction

Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in original)). Under Coast Guard procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.

In this case, the Coast Guard alleged Respondent took a pre-employment drug test, Respondent signed a Federal Drug Testing and Control Form, Respondent's urine specimen was collected and analyzed using procedures approved by the Department of Transportation, and the specimen tested positive for cocaine metabolites. (Entire Transcript). A license, certificate of registry, or Merchant Mariner's Document (MMD) shall be revoked if it is shown that the holder has been a user of, or addicted to, a dangerous drug unless he can prove satisfactory cure. 46 U.S.C. 7704(c). A "dangerous drug" is defined as "a narcotic drug, controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970). 46 U.S.C. 2101(8)(a). A "narcotic drug" includes "[c]oca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed. [The term also includes] [c]ocaine, its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. 802(17).

Based on Respondent's positive test result for cocaine metabolites, I conclude that Respondent Tart is a user of dangerous drugs.

The Coast Guard met its burden of proof by a preponderance of the evidence by showing that Respondent is a User of Dangerous Drugs. In addition to Respondent's positive drug test, the Coast Guard showed through testimony that the drug test was performed properly and the specimen container was unsealed no earlier than necessary. (Tr. 39-50, 115). Respondent was unable to rebut this evidence. Respondent argued that the specimen container was not sealed when he received it (Tr. 18, 65-66), but that if it was sealed, then Respondent's justification for testing positive for cocaine had to do with his taking of over-the-counter medication (Tr. 104, 162-163). Neither of these arguments is supported by direct evidence. The other members who complained about receiving open containers tested negative for Use of Dangerous Drugs. (Tr. 133). Respondent only has receipts for medication purchased after December 10, 2003, the date of the drug test; he does not possess receipts for medication prior to the date of the test, nor did he inform the MRO that he was taking any type of medicine at the time of the drug test. (Tr. 162-163).

I also find the testimony of Respondent's character witnesses to be irrelevant and unpersuasive. The witnesses knew Respondent, but are not capable of knowing what he is doing every moment of the day. They may think that he is not the type of person who would use cocaine and be shocked to hear

that he did in the past (Tr. 151-152), but they cannot testify to his use, or lack thereof, in this particular situation.

The U.S. Administrative Procedure Act (APA), 5 U.S. Code 551-559, outlines the procedures for Coast Guard Suspension and Revocation Hearings before U.S. Administrative Law Judges. 46 U.S. Code 7702(a). The APA only authorizes sanctions to be imposed if upon consideration of the record as a whole the charges are supported by reliable, probative, and substantial evidence. 5 U.S. Code 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the (U.S.) Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of showing something by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (Citing In re Winship, 397 U.S. 358, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). Under the APA and Coast Guard rules and regulations, the Investigating Officers bear the burden of proving the charges in the Complaint by a preponderance of the evidence at the hearing before the U.S. Administrative Law Judge. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard Investigating Officer must prove with reliable and probative evidence that Respondent more likely than not committed the violation charged or alleged in the Investigating Officer's Complaint that was served upon the Respondent well before the hearing date.

Title 46 U.S. Code 7704(c) provides that a Coast Guard issued merchant mariner's license, certificate of registry or merchant mariner's document should be revoked if the credential holder has been shown to be a user of or addicted to a dangerous drug unless the holder proves cure by completed drug rehabilitation from use of dangerous drugs. An individual will be presumed to be a user of dangerous drugs if the individual fails a chemical test for dangerous drugs. 46 CFR 16.201(b); Appeal Decision 2529 (WILLIAMS) (1991). The Coast Guard Investigating Officer (IO) may prove a prima facie case by showing three things: (1) the Respondent was tested for dangerous drugs; (2) the Respondent tested positive for a dangerous drug; and (3) the drug tests were conducted in accordance with 46 CFR Part 16. Appeal Decision 2584 (SHAKESPEARE) (1997).

As the evidence offered and produced in the Hearing record before the U.S. Administrative Law Judge shows, the Respondent was a holder of a U.S. Coast Guard issued U.S. Merchant Mariner's Document. The next question is whether the Coast Guard has proved a prima facie case that Respondent was a user of a dangerous drug under 46 U.S. Code 7704(c), as alleged in the IO's Complaint.

A. Respondent was tested for dangerous drugs.

The evidence proved that on the date of the collection, the Respondent gave a urine specimen to a trained and experienced urine specimen Collector for a pre-employment drug test. Additionally, the evidence demonstrates an unbroken chain of custody of Respondent's urine sample from the time Respondent gave his urine sample to

the Collector through all phases of the testings by the two tested and certified testing laboratories. Respondent's urine sample was properly collected by the Collector. The Collector released the urine sample to the first testing laboratory. The urine sample arrived at the first testing laboratory with the specimen bottles' seals intact. The first laboratory performed the required initial test and also a confirmation test on a portion of Respondent's urine sample. The Coast Guard Investigating Officers introduced evidence that Respondent took a pre-employment drug test on Wednesday, December 10, 2003. Respondent's urine sample subsequently tested positive at least three times for dangerous drugs by two laboratories, the Quest Diagnostics Laboratory, of Irving, Texas, near Dallas, Texas, and the Kroll Drug Testing Laboratory, of Gretna, Louisiana. The Coast Guard Investigating Officers have made a prima facie case and proved this element.

B. Respondent tested positive for a dangerous drug.

Based on the evidence, Respondent's urine sample tested positive for a dangerous drug, cocaine, by two tested and certified drug-testing laboratories, as stated above. A "dangerous drug" is "a narcotic drug, controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970)." 46 U.S. Code 2101(8a). A "controlled substance" is defined as a "drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S. Code 802. The drug cocaine is listed in schedule II of the controlled substances schedules. 21 U.S. Code 812(c). Since cocaine is included in schedule II of the controlled substances schedules, cocaine is a dangerous drug within the meaning of 46 U.S. Code 7704(c).

Respondent's urine samples were confirmed by the laboratories to contain 329 nanograms of Benzoylecgonine. As the laboratories are required under 49 CFR 40.87(a & c) to report a confirmed concentration of Benzoylecgonine greater than 150 ng/ml as a positive result for cocaine, and the MRO verified the two certified laboratories' findings, the Coast Guard has proved a prima facie case showing that Respondent tested positive for use of a dangerous drug, namely cocaine.

C. The drug test was conducted in accordance with 46 CFR Part 16.

Under 46 CFR 16.201(a), chemical testing of maritime personnel under Subpart B of Part 16 of Title 46 of the CFR must be conducted in accordance with the procedures detailed in 49 CFR Part 40. The Coast Guard Commandant has held that the Investigating Officers have made a prima facie showing of this element when the Investigating Officers introduced evidence involving the collection process, the chain of custody, how the specimen was handled and shipped to the testing laboratory. Appeal Decision 2632 (WHITE) (2002). The evidence in this record demonstrates that Respondent's urine sample was collected by a trained, experienced and careful Collector; a split sample was collected. There was no unbroken chain of custody. The first laboratory performed the required initial test and the confirmatory test and found cocaine in Respondent's urine. The second laboratory confirmed the test for cocaine and both laboratories were tested and certified by the U.S. Department of Health and Human Services. The MRO first interviewed Respondent and found no medical excuse for cocaine and then verified the test results. Therefore, the Investigating Officers have

made a prima facie case by proving that the drug tests were conducted in accordance with 49 CFR Part 40.

Once the Investigating Officers prove a prima facie case, the burden then shifts to the Respondent to produce persuasive, credible evidence to rebut the presumption, that Respondent is a user of a dangerous drug. Appeal Decision 2584 (SHAKESPEARE) (1997) (citing Appeal Decision 2379 (DRUM) (1985). (When a vessel strikes a fixed object, a presumption of negligence establishes a prima facie case of negligence, and Respondent then has the burden of rebutting that presumption)). If the Respondent does not produce credible, persuasive rebuttal evidence, the ALJ may find the charges proved based solely on the presumption. Appeal Decision 2584 (SHAKESPEARE) (1997) (citing Appeal Decision 2266 (BRENNER) (1981). (Unrebutted presumption of negligence is sufficient to find charge of negligence proved) and Appeal Decision 2174 (TINGLEY) (1980) (ALJ could rely solely on the unrebutted presumption of negligence)).

To rebut the Coast Guard's prima facie case, the Respondent argued and testified that he tested positive for cocaine because the collection kit that was used had already been opened and used before. I do not find this credible. After carefully observing his testimony and that of the Collector. I find the Collector much more credible. There is no credible and convincing evidence in the record to support this claim that Respondent makes and any other claims that he makes. As Respondent has not offered any convincing, credible evidence to rebut the Investigating Officers' prima facie proof and case, the Investigating Officers have proved by a preponderance of the reliable, credible,

probative and substantial evidence that the Respondent is a user of dangerous drugs, namely cocaine, under 46 U.S. Code 7704(c).

