UNITED STATES OF AMERICA

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

UNITES STATES COAST GUARD

Complainant

vs.

CLIFFORD BLACKMON

Respondent.

Docket Number: CG S & R 04-0534
CG Case No. 2214316

DECISION AND ORDER

Issued: August 22, 2005

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

Appearances:

For the Coast Guard
LT Michael R. Pierno, Senior Investigating Officer
CPO John Price, Investigating Officer
Sector Central Pacific
Sand Island Parkway
Honolulu, Hawaii 96819

For the Respondent
Earle A. Partington, Attorney
Law Offices of Earl A. Partington
1330 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813

I. PRELIMINARY STATEMENT

The Investigating Officers (IOs) of the United States Coast Guard (Coast Guard), Sector Honolulu, initiated this administrative action seeking revocation of Merchant Mariner's Document (MMD) 005349 issued to Clifford Blackmon (Respondent). The Coast Guard issued a Complaint to Respondent dated October 5, 2004, pursuant to the legal authority contained in 46 U.S.C. 7704(c) and its underlying regulation contained in 46 CFR 5.35.

The IOs alleged that on August 27, 2004, Respondent took a pre-employment drug test. In support of the Complaint, the Coast Guard stated Respondent's urine specimen, collected by an employee collector of Straub Occupational Health and analyzed by Quest Diagnostic Laboratory, subsequently tested positive for marijuana metabolites.[1] Thus, the IOs allege Respondent used or was addicted to the use of dangerous drugs.

Respondent's attorney and Respondent's Answer to this Complaint dated October 22, 2004, admitted Coast Guard's jurisdiction over this proceeding. Respondent denied that he knowingly used an illegal drug, denied the accuracy of the drug test, but admitted "all else." On January 11, 2005, the trial-type hearing in this matter commenced before U.S. Administrative Law Judge Thomas E. P. McElligott (ALJ), in accordance with the U.S. Administrative Procedure Act, codified at 5 U.S. Code 551-559, including the Coast

[1] During the hearing on January 11, 2005, the Coast Guard's verbal motion to amend the Complaint was granted over Respondent's objection. A typographical error inadvertently listed First Advantage Corporation opposed to Quest Diagnostic Laboratory as the laboratory which performed the initial drug test analysis. (Tr. 8-10). First Advantage Corporation is the employer of the Medical Review Officer in this case.

Guard procedural rules and regulations set forth in 33 CFR Part 20. The Coast Guard offered the testimony of three (3) witnesses all testifying under oath and offered six (6) documents as exhibits into evidence. Respondent's attorney introduced the testimony of one (1) witness, a polygraph examiner, and offered three (3) documents into evidence. Respondent testified in his own behalf. The Judge admitted the nine (9) exhibits into evidence. After being placed under oath, Respondent testified on his own behalf and was cross-examined by the Coast Guard. The lists of the five (5) witnesses sworn under oath by the ALJ and nine (9) exhibits admitted into evidence by the ALJ are contained in Attachment A.

Both parties exercised their right to file post hearing briefs in accordance with 33 CFR 20.710. Without assistance of counsel, Respondent also filed two letters with the Undersigned Administrative Law Judge (ALJ).[2] Both correspondences were handwritten and the Judge forwarded copies of both to Respondent's Attorney of Record and the Coast Guard Investigating Officers. The correspondences will be treated as post hearing filings, accepted into the record, and given appropriate weight since the Coast Guard had an opportunity to review and respond to the correspondences. Thus, there was no ex parte communications.

After careful review of the entire record as a whole including factual allegations, witness testimony and applicable statutes, regulations and case law, I find the Coast Guard Investigating Officers **PROVED** that Respondent was a user of dangerous drugs.

[2] The Undersigned received Respondent's first handwritten correspondence on January 25, 2005. The second correspondence dated March 30, 2005, was received by the Undersigned on April 5, 2005.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the entire hearing record considered as a whole including documentary exhibits and witness testimony.

