

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL ANTHONY TAYLOR

Respondent.

Docket Number: CG S&R 04-0498

Case No. 2156149

DECISION AND ORDER

Issued: January 10, 2005

Issued by: Jeffie J. Massey, Administrative Law Judge

Appearances:

For Complainant

ENS Matthew Spolarich
CWO Jason Boyer
U.S. Coast Guard
MSO Morgan City
800 David Drive
Morgan City, La 70380

For Respondent

Michael Anthony Taylor, *pro se*

PRELIMINARY STATEMENT

On September 21, 2004, the United States Coast Guard (“USCG” herein) initiated an administrative proceeding against credentials issued to Michael Anthony Taylor by the USCG. Specifically, it was alleged that, while a holder of Coast Guard issued credentials on July 7, 2004, the Respondent submitted a urine sample that tested positive for marijuana metabolites, thereby giving rise to an allegation that he was a user of or was addicted to dangerous drugs.

On October 29, 2004, Respondent’s Answer was received by the Docketing Center (after receiving an extension). In his Answer Respondent denied all of the allegations and requested to be heard on the proposed order.

A hearing was duly scheduled and convened in Houma, Louisiana on January 5, 2005. The USCG called the following witnesses: Trent Sanamo, Dr. Robert Davis, Gretchen Moore, Bryan Gisclair, and Dr. Harold Miller. Ten exhibits were admitted for evidentiary purposes on behalf of the USCG and two exhibits were admitted for evidentiary purposes on behalf of the Respondent. The Respondent testified in his own behalf.

At the end of the testimony, the evidentiary record was closed. Both sides waived the filing of written proposed findings of fact and conclusions of law, and the filing of post-hearing briefs. The undersigned then announced her decision on the record. Further, the undersigned informed the parties that this written rendition of the findings of fact and conclusions of law announced on the record would be issued as soon as possible. This document constitutes said issuance.

FINDINGS OF FACT

1. On and about July 20, 2004, the Respondent was employed by Edison Chouest Offshore and reported for duty as a deckhand onboard the OSV Loop Loader.
2. As an employee of Edison Chouest Offshore, the Respondent was a holder of credentials issued to him by the USCG.
3. On and about July 20, 2004, Respondent's employer elected to have the Respondent submit to chemical testing based upon a reasonable suspicion that the Respondent was under the influence of an intoxicating substance.
4. The employer's election to have the Respondent submit to chemical testing was based on the observation of at least two supervisory employees who both suspected that the Respondent was under the influence of an intoxicating substance as a result of their observation of the Respondent's behavior.
5. The Respondent submitted to a breath test (which was negative for alcohol content) and then submitted a urine sample pursuant to the provisions of Part 40 of Title 49, Code of Federal Regulations.
6. The urine specimen submitted by the Respondent was tested in accordance with the provisions of Part 40, supra, and tested positive for marijuana metabolites.
7. The results of the urine testing were properly reviewed by a Medical Review Officer.

8. The Respondent admitted to being in the presence of multiple persons who were smoking marijuana the day before the testing was performed.

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.

Title 46 U.S.C. §7704(c) provides that 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(8a). A “controlled substance” is further 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.C. 802. Any material containing any quantity of “Marihuana” is listed under Schedule I(c) of the controlled substances schedules. 21 U.S.C. 812(c). Therefore, the Coast Guard must prove Respondent was a holder of a license, certificate of registry, or merchant mariner’s document at the time he tested positive for marijuana metabolites.

If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b). The statutory wording of 46 U.S. Code § 7704(c) clearly shows that even a one time use of a dangerous drug constitutes grounds for revocation unless the mariner shows satisfactory proof that he is cured. See 46 U.S. Code § 7704(c); See also **APPEAL DECISION 2535 (SWEENEY)**.

The testimony of Trent Sanamo, the Health, Safety and Environmental Coordinator for Edison Chouest Offshore (“Edison” herein) in July 2004, established that the Respondent was an employee of Edison on July 20, 2004, and that he was due to board a vessel as part of a crew change. At approximately 8:00 a. m. on the morning of July 20, he received a call from the location of the crew change which indicated that the Respondent had arrived, and he appeared to be under the influence of “something.” Upon his arrival at the Respondent’s location, Mr. Sanamo noted that the Respondent was not “acting normal”; his speech was slurred, he was stumbling and he was unable to

hold a conversation. Mr. Sanamo reiterated that the Respondent appeared to be under the influence of some substance, and that he was not fit for duty. He added that he had been around persons under the influence of marijuana in the past. The Respondent attempted to elicit testimony from the witness that the reason he was “singled out” for a test was because he was late for crew change, and he drove instead of taking the crew bus. The witness reiterated that the Respondent was chosen for chemical testing because of the way he was acting.

Bryan Gisclair, Operations Coordinator for Edison in July 2004 testified that he was summoned to the location of the crew change by the security guard. Upon observing the Respondent, he agreed with the suggestion that the Respondent should undergo chemical testing. A breath test for alcohol was negative, so the witness proceeded to transport the Respondent to the location where the urine specimen was to be collected. Mr. Gisclair testified that while the Respondent did not fall down, his “general actions” were not good. He further testified that Respondent’s speech was slurred and he would fall asleep in the middle of a sentence. In his opinion, the Respondent was not fit for duty. He did say that the Respondent just kept saying he was really tired.

Gretchen Moore testified as to the procedures followed during the urine collection process. Her procedures were in compliance with the provisions of Part 40, *supra*. The evidence showed her to be an experienced collector, and the undersigned found no irregularities about her testimony.

