

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL MCDUFFIE

Respondent.

Docket Number: CG S&R 04-0347
CG Case No. 2097905

DECISION AND ORDER

Issued: February 10, 2005

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

MST1 Ray S. Robertson
LT John Catanzaro
U.S. Coast Guard
Marine Safety Office Mobile
Building 102, Brookley Complex
South Broad Street
Mobile, AL 36615-1390

For Respondent

Michael McDuffie Appeared for Himself

I.
PRELIMINARY STATEMENT

This case began on July 6, 2004 when the Coast Guard filed a Complaint against the Respondent, Michael McDuffie, under the statutory authority contained in 46 U.S.C. § 7704(c) and the Coast Guard regulation codified at 46 C.F.R. § 5.35. Mr. McDuffie is the holder of Coast Guard issued License Number 895027 authorizing him to serve as “. . .Master of Steam or Motor Vessels of not more than 100 gross registered tons (domestic tonnage) upon near coastal waters.” The Coast Guard alleged that Mr. McDuffie tested positive for Marijuana Metabolite on a pre-employment drug test administered on June 3, 2004. The Investigating Officer seeks the revocation of Mr. McDuffie’s Coast Guard license under 46 U.S.C. § 7704.

Respondent’s Answer was submitted on July 6, 2004 and he admitted all Jurisdictional and Factual Allegations except numbers five and six of the Factual Allegations. In this regard he denied:

- “5) Specimen tested positive
- 6) Dr. Brian Heinen M.D.verified the positive test.”

On July 8, 2004 the case was assigned to this Judge. Thereafter, the Respondent filed a motion seeking a “continuance” of the hearing until January, 2005.¹ On August 13, 2004 the Scheduling Order was issued setting the case for hearing on September 28, 2004 at Daphne, Alabama.

Next, the Coast Guard moved to have two witnesses (Drs. Heinen and Green) testify by telephone (Motion dated August 19, 2004). On August 31, 2004 an Order granting that request and also granting Mr. McDuffie’s oral request for a continuance was entered. The hearing was rescheduled for December 2, 2004. On October 6, a pre-hearing conference was conducted to discuss procedural issues and to rule on various motions. The Investigating Officer and the

¹ At that stage, the case had not yet been set for hearing.

Respondent participated and an Order was issued setting out the matters discussed and the rulings made. See Order dated October 20, 2004.

On October 2, 5, and November 3 and 4, the Respondent filed various motions seeking the production of documents, subpoenas, interrogatories, and to object to the telephonic testimony of Drs. Heinen and Green. On November 6, 2004, an Order granting some of the requests and denying others was issued. Subsequently, Mr. McDuffie filed three other motions to continue the proceeding but they were denied. (See Orders of November 8, 15, and 22, 2004).

The hearing was held as previously rescheduled on December 2, 2004 at Daphne, Alabama. The Investigating Officers and the Respondent appeared. The Coast Guard sponsored four witnesses including: (a) the individual who collected Mr. McDuffie's urine sample at Springhill Industrial Drug Testing (Ms. Tami Byrd); (b) Dr. David Green, Laboratory Director at Kroll Laboratory Specialists; (c) Dr. Brian Heinen, the Medical Review Officer; and (d) Mr. Terry Dickinson, General Manager, Graham Gulf, Inc. The Investigating Officer also offered eight exhibits which were admitted into evidence and are identified on Attachment B.²

The Respondent testified and introduced nine exhibits at the hearing, eight of which were admitted. They are identified on Attachment B. Respondent (Resp.) Exhibit H was reserved pending further consideration. It is the drug test results from a test performed by American Toxicology Institute involving a hair sample from the Respondent. Under usual conditions the Department of Transportation rules governing chemical tests for dangerous drugs do not allow for the testing of hair. Since the record here does not reveal any impediment to Mr. McDuffie providing a urine sample, this exhibit will not be admitted. See Appeal Decision 2575 (WILLIAMS).

² Exhibit No. IO-7 was initially reserved but was admitted near the end of the hearing. See Transcript (TR) 137.

At the conclusion of the hearing, I announced that the Investigating Officer proved the elements of the Complaint by the preponderance of the evidence and that Mr. McDuffie's Coast Guard license was Revoked because he had been shown to be the user of dangerous drugs.

II.

STATUTES AND REGULATIONS INVOLVED

A. Procedural Matters

1. This proceeding is governed by the Administrative Procedure Act , which is incorporated into these proceedings under 46 U.S.C. 7702, which reads:

§ 7702. Administrative procedure

(a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.

2. 46 U.S.C. §§ 7701-7705 set out the general procedures governing the suspension and revocation of merchant mariners' licenses and documents. 46 U.S.C. § 7704 provides in pertinent part:

§ 7704. Dangerous drugs as grounds for revocation

(b) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

3. The regulations governing the performance of chemical tests for dangerous drugs adopted by the United States Department of Transportation are codified at 49 C.F.R. § 40.3 Specifically, the specimen collection procedures are set out at 49 C.F.R. § 40, subpart E.

³ 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. The DOT drug testing regulations continue to govern the testing of mariners subject to the jurisdiction of the Coast Guard.

4. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 C.F.R. § 16. As pertinent here, 46 C.F.R. § 16.201(b) provides that:

Subpart B – Required Chemical Testing

§ 16.201 Application.

(c) 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.

5. When a chemical test for dangerous drugs is administered in compliance with the DOT regulations at 49 CFR § 40 and the mariner involved fails the test, the Coast Guard must be notified by the employer as follows:

(c) If an individual holding a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual's employer, prospective employer, or sponsoring organization must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 § part 5.

(46 CFR § 16.201(c))

6. Under the DOT regulations the employer must not require the mariner to sign a consent or release form as follows:

No, as an employer, you must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services).

(49 CFR § 40.27)

7. The General Confidentiality Rule for Drug and Alcohol Test Information reads as follows:

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

(49 CFR § 40.321)

8. The definitions section of the DOT drug testing rules defines a “third party” as follows:

(a) A “third party” is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(49 CFR § 40.321(a))

9. The Coast Guard Rules of Practice which apply to this proceeding are codified at 33 C.F.R. § 20.

III. **FINDINGS OF FACT**

A. Jurisdictional Allegations Admitted by the Respondent in the Answer

1. The Respondent’s address is [Redacted] and the telephone number is [Redacted].
2. Respondent holds license number 895027.

B. Factual Allegations Admitted by the Respondent in the Answer

“The Coast Guard alleges that:

1. On **June 3, 2004**, Respondent took a **Pre-Employment** drug test.
2. A urine specimen was collected by Tammy Byrd of Springhill Industrial Drug Testing.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was collected and analyzed by **Kroll LSI** using procedures approved by the Department of Homeland Security.”

C. Factual Allegations Not Admitted by the Respondent in the Answer

5. “That specimen subsequently tested positive for **Marijuana Metabolites**.
6. That MRO Dr. Brian Heinen M.D. verified the positive test for **Marijuana Metabolites**.”

D. Other Facts

1. Ms. Tami Byrd collected Mr. McDuffie's urine sample at Springhill Industrial Drug Testing, Mobile, Alabama on June 3, 2004. She is an experienced, certified specimen collector familiar with the DOT rules governing such collections. (TR 16-17). She has administered "well over 100" collections. (TR 18). She identified the Respondent by reference to his driver's license. (TR 19-20) She also entered Mr. McDuffie's Social Security number on the Federal Drug Testing Custody and Control Form. (TR 22) She checked the DTCC form noting that McDuffie's temperature was within acceptable range. (TR 21). The specimen which was split into two bottles remained in her presence until it was sealed and labeled. (TR 21-22). Next she made the following certification on the form:

"I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements." (*Id.*).

(TR 22-23, IO Exhibit 1).

2. Mr. McDuffie too signed the DTCC form and also made the following certification:

"I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct." (*Id.*).

3. The specimen bottles were transported by Airborne Express to Kroll Laboratory Specialists, Gretna, LA where they were received the next day on June 4, 2004. (IO Exhibit 3). There the seals on the specimen bottles were examined and were found to be intact. (TR 38) The specimen bottles were given a unique laboratory accession number and an aliquot was taken for the initial screening test. (*Id.*) That test revealed the Respondent's sample contained 79

ng/ml of THC. (TR 40). The DOT screening cutoff concentration for THC is 50 ng/ml. (IO Exhibit 4, Section VI; TR 44-46).

4. A confirmatory test was conducted next on a separate aliquot taken from the same specimen. This test was conducted by GC/MS. The results revealed the presence of a marijuana metabolite in the concentration of 37 ng/ml. (IO Exhibit 3, Section G; TR 60, 67). The DOT allowable threshold limit is 15 ng/ml. (IO Exhibit 3; Section VI; TR 51).

5. Before the test results were released to the Medical Review Officer, the Laboratory's Certifying Scientist, David Drewek, reviewed all the data involved and signed the Drug Test Report confirming the test results. (IO Exhibit 5).