1. At all relevant times mentioned herein and specifically on or about August 27, 2004 through January 11, 2005, Respondent was the holder of a U.S. Merchant Mariner's Document 005349 issued to him by the United States Coast Guard.
2. Respondent served in the U.S. merchant marine for thirteen (13) years and was most recently employed aboard the USN Victorious, an oceanographic research vessel based out of or shipping out of Japan. (Tr. 106-08).[3]
3. The last time Respondent sailed on the USN Victorious was October 11 through April 26, 2004, at which time Respondent departed the vessel for his scheduled six-month rotation back to shore. (Tr. 108).
4. Respondent was scheduled to return to work in September 2004 and processing for his return to work would begin in August 2004. (Tr. 109).
5. Respondent stated he attended a house party in the Kalihi area of Hawaii on or about July 19 or 20, 2004, where various individuals smoked marijuana. (Tr. 111-14). This was over thirty (30) days before he gave his urine specimen for a drug test.
6. Respondent denies using marijuana at the house party or anytime prior to giving his pre-employment urine specimen on August 27, 2004. (Tr. 114).[4]

---

[3] The citations in this Initial Decision and Order are as follows: Transcript followed by the page number, (Tr. ____); Coast Guard Investigating Officer Exhibit followed by number (IO Ex. ___); and Respondent Exhibit followed by a letter (Resp Ex. ___).

7. On August 27, 2004, Lois Arakawa, an employee and experienced urine specimen Collector from the local Straub Clinic, collected a urine sample from Respondent for the purposes of a performing a pre-employment drug test by a certified laboratory. (Tr. 28-29; IO Ex. 1).

8. Ms. Arakawa, a registered nurse and specimen collector with approximately fifteen (15) years of collector experience who receives training every five years regarding urine specimen collections in accordance with 49 CFR Part 40, testified that she performs approximately one hundred urine specimen collections a month. (Tr. 12-14).

9. Ms. Arakawa testified that although she did not remember Respondent or the urine collection on August 27, 2004, she always follows the same process in accordance with 49 CFR Part 40 and she explained the collection process. (Tr. 13-15, 29; IO Ex. 1). This Collector recognized her signature on the Drug Testing Custody and Control Form and Document in evidence.

10. Ms. Arakawa explained the urine collection process begins with the integrity of the collection site wherein the sink and toilet are separate; next "bluing" of the water to eliminate or make obvious to a trained collector's eyes, other sources of contamination, and the toilet tank is taped. (Tr. 15-16). The Collector requests from the donor of the specimen a valid photo identification and social security number. (Tr. 16). The Respondent then chooses a cup and is instructed to remove extra clothing that may contain an adulterant, such as a vial. (Id.). Afterwards, the Collector writes the Respondent's social security

---

[4] During Respondent's case-in-chief, he admitted to smoking marijuana in 1996 and he experimented with the drug while serving in the United States Navy twenty-five (25) years earlier. (Tr. 107-08, 117-19).

number on the Custody and Control Form and secures the specimen cups with tamper-proof evidence tape. (Tr. 21).

11. Each Custody and Control Form contains a unique identification number, which is recorded on the tamper-proof tape. (Tr. 21). The respondent is directed to date and initial the tape on both bottles of his urine samples. (Tr. 22-23).

12. Collector-Nurse Arakawa checked the temperature of the specimen to ensure the sample is between ninety 90 and 120 degrees Fahrenheit. This is the normal temperature range for human urine when measured within four (4) minutes of production. Once the collector determines the sample is within the acceptable range, the specimen was split or divided into two containers or bottles. (Tr. 20). Sometimes referred to as a "split sample."

13. Both sealed urine containers by Respondent are placed into a transport bag for delivery to the first certified testing laboratory. (Tr. 24).

14. Dr. Louis Jambor, the Forensic Testing Director for the certified Quest Diagnostics Testing Laboratory for nine and a half years, offered sworn expert testimony regarding laboratory procedures performed on Respondent's urine specimen in accordance with 49 CFR Part 40, the drug testing rules and regulations. (Tr. 32-3; IO Ex. 2).