I have taken official notice of the following statutory and regulatory provisions, Commandant's Decisions on Appeal and other case law, as requested by the Investigating Officer, Command Senior Chief and Marine Science Technician John I. Brown. Statutory and regulatory provisions: 46 U.S. Code 7701, 46 U.S. Code 7704(1)(B), and 46 CFR 5.35. I will take official notice of 46 CFR 5.35, but there was no proof of any conviction for a dangerous drug law violation in any criminal court in this case. I will take official notice of the following Commandant's Decisions on Appeal:

(1) Appeal Decision 2583 (WRIGHT) - Under Coast Guard rules and regulations, there is a presumption that an individual who fails a chemical drug test conducted under 46 CFR Part 16 for a dangerous drug is a user of dangerous drugs. See 46 CFR § 16.201(b). According to the APA and Coast Guard regulations, the Investigating Officer has the burden of proving all elements of the Complaint. See 46 CFR § 5.539. To meet this burden, as applied to the Complaint at hand, the Investigating Officer must prove three elements: 1) that the respondent was the individual that 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. Appeal Decisions 2379 (DRUM), 2279 (LEWIS). This proof establishes a presumption of use of a dangerous drug and then shifts the burden of going forward with evidence to the

Respondent to rebut this presumption. *Id.* If the Respondent produces no convincing 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. *Id.* ...There is nothing in the record that suggests that the Administrative Law Judge relied on any evidence that was inherently incredible in reaching his determination that the Appellant used marijuana (here cocaine), nor was his decision clearly erroneous, arbitrary or capricious. Thus, I find no basis to overturn that determination. Appeal Decision 2542 (DEFORGE).

(2) The record similarly offers both documentary and testimonial evidence of the precautions taken by the Collector to maintain the chain of custody and the integrity of Respondent's urine specimens. Any specimen showing signs of seal tampering is rejected. No credible evidence suggests any carelessness or other impropriety while the specimen was in the Collector's custody. The evidence points to the specimen having been carefully and professionally tested by two (2) federally tested and certified laboratories, using NIDA-certified laboratories. The sufficiency of a chain of custody goes to the weight to be accorded the evidence, not to its admissibility. There is evidence in the record to support the finding of the Administrative Law Judge that the chain-of-custody procedures of 49 CFR Part 40 were satisfactorily complied

with. His conclusion will not be overturned unless they are without support in the record and are inherently incredible. Appeal Decision 2541 (RAYMOND).

(3) Even where multiple, technical infractions of the regulations occur, the testing procedure, as a whole, is not vitiated where the infractions do not breach the chain of custody or violate the specimen's integrity. Appeal Decision 2537 (CHATHAM). Respondent's due process rights were fully protected.

The Investigating Officers proved their case.

The only remaining issue is the sanction.

SANCTION

Title 46 U.S. Code 7704(c) requires revocation of a U.S. Coast Guard issued merchant mariner's license, certificate of registry or merchant mariner's document if the holder of the credential is a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof of cure. Cure is a two step process that requires the Respondent to have successfully: (1) completed a bona fide drug abuse rehabilitation program and (2) demonstrated complete non-association with drugs for one year after the successful completion of the drug rehabilitation program. Appeal Decision 2535 (SWEENEY) (1992). Since the Respondent did not offer any evidence of substantial involvement in the cure process, the usual sanction is revocation of his Coast Guard issued Merchant Mariner's Document. Unless Respondent Eric D. Tart files proof within thirty days before or after the date of this Decision and Order that he has enrolled in a

proper Drug Rehabilitation Course, satisfactory to the Investigating Officers of the Coast Guard Marine Safety Office, 9640 Clinton Drive, P.O. Box 446, Galena Park, Texas 77547-0446, facsimile 713-671-5185, the following Order will take effect.

ADVICES

The Respondent is advised of his right to appeal in accordance with Subpart J of 33 CFR Part 20, which is enclosed herein.

ORDER

Based upon the facts, the applicable law and consideration of the entire record, Respondent's U.S. Coast Guard issued Merchant Mariner's Document is hereby ordered REVOKED. This includes all duplicates of that document and any other U.S. Coast Guard Merchant Mariner's Licenses or Documents issued to Respondent that have not expired. The Respondent's U.S. Merchant Mariner's Document, even if expired, is to be immediately delivered by hand or mail to the Senior Investigating Officer or to an Investigating Officer of the U.S. Coast Guard, Marine Safety Office Houston-Galveston, 9640 Clinton Drive, Houston, Texas 77029, telephone 713-671-5193.

Thomas E. P. McElligott
U.S. Administrative Law Judge

Done and dated on December 13, 2004
Houston, Texas