6. Dr. Brian Heinen is the Medical Review Officer (MRO) who reviewed Mr. McDuffie's test. He compared the copy of the DTCC form he had received from the collection site and the one from the laboratory. The doctor found no procedural errors. (TR 82). Next, he telephoned Mr. McDuffie on June 7, 2004 and discussed the positive test result with him. Dr. Heinen concluded that there was no justifiable medical explanation for the presence of marijuana metabolite in the mariner's system. On June 7, 2004 the doctor concluded that the drug test results were POSITIVE FOR THC. (IO Exhibit 6; TR 83). The doctor signed the DTCC form and sent his report to Graham Gulf, the employer who ordered this pre-employment drug test. (TR 83-85).

7. Mr. Dickinson Graham Gulf's General Manager, reported the positive drug test results to the Coast Guard Marine Safety Office at Mobile, Alabama on June 8, 2004. (TR 97). The Complaint in this case was filed the following month on July 6, 2004.

IV. OPINION

A. General.

1. The Coast Guard has jurisdiction over Respondent and this matter pursuant to 46 U.S.C. 7704, which states that “if it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.” The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 C.F.R. § 20.701. See also Appeal Decision No. 2603 (HACKSTAFF); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). It is now well established that the Investigating Officer must prove three elements to meet this burden in a case involving the use of a dangerous drug where a chemical drug test is conducted. As set out in Appeal Decision 2583 (WRIGHT) (p. 4) they are:

To meet this burden, as applied to the specification 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 C.F.R Part 16. Appeal Decisions 2379 (DRUM), 2279 (LEWIS).

See also Appeal Decision Nos. 2584 (SHAKESPEARE); 2632 (WHITE); and 2637 (TURBEVILLE).

2. The first witness to testify at the hearing was Ms. Tami Byrd. She is the individual who collected Mr. McDuffie’s specimen and is an experienced, certified specimen collector. (TR 16). She is familiar with the DOT guidelines governing the collection procedures and described how she conducted the collection. First, she identified the Respondent by reviewing his driver’s license and wrote his social security number on the custody form. (TR 19-20). Once he provided the urine specimen she checked the temperature to assure it was within the acceptable

range, split the sample into two vials, and sealed and labeled both in McDuffie's presence. (TR 21-22). Then, the Mr. McDuffie signed the custody form certifying that the specimen was his, that it was sealed in his presence, and that the information on the labels was correct. (TR 22-23). Next, Ms. Byrd too signed the DTCCF certifying that the specimen was collected, labeled, sealed and released to the delivery service in accord with Federal requirements. (TR 23). Subsequently, the specimen bottles were picked up by Airborne Express and delivered to the drug testing laboratory the next day.

Reviewing this testimony and Exhibits IO-1, 2, and 5 (the copies of the Federal Drug Testing Custody and Control Form involved here) I find that this evidence supports the conclusion that the specimen collected was provided by Mr. McDuffie and that it was collected and handled in compliance with the DOT regulations codified at 49 CFR § 40.

3. Dr. David Green, Laboratory Director of Kroll Laboratory Specialists testified regarding the drug testing procedures followed by Kroll. The specimen bottles were examined upon receipt on June 4, 2004 and photographed to show the seals were intact and not broken. (Exhibit IO-3(B); TR 34-35). The laboratory applied a so-called "accession number" (8193541) to the bottles and that number identified Mr. McDuffie's specimen throughout the testing process. (TR 34-36).

Once the laboratory personnel were satisfied that the specimen was acceptable for testing, a portion (aliquot) was poured into a test tube and inserted into the initial screening instrument. (TR 39-41). This specimen tested positive with a reading of 79 ng/ml. (TR 40). The cutoff level on this initial screening test is 50 ng/ml. (TR 40, 45-46, 51). Next, another aliquot was poured from the original sample and a second test was conducted to confirm and qualify the drug in question. (TR 50).

This GC/MS test identifies the components of various drugs by a separation technique and determines the amounts of those unique characteristics. The confirmation test looks at only a small fraction of the total pool of marijuana products and the cutoff level is lower. (TR 51). The DOT established cutoff level on this test was 15 ng/ml. (IO Exhibit 3, Section VI; TR 51). The Respondent's specimen tested at 37 ng/ml. (TR 51, 61). This result too was positive for marijuana metabolite. (TR 61, 63). That determination was verified by the Certifying Scientist (Drewiek) on the FDTCCF on June 7, 2004. (IO Exhibit 2).

Dr. Green's testimony is supported by the laboratory's litigation package which includes the detailed documentation associated with the testing of Mr. McDuffie's urine sample. Dr. Green testified that Mr. McDuffie's specimen was tested in accord with the DOT drug testing regulations and that he did not doubt the integrity and accuracy of the test. (TR 62-63). He is a very credible witness. Accordingly, I find that the test results reached by Kroll Laboratory Specialists in the testing of Mr. McDuffie's urine specimen are accurate and valid.

4. Doctor Heinen, a Board Certified Medical Review Officer, was the physician who reviewed the test results in this case. He received the laboratory report of the positive test results and compared that document to the separate MRO DTCC form copy. (IO Exhibit 5; TR 82). Then he interviewed Mr. McDuffie by telephone on June 7, 2004 and discussed the results with the Respondent. (TR 82-83). At the end of that session the Doctor concluded that the mariner did not have any credible explanation for the positive result. (TR 82-83). Accordingly, he signed the DTCC form verifying that the test results were positive. (IO Exhibit 4).

On that same day Dr. Heinen sent his report of the positive drug test results to Graham Gulf. (IO Exhibit 6). That company was seeking to hire McDuffie and had directed the mariner to undergo this pre-employment drug test. (TR 102).

I conclude that Dr. Heinen is a credible witness and he properly performed his duties as Medical Review Officer under the DOT drug testing regulations.

In sum, therefore Mr. McDuffie's urine sample was properly tested as required by the applicable Federal requirements. He has been found to be the user of a dangerous drug (marijuana) and his license must be revoked in accordance with 46 USC § 7704.

B. The Confidentiality Issue.

Mr. McDuffie challenged the drug test here on the basis that the test results were confidential and that Dr. Heinen and his potential employer (Graham Gulf) were not authorized by him to notify the Coast Guard. That defense is not valid. Coast Guard regulations require the company ordering a drug test for a potential marine employee to notify the Coast Guard where the individual tests positive for drug use. See 46 CFR § 16.201(c); TR 100-101. That regulation is set out *infra* at page 5. Moreover, the rule regarding the confidentiality of drug test results prohibits an employer from releasing individual test results to **third parties** without the employee's specific written consent. (49 CFR § 40.321). The term third party however is defined in the regulations as any person or organization with whom other parts of the regulations do not explicitly authorize or require the transmission of information in the course of the drug testing process. (49 CFR § 40.321(a)). Since the regulations specifically require the employer to notify the Coast Guard if a mariner tests positive on a drug test, the Coast Guard is not a "third party" within the meaning of the confidentiality rule above.

V.
ORDER

For all of the foregoing reasons, **IT IS ORDERED THAT** License Number 895027 issued by the United States Coast Guard to Michael McDuffie is **HEREBY REVOKED.**

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).

PETER A. FITZPATRICK
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

Done and dated February , 2005.
Norfolk, Virginia

ATTACHMENT A

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COMPLAINANT'S WITNESSES

1. Tami Byrd
2. David Green, MD
3. Brian Nicholas Heinen, MD
4. Terry Michael Dickinson

RESPONDENT'S WITNESSES

1. Michael McDuffie

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

- IO Exhibit 1 - Collection Agency chain of custody form
- IO Exhibit 2 – Laboratory chain of custody form
- IO Exhibit 3 – Kroll litigation package
- IO Exhibit 4 – Medical Review Officer copy of FDTCC
- IO Exhibit 5 – Kroll Drug Test Report dated June 7, 2004
- IO Exhibit 6 – Heinen Medical Review Officer's verification report
- IO Exhibit 7 – Graham Gulf Inc. letter dated June 8, 2004
- IO Exhibit 8 – McDuffie's Application to renew Coast Guard issued License dated October 24, 2000

RESPONDENT'S EXHIBITS

- Resp. Exhibit A – SECON letter dated August 21, 2002
- Resp. Exhibit B – Drug test dated October 1, 2003
- Resp. Exhibit C – Drug test dated October 6, 2003
- Resp. Exhibit D – Advanced Toxicology Network drug test dated October 6, 2003
- Resp. Exhibit E – Advanced Toxicology Network drug test dated February 11, 2004
- Resp. Exhibit F – Advanced Toxicology Network drug test dated February 11, 2004
- Resp. Exhibit G – Kroll Federal Drug Testing Custody and Control Form dated June 3, 2004
- Resp. Exhibit H – not admitted
- Resp. Exhibit I – INVIMED Inc. drug test dated August 2, 2004