15. This Administrative Law Judge took official notice that Quest Diagnostics Laboratory is a certified and registered laboratory with the U.S. Department of Health and Humans Services and its U.S. Substance Abuse and Medical Health

Services Administration (SAMHSA) certified, as evidenced in the January 4, 2005 publication of the U.S. Federal Register. (Tr. 34-36).

16. Dr. Jambor of the Drug Testing Laboratory explained that the urine specimens are kept in a secured environment, accessed only by a key card, in a locked refrigerator. (Tr. 40).

17. The said Laboratory's first or initial test of the specimen is an immunoassay test (semi-quantitative result concluding whether specimen is positive or negative for drugs) performed on a spectrometer that is calibrated on each day of use. (Tr. 41).

18. Respondent's urine specimen tested positive for marijuana metabolites by both required tests including the Gas Chromatography, Mass Spectrometry Test and results were then forwarded to the Medical Review Officer. (Tr. 39, 44-46; IO Ex. 2).

19. When the initial test was positive for marijuana metabolites, a second confirmatory test, also known as the Gas Chromatography, Mass Spectrometry (GC/MS) test, is and was performed. (Tr. 42).[5]

20. The confirmatory test cutoff measurement for a negative test is fifteen (15) nanograms per milliliter. (Tr. 43, 44, 51).

21. The second confirmatory test confirmed the presence of marijuana metabolites in Respondent's urine measuring forty-one (41) nanograms per milliliter, which significantly exceeds the minimum of the fifteen (15) nanograms per milliliter needed for a positive test. (Tr. 44).

---

[5] The five drugs marijuana metabolites, cocaine metabolites, amphetamine, opiate metabolites and phencyclidine. See 49 CFR 40.85.

22. Dr. John Womack, Senior Medical Review Officer (MRO) at Advantage Corporation, verified the positive drug test taken by Respondent on August 27, 2004. (Tr. 59-61; IO Ex. 3).

23. After he received the laboratory's two test results, Dr. Womack interviewed Respondent on August 31, 2004, to determine if a legitimate medical explanation existed for the positive drug test results. (Tr. 64-65; IO Ex. 4). Respondent confirmed that he did not have a prescription for Marinol, or Dronabinal. (Tr. 66).

24. Dr. Womack interviewed Respondent and asked Respondent if he used marijuana prior to the drug test, and Respondent answered, "no." (Tr. 66).

25. When Dr. Womack asked Respondent if he had an explanation for the positive drug test, Respondent replied that he was taking a codeine-containing medication called Augmentin. Dr. Womack explained to Respondent that those medications would not cause a positive drug test for marijuana metabolites. (Tr. 66-68; IO Ex. 4).

26. Respondent requested a split test by a second certified different laboratory. The split test or third test performed by a second certified laboratory, LabCorp Laboratory, also confirmed the presence of the marijuana metabolites in Respondent's urine specimen. (Tr. 69; IO Ex. 6).

27. The Medical Review Officer's, Dr. Womack's, final determination, regarding the two laboratories three tests and MRO's interviews of Respondent is that the Respondent's urine specimen was properly found positive for marijuana metabolites and marijuana use by Respondent. (Tr. 69, 71; IO Ex. 3, 5, 6).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was the holder of Coast Guard issued U.S. Merchant Mariner's Document number 005349.
2. Respondent and the subject matter of the hearing are properly within the jurisdiction vested in the U.S. Coast Guard under 46 U.S. Code Chapter 77, 46 U.S.C. 7704(c); 46 CFR Parts 5 and 16; 33 CFR Part 20; and the U.S. Administrative Procedures Act, 5 U.S. Code 551-559.
3. On August 27, 2004, Respondent participated in a pre-employment drug test, which proved positive for marijuana metabolites.
4. Respondent's positive drug test created the presumption that he is a user of dangerous drugs. 46 CFR 16.201(b).
5. Respondent failed to rebut the presumption that he is a user of dangerous drugs.
6. The Investigating Officers **PROVED** by a preponderance of reliable, probative, substantial and credible evidence that Respondent was a user of or addicted to the use of a dangerous drug, namely marijuana.

IV. DISCUSSION

A major purpose of Coast Guard Suspension and Revocation trial-type hearings is to promote safety of lives and properties at sea and in ports. 46 U.S.C. 7701. These hearings are remedial in nature and do not affix criminal or civil liability. See 46 CFR 5.5; Appeal Decision 2639 (HAUCK) (2003). The U.S. Coast Guard Commandant delegated to U.S. Administrative Law Judges the authority to hear at trial-type hearings

these cases and decide to dismiss or suspend or revoke a license, certificate or merchant mariner's document for proved violations arising under 46 U.S.C. 7703 and 7704; 46 CFR Part 5.

A mariner's U.S. Coast Guard issued Merchant Mariner's License, Certificate of Registry, or Merchant Mariner's Document (MMD) is subject to revocation upon proof to a U.S. Administrative Law Judge that the holder of such a document is a user of, or addicted to the use of a dangerous drug. 46 U.S. Code 7704(c). See also Appeal Decision 2634 (BARRETTA) (2002). "Congress enacted 46 U.S. Code 7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine." Id. (Citing House Report No. 338, 98th Cong., 1st Sess. 177 (1983)).

To minimize the use of dangerous drugs by U.S. merchant mariners, the Coast Guard chemical drug testing laws and rules require maritime employers to conduct pre-employment, periodic, random, serious marine incident and reasonable cause drug testing. See 46 CFR Part 16. The type of testing at issue in this trial-type hearing is a pre-employment drug test. Under the laws and rules, a marine employer must subject prospective employees to chemical testing prior to employment as a crewmember. 46 CFR 16.210. Further, the marine employer's chemical drug testing program must be conducted in accordance with applicable statutes and regulations and Appeal Decisions. See generally 49 CFR Part 40; 46 CFR Part 16, including 16.113. If an employee fails the chemical drug test by testing positive for dangerous drugs, the individual is then presumed to be a user of dangerous drugs. 46 CFR 16.201(b). See also Appeal Decision 2584 (SHAKESPEARE) (1997). Moreover, the maritime employer is then required to

remove the employee from duties that directly affect the safe operation of the vessel and must quickly report the positive drug test results to the nearest U.S. Coast Guard Officer in Charge of a Coast Guard Marine Inspection Office. 46 CFR 16.201(c).

Here, the Coast Guard charged Respondent with use of or addiction to the use of dangerous drugs because he tested positive for marijuana metabolites in a pre-employment drug test and alleged Respondent violated 46 U.S.C. 7704(c) and its underlying regulations codified at 46 CFR 5. The Coast Guard Investigating Officers seek revocation of Respondent's MMD in accordance with 46 CFR 5.569. A major issue for determination by the Undersigned Judge in this case is whether Respondent's positive drug test is the result of dangerous drug use or innocent ingestion.

A. Burden of Proof

The U.S. Administrative Procedure Act (APA), 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before U.S. Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Investigating Officer, to prove the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). "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 proving a fact 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)). Therefore, the Investigating Officers (IOs) must prove by credible, reliable, probative and substantial evidence that Respondent more likely than not committed the violation charged.

B. Prima Facie Case of Use of a Dangerous Drug

The IO must establish a prima facie case to prove the allegation of use of a dangerous drug. Appeal Decision 2603 (HACKSTAFF) (1993). First, the IO must prove that respondent was the individual tested for dangerous drugs. Second, a showing must be made that respondent tested positive for dangerous drugs by a certified laboratory and Medical Review Officer, thus failing the drug test. Third, the IO must prove the drug test was conducted in substantial compliance with 46 CFR Part 16. Id. Once these requirements are satisfied, the burden of proof shifts to the Respondent or his attorney who must produce persuasive evidence to rebut the positive drug test evidence. Id. If the respondent fails to rebut the evidence, the Administrative Law Judge may find the charges proved based upon the presumption alone. Id. See also Appeal Decision 2592 (MASON) (1997).

Here, the first test or the initial immunoassay test concluded the Respondent's urine specimen was positive for marijuana metabolites. (Tr. 39, 44, 46; IO Ex. 2). Moreover, the second or confirmatory test, known as the Gas Chromatography/Mass

Spectrometry (GC/MS) test, also confirmed the presence of marijuana metabolites which measured forty-one (41) nanograms per milliliter. (Tr. 43-44). This was well above the minimum positive of fifteen (15) nanograms per milliliter. These two tests when combined are substantial evidence of the certified laboratory's findings. Dr. Jambor of the laboratory testified that the amount of marijuana metabolites exceeded the cutoff or minimum level, of fifteen (15) nanograms, established in 49 CFR Part 40. (Tr. 42-51; IO Ex. 2). Dr. Womack, the Senior Medical Review Officer (MRO), received and verified the laboratory's initial two test results and interviewed Respondent in an effort to determine if a legitimate medical explanation existed for the Respondent's positive drug test. (Tr. 59-65; IO Ex. 3, 4). During the interview by Dr. Womack, Respondent stated he was taking Augmentin, a codeine-containing medication. Dr. Womack testified credibly under oath that Augmentin would not cause a positive drug test for marijuana metabolites. (Tr. 66-68). Dr. Womack did not discover any satisfactory medical explanation for the Respondent's positive drug test. (Tr. 67; IO Ex. 3, 4, 5, and 6). The two certified laboratories three tests and the Medical Review Officer, Dr. Womack, all reported positive findings of marijuana use by Respondent.

I find that the Coast Guard did establish and prove a prima facie case of dangerous drug use. Respondent, identified by his signature on the Drug Testing and Control Form with his date of birth, social security number, lab accession number, initials and date evidenced on the Custody and Control Form in accordance with 46 CFR 40.61(c) was the individual who provided the urine specimens tested for drugs. (Tr. 16, 21-23; IO Ex. 1 and 2). Furthermore, Respondent did not dispute that he was the individual who participated in the pre-employment drug test at issue in this matter. The

urine collected subsequently tested positive for marijuana metabolites; thus Respondent failed the drug test. (Tr. 44, 46; IO Ex. 2). This included three (3) positive drug tests by two (2) certified laboratories, and confirmed by the Medical Review Officer.

The Coast Guard presented the testimony under oath of three witnesses: the urine specimen Collector, Laboratory Director and Medical Review Officer (MRO). The Collector testified that on an average day, she may collect five to ten specimens. (Tr. 28). Collector-Nurse Ms. Arakawa testified that Straub Clinic maintains a protocol book for errors that can be corrected by an affidavit (example, failure to record date or mark an incorrect box). (Tr. 28). The collector testified that she was not aware of any evidence or fatal errors at Straub Clinic. (Tr. 29-30). I find the drug test reasonably complied with procedures detailed in 49 CFR Part 40.

In contrast, I do not find that Respondent successfully rebutted the established and proven presumption of drug use. The MRO interviewed Respondent as usual and required after the positive drug test laboratory results and Respondent did not provide a verifiable medical explanation for the positive test results. (Tr. 65-67). Respondent did not have a prescription for Marinol or Dronabinol, two drugs which could produce positive drug test results. (Tr. 66).[6] Respondent's only explanation to the MRO for the positive results was that he was taking codeine containing medication called Augmentin. The MRO informed Respondent and testified before the Judge that those drugs would not produce a positive drug test. (Tr. 66).

During the hearing and in an attempt to explain the positive drug test, Respondent testified that he attended a house party on or about July 19 or 20, 2004, where individuals smoked marijuana. (Tr. 110-14). Respondent denied using marijuana at the party and

testified that he did not knowingly ingest marijuana.[7] (Tr. 114, 120-21). It is well established that the ALJ is the finder of fact and entrusted with determining witness credibility. Appeal Decision 2637 (TURBEVILLE) (2003). Moreover, the ALJ is in the best position to assess body language, demeanor, and tone of voice, needed to make witness credibility decisions and resolve inconsistencies in the evidence. Appeal Decision 2639 (HAUCK) (2003).

Whether Respondent knowingly or accidentally ingested marijuana is not a viable defense to rebut a positive drug test. In Appeal Decision 2527 (GEORGE) (1991), the Commandant held, "Mere supposition or speculation unfounded in fact will not serve to vitiate a valid certified laboratory analysis, conduced in accordance with applicable regulations." Appeal Decision 2596 (HUFFORD) (1998) (ALJs finding that respondent's contention of accidental ingestion which was unsupported by the record was affirmed on appeal).

In a further effort to support his testimony denying drug use or proposing the possibility of accidental ingestion, Respondent offered the testimony of a polygraph or lie detector examiner, George Tatum. Mr. Tatum retired from the Federal Bureau of Investigations (FBI) as a special agent. (Tr. 78). In addition to Mr. Tatum's career as a criminal investigator, he also trained and became qualified as a senior polygraph analyst. (Tr. 78-79; Resp Ex. B). Mr. Tatum conducted approximately 1500 polygraph examinations for criminal specific testing, background investigations, and applicant testing. (Tr. 80). Mr. Tatum explained the goal of a polygraph examination is to

---

[6] See Appeal Decision 2583 (WRIGHT) (1997).

[7] Dr. Jambor confirmed if Respondent attended a party over thirty days before the drug test, on or about July 27, 2004, passive inhalation of other's marijuana smoke would not cause the positive drug test over 30 days later. (Tr. 131-34).

determine whether an examinee is displaying any type of deception or lying in response to particular questions. (Tr. 82-83).

On January 5, 2005, Mr. Tatum conducted a polygraph examination on Respondent. (Tr. 84). Mr. Tatum explained the polygraph examination consists of four parts: 1) pre-test interview with examinee to collect general information; 2) examinee assists polygraph examiner with the formulation of questions to be asked and is told of the questions he will be asked; 3) actual testing; 4) evaluation or the actual scoring and/or post test, if necessary. (Tr. 81-82). Mr. Tatum asked Respondent three relevant questions regarding drug use. Mr. Tatum concluded that Respondent's answers were truthful. (Tr. 89; Resp Ex. A). The Coast Guard did not object to Mr. Tatum's testimony or evidence admitted regarding the polygraph examination conducted on Respondent. This Administrative Law Judge did and does not find Respondent and Respondent's witness credible.

At this time, this Judge, upon review of the entire record considered as a whole including witness testimony and competent evidence, does not find the polygraph examination persuasive evidence to overcome a presumptively valid three (3) tests by two (2) tested and certified laboratories and a Medical Review Officer's positive drug test result. An ALJ is vested with authority to attribute appropriate weight to polygraph evidence. Appeal Decision 2546 (SWEENEY) (1992). According to Mr. Tatum's testimony, a polygraph cannot negate a positive urinalysis. However, Mr. Tatum nevertheless concluded Respondent's answers to questions regarding drug use on January 5, 2005, were truthful. Mr. Tatum asked Respondent approximately eight to ten questions. Of those questions, two were directed to the incident at issue. (Tr. 89-92).

Mr. Tatum further provided that in his opinion, polygraph results are 95% to 96% accurate. (Tr. 89). Therefore, he admitted that at least 4% to 5% of polygraph examinations could give inaccurate or wrong results. Mr. Tatum testified that he had not testified in Federal Court, but has testified in State Court and to his knowledge; only two (2) states of the fifty (50) states of the USA admit results from lie detector or polygraph examination into evidence.[8] (Tr. 92, 101-02). Forty-eight (48) states of our fifty (50) states do not admit such results in such cases to be admitted into evidence and therefore are not weighed as evidence.

I find that the Coast Guard proved by substantial, reliable, credible and probative evidence that Respondent used or is addicted to the use of a dangerous drug. I do not find Respondent and Respondent's witness testimony credible to rebut the valid drug test result when considering the entire record as a whole.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the U.S. Administrative Law Judge (ALJ). Appeal Decision 2362 (ARNOLD) (1984). Title 46 of the Code of Federal Regulations Part 5 Section 569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of the Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

[8] During the hearing Mr. Tatum testified that he believed Arizona State Court accepted polygraph evidence and was uncertain which other state admitted polygraph results into evidence. (Tr. 101). Respondent's resident State of Hawaii does not admit such evidence. Forty-eight (48) of the fifty (50) USA states do not admit it into evidence, according to Respondent's own witness.

Once the Coast Guard proves a mariner used or was addicted to the use of dangerous drugs, his credentials must be revoked unless cure of drug use is proven. See 46 U.S.C. 7704(c); 46 CFR 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of cure, an ALJ must revoke Respondent's license and document. Appeal Decision 2634 (BARRETTA) (2002). In contrast, where Respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program," an ALJ may stay the revocation and continue the Suspension and Revocation hearing. Id. See also Commandant's Review Decision 18. Absent evidence of cure or substantial involvement in the cure process, an ALJ has no choice but to revoke under 46 U.S. Code 7704(c). Appeal Decision 2583 (WRIGHT) (1997); Appeal Decision 2552 (FERRIS) (1993).

Here, the Investigating Officers proved and the Undersigned Judge found, Respondent used a dangerous drug. Furthermore, Respondent and Respondent's attorney did not provide or demonstrate proof or evidence of cure of drug use by substantial involvement in the cure process. Generally this would be done by Respondent's or Respondent's attorney's evidence of enrollment in an acceptable drug rehabilitation program, since this positive finding by two (2) laboratories and the Medical Review Officer. Therefore, I am precluded or prevented from issuing an order less than **REVOCATION**.

VI. ORDER

IT IS HEREBY ORDERED, that United States Coast Guard Merchant Mariner's Document Number 005349 issued by the United States Coast Guard to Clifford

Blackmon, is hereby **REVOKED**, and shall be immediately delivered by mail or hand to the United States Coast Guard, Investigating Officers, Marine Safety Office, U.S. Coast Guard Sector Honolulu, 433 Ala Mona Boulevard, Honolulu, Hawaii 96819.

PLEASE BE ADVISED that the service of this decision on Respondent's counsel or Respondent will serve as notice to Respondent of his right to appeal. The rules and procedures governing administrative appeals are set forth in 33 CFR 20.1001-20.1003. Attachment B.

____
THOMAS E. P. MCELLIGOTT
U.S. Administrative Law Judge

Dated this 22nd day of August, 2005
Houston, Texas

ATTACHMENT A

LIST OF WITNESSES AND EXHIBITS

INVESTIGATING OFFICER'S (IO) EXHIBITS

1. Federal Drug Testing Custody and Control Form - Collector's Copy
2. Federal Drug Testing Custody and Control Form– Laboratory Copy and Litigation Package
3. Federal Drug Testing Custody and Control Form – Medical Review Officer's Copy
4. Medical Review Officer's Drug Specific Interview Information Sheet
5. Medical Review Officer's Report and Determination Letter dated August 31, 2004
6. Medical Review Officer's Split Test Confirmation Report dated September 9, 2004

INVESTIGATING OFFICER'S (IO) WITNESSES

1. Lois Arakawa, Specimen Collector and Nurse employed by the Straub Clinic
2. Dr. Louis Jambor, Ph.D. Director for Quest Diagnostics Certified Laboratory located in Van Nuys, California
3. Dr. John Womack, MD, Senior Medical Review Officer, employed by First Advantage Corporation

RESPONDENT'S EXHIBITS

A. Polygraph Examination Report on Clifford Blackmon dated January 5, 2005
B. Curriculum Vitae of George A. Tatum, III
C. Alcohol Drug & Psychological Testing Receipt and Results of Test performed on August 30, 2004. Nine page report from www.5minutedrugtest.com

RESPONDENT'S WITNESS

1. George A. Tatum, Polygraph Examiner or Lie Detector Examiner
2. Clifford Blackmon, Respondent

ATTACHMENT B

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS
PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD
SUBPART J - APPEALS

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 Sec. 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.