Dr. Harold H. Miller, Laboratory Director for Quest Diagnostics, authenticated the process by which the Respondent’s urine specimen was received at the laboratory and tested. Again, based on the testimony of this witness, it was clear that the provisions of

Part 40 were followed. Dr. Miller also answered the Respondent's questions about how long marijuana stays in a person's body, detailing the process by which marijuana is stored in the body, then eliminated. Dr. Miller also explained how it was possible to have a positive test for marijuana that was followed by a negative test only a few days later. Dr. Miller also discussed various methods by which substances can be added to urine samples to mask the detection of marijuana metabolites during the testing process.

The final witness on behalf of the USCG was the Medical Review Officer (MRO) in this case, Dr. Robert Davis. Dr. Davis related his telephone conversation with the Respondent and generally discussed the role of the MRO in the testing process. Again, this witness' testimony reflected compliance with the provisions of Part 40.

After being advised of his right to testify, the Respondent decided to testify on his own behalf. He explained that when he arrived at the crew change location, he had been up for a very long time, having driven from Tampa, Florida, and getting lost in the process. He explained that he exchanged harsh words with the security guard at the crew change location, and he felt he was being singled out because he drove to the location and he was late. He admitted that he had been "around" marijuana. On questioning by the undersigned, he elaborated that he had been to a birthday party where approximately twenty people had been smoking marijuana in a room. He claimed to have only remained in the room for ten minutes before walking outside. This occurred the previous day. Through his testimony, he offered the results of a urine test performed on July 26, 2004, which reflected no positive results for marijuana. (See Respondent's Exhibit 1 & 2.)

In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence,

and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. **Appeal Decision 2639 (HAUCK)** (2003). As I noted on the record after the close of the evidence, I find the testimony of the witnesses for the USCG to be entirely credible. The testimony clearly showed that the Respondent was a holder of USCG issued credentials, that he submitted to a reasonable cause urine test on July 20, 2004, and that the specimen was collected and tested in compliance with the Part 40 provisions.

The Respondent, through his testimony and his questioning of USCG witnesses sought to show that he was unfairly singled out for testing because he was late for crew change, and he drove his vehicle instead of riding the crew bus provided by Edison. He also attempted to explain the abnormalities in his behavior on July 20 by pointing to his lack of sleep. Lastly, he attempted to discredit the results of the testing on the July 20 specimen by submitting test results ostensibly produced as a result of a specimen submitted on July 26.

The USCG objected to the admission of the July 26 test results, claiming they were not relevant. They were admitted because they are relevant. But, they are not necessarily probative—which is why those results do not produce any measurable conflict of evidence in this case. Besides the possibility that the urine specimen submitted by the Respondent on July 26 had been adulterated with an agent to mask marijuana metabolites (there was no testimony that the testing process ruled this out), the existence of a negative test result on July 26 does not impugn the validity of the July 20 test, based on the record before me. Considering the Respondent's testimony and the testimony of Dr. Miller, it is entirely possible that the marijuana present in the

Respondent's system on July 20 had dissipated to the point that it was below the minimum cut-off point (established in Part 40) by July 26. On the record before me, this scenario is substantially likely to have occurred.

With the Respondent's sworn admission that he had been around at least twenty people who were smoking marijuana on the day before he was tested by Edison, one would expect a positive test result on July 20. Accordingly, I find no significant conflicts of evidence in this case. Lastly, I note the fact that if the Respondent was overly tired on July 20 (assuming *arguendo* that his testimony on this point is truthful), this in no way repudiates the reasonableness of the testimony concerning his abnormal behavior which led to the reasonable cause testing. The behavior and actions of the Respondent, as related through the testimony of Mr. Sanamo and Mr. Gisclair, clearly gave rise to a reasonable conclusion that the Respondent was under the influence of some intoxicating substance.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On and about July 20, 2004, Respondent was employed with Edison Chouest Offshore and he was the holder of credentials issued by the USCG.¹
2. On and about July 20, 2004, the behavior of the Respondent gave rise to a reasonable conclusion that he was under the influence of an intoxicating substance, thus giving his employer the right to administer chemical testing to him.

¹ The Complaint lists the date in question as July 7, 2004, I find this to be an insignificant variance.

3. Respondent submitted a urine specimen which subsequently tested positive for marijuana metabolites, all pursuant to the provisions of Part 40 of Title 49, Code of Federal Regulations.
4. The USCG proved by a preponderance of the evidence that sanctions are warranted against Respondent's Coast Guard issued credential(s) under 46 U.S.C. §7704, because the evidence proved Respondent to be a user of dangerous drugs.
5. Pursuant to the provisions of 46 USC §7704(c), the evidentiary record supports a revocation of all credentials issued to the Respondent by the USCG.

SANCTION

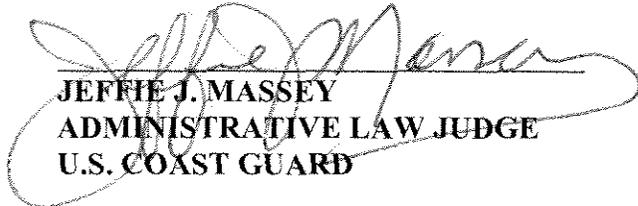
Under the provisions of 46 USC §7704, an Order of Revocation of the credentials issued to the Respondent by the USCG must be entered.

ORDER

IT IS HEREBY ORDERED that all credentials issued to the Respondent by the United States Coast Guard, including but not necessarily limited to Merchant Mariner's Document number 417043008 are hereby **REVOKED**. **You must immediately surrender all documents in your possession to the Coast Guard. If you knowingly continue to use your documents, you may be subject to criminal prosecution.**

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated January 10, 2005.
New Orleans, Louisiana


JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD