

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

UNITED STATES COAST GUARD

Complainant

vs.

JOSEPH PATRICK WOLFINGBARGER

Respondent.

Docket Number CG S&R 04-0541
CG Case No. 2215725

DECISION AND ORDER

Issued: January 17, 2006

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

Appearances:

Senior Investigating Officer, Lieutenant Christopher Rose and
Investigating Officer, Chief Warrant Officer Nicholas J. Meyers,
both Investigating Officers stationed at the time at the U.S. Coast Guard
Marine Safety Detachment Cincinnati, 3653 River Road, Cincinnati, OH 45204
For the U.S. Coast Guard

Raymond G. Musgrave, Esq. of the Law Office of Musgrave & Musgrave,
627 Main Street, P.O. Box 11, Point Pleasant, WV 25550
For the Respondent

PRELIMINARY STATEMENT

This was a trial-type hearing before Thomas E. P. McElligott, a U.S. Administrative Law Judge, Department of Homeland Security/U.S. Coast Guard. The hearing was held in the U.S. Courthouse of the U.S. Court of Appeals, on November 16, 2005, in the city of Cincinnati, Ohio. This trial-type hearing was brought under the authority of the U.S. Administrative Procedures Act, 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 authority includes 46 CFR 5.35 (use of dangerous drugs). The captioned Respondent prior to and at the time of the hearing held a U.S. Coast Guard issued U.S. Merchant Mariner's Captain's License. The Respondent stated that he has this original license in safe keeping and he agreed to deliver it to the Investigating Officers following the hearing. The Investigating Officer's Complaint served on Respondent personally alleged Respondent J. P. Wolfingbarger was the holder of a U.S. issued Merchant Mariner's License and was a user of dangerous drugs, in that his urine specimen was collected from him and was drug tested and found positive for cocaine use. Well prior to the hearing date, the Investigating Officers served the Complaint personally upon the Respondent. In the Complaint, the Investigating Officers sought revocation of Respondent's U.S. Merchant Mariner's License, which was issued to him by the U.S. Coast Guard, in accordance with 46 U.S. Code 7704.

Respondent's said attorney filed a "Motion for More Convenient Forum" to hold the hearing and suggested that the matter be held at the U.S. Courthouse for the U.S. Court of Appeals, located at 100 East 5th Street, in Cincinnati, Ohio. Without objection by the U.S. Coast Guard Investigating Officers, this motion was granted. Respondent's attorney Raymond G. Musgrave filed an "Answer and Affirmative Defenses" to the

Complaint served upon Respondent. It was received at the ALJ Docketing Center in Baltimore, Maryland on October 28, 2004. It is a 6-page document with an additional Certificate of Service.

The matter was scheduled for an earlier hearing date, but Respondent's counsel had some serious cardiac difficulties and was operated on. Therefore, the hearing was continued until his health improved and so the matter was held in Cincinnati, Ohio, in the said courthouse, on November 16, 2005.

The matter proceeded to hearing in a courtroom, in the U.S. Courthouse, in Cincinnati, Ohio, before U.S. Administrative Law Judge (ALJ) Thomas E. P. McElligott. The Respondent's attorney and the Investigating Officers were present throughout the hearing. Respondent showed up at the hearing a few minutes late and sat at counsel table with his attorney throughout the remainder of the hearing and testified in his own behalf when he was called by his attorney to testify. Both sides made their Opening Statements and then the Investigating Officers offered their documentary evidence and their three (3) witnesses testified under oath. The Defense Attorney called as their witness Respondent J. P. Wolfingbarger who testified under oath and did not call the other two (2) listed witnesses Respondent's attorney had listed previously as his potential witnesses, more or less as character witnesses.

FINDINGS OF FACT

The Findings of Fact and Rulings are based upon a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, and the entire hearing record considered as a whole, as well as the applicable laws.

1. Respondent was a holder at the time of these dates and instances of a U.S. Coast Guard issued U.S. Merchant Mariner's Captain's License.
2. At the time of these instances, Respondent was operating as a Captain aboard a vessel which included nine (9) crewmembers, eight (8) of which were under Respondent's jurisdiction and control as the captain and master of the vessel. At the time, Respondent was employed as a captain by the Ingram Barge Company. He testified he had been with this company about twenty (20) years. Factual allegations of the Complaint included "Use of or Addiction to the Use of Dangerous Drugs." The Coast Guard further alleged in the Complaint served personally upon the Respondent that: (1) on August 18, 2004, the Respondent took a random drug test; (2) Respondent's urine specimen was collected by Collector John Crivello of West Kentucky Drug Screen, Inc.; (3) the Respondent signed a "Federal Drug Testing Custody and Control Form"; (4) the Respondent's urine specimen was collected and analyzed by Advanced Toxicology Network using procedures approved by the U.S. Department of Transportation; and (5) that specimen of Respondent subsequently tested positive for cocaine metabolites. Respondent's attorney's Answer to the Complaint stated that he is without sufficient knowledge to answer the Complaint completely and required strict proof thereof.
3. Respondent's urine specimen was collected by a trained and experienced human urine specimen Collector, employed at the time by West Kentucky Drug Screen, Inc., Mr. John Crivello.

4. Respondent consented to the drug test on his urine specimen when Respondent completed and signed the “Federal Drug Testing Custody and Control Form”. By completing and signing this consent form, Respondent gave his approval to the collection process. In it Respondent placed his date of birth, the date of the collection of his urine sample and his signature.
5. Respondent was given a collection container cup by the Collector and was asked by the Collector to fill it to at least a certain level on the cup indicated by the Collector. A West Kentucky Drug Screen collection container (also sometimes referred to as a “specimen cup”) was used. Respondent’s specimen was then poured by the Collector into two (2) bottles or containers which were both sealed in Respondent’s presence and Respondent initialed the sealings. This is sometimes referred to as a “split specimen”.
6. Respondent’s urine specimen was collected by Mr. John Crivello (“the Collector”), a trained and experienced Collector of human urine specimens.
7. The Collector unsealed the specimen collection cup in the presence of Respondent prior to giving it to Respondent for collection. The Collector wore gloves during the collection process.
8. After the Respondent gave the specimen cup containing Respondent’s urine sample to the Collector, the Collector split the sample into two bottles and sealed both bottles. Respondent initialed the labels verifying that they were sealed in Respondent’s presence and no contamination took place.
9. The Collector then completed, dated and signed the chain of custody forms also called a “Federal Drug Testing Custody and Control Form”. Respondent

completed and signed a copy of the “Federal Drug Testing Custody and Control Form” after giving Respondent’s urine sample to the Collector, thereby authorizing Respondent’s approval of the collection procedures.

10. The sample was later delivered to the testing laboratory, operated by Advanced Toxicology Network, using procedures and two required tests approved by the U.S. Department of Transportation and/or the U.S. Department of Health and Human Services.
11. Respondent later was notified, that he testified positive in this laboratory, for cocaine use, by the Medical Review Officer (MRO). Respondent was also advised by this MRO that Respondent could have a second laboratory retest them, since there were two sample bottles, sometimes called a “split sample”. Respondent did not request this Medical Review Officer to have a second laboratory retest Respondent’s urine sample.
12. The specimen collector cup was unsealed by the Collector before handing it to the Respondent or person who will give the urine sample. Respondent also testified that he was taking over-the-counter medications at or before the drug test that he bought at a Wal-Mart store. Respondent took the stand and denied using cocaine on or before August 18, 2004. Respondent and his attorney attempted to argue that his many years of prior negative drug tests should be admitted as evidence of his lack of use of a dangerous drug. The U.S. Administrative Law Judge (ALJ) did not admit this into evidence, ruling that he accepted that the Respondent did not use drugs during the prior period when he was previously tested because if he did, then Respondent would have been charged by Investigating Officers with Use

of a Dangerous Drug at a much earlier date as a result of an earlier test failure.

The ALJ ruled on a prior motion of Respondent's attorney that he did not have to provide proof of passing all of these prior tests for many years because the ALJ would assume for the purpose of this hearing that the Respondent had passed all prior drug tests or he would have been served much earlier with Complaints by the U.S. Coast Guard Investigating Officers for failing any prior urine drug tests.

13. The Respondent's U.S. Coast Guard issued Merchant Mariner's License has not expired and is still valid. The Respondent has promised in the hearing room to turn it over to the Investigating Officers shortly after the hearing. The Respondent stated that he has been unable to work under the license since that time so he took a lesser paying job in a factory. The Respondent states that in the factory he only earns about \$20,000 a year or less, whereas as a captain in the U.S. Merchant Marine on the lakes and U.S.A. rivers he was earning approximately \$70,000 a year. The Respondent's employer maritime company, after it learned of his drug test failure, dismissed Respondent from his captain's position and as their employee of about twenty (20) years. The Respondent states that as a result of the loss of his captain's job, he lost his home and is now living with his married daughter. Respondent did not testify as to how much money he lost paying for the drug cocaine.
14. On the date of the collection of the Respondent's urine specimen, Wednesday, August 18, 2004, Respondent held or possessed a U.S. Coast Guard, Regional Examination Center, issued credential known as a U.S. Merchant Mariner's License. The Respondent's License contained identifying data and according to

Respondent will automatically expire in the year 2006. These licenses are usually issued for five (5) years and then automatically expire if not renewed by the mariner at a U.S. Coast Guard, Regional Examination Center.

15. On the urine sample collection date, Wednesday, August 18, 2004, Respondent responded to a random drug test and gave his urine sample at that time. The urine drug test was ordered by his marine employer. The collection was aboard ship. Respondent's eight (8) other crew members also gave urine samples in the same manner.
16. Respondent's urine specimen was collected by a trained and experienced human urine sample Collector, Mr. John Crivello, employed at the time by the West Kentucky Drug Screen, Inc.
17. On the date of the collection of the urine specimen, the Respondent completed and signed a copy of the usual and proper "Federal Drug Testing Custody and Control Form". The Respondent signed it and gave his date of birth and date of the collection. At no time during the entire collection process and procedures of urine collection of Respondent's urine specimen, did Respondent make any claims or written notations that there was any problem with the collection cup or any other problems, or that any 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 any of them were unsealed. Respondent did not make any objections then at the collection date and site, nor on the said collection form he completed and signed.

18. The Collector testified credibly as did the Medical Review Officer and the Representative from the Analytical Laboratory. After watching and listening carefully to all who testified at the hearing, I find the testimony credible of the Collector, the Representative from the tested and certified Laboratory and the Medical Review Officer (MRO). With regard to Respondent's testimony, I do not find it credible.
19. The Respondent's urine specimen was received from the Respondent and properly sealed and then sent to a designated, tested and certified drug-testing laboratory.
20. The Respondent's urine specimen was collected using a urine sample collection kit. During this collection, the Collector was dealing with only one urine specimen donor at a time, namely the Respondent, Joseph Patrick Wolfingbarger.
21. The collection cup and the two (2) bottles sealed by the Collector were then sent to the laboratory, again sealed. Advanced Toxicology Network 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) or one of its subsidiary agencies.
22. The Respondent delivered approximately 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 the last many years in his career as a U.S. Merchant Mariner, working for about twenty (20) years at the same marine employer. 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 Respondent's urine.

23. The Collector, after he received at least 60 milliliters of urine from the Respondent in the collection cup, broke the seal on two other little bottles from the collection package and filled each of them with at least 30 milliliters of Respondent's urine, each to be sent to the tested and certified laboratory, Advanced Toxicology Network.
24. 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 two 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, the Collector then put the sealed bag into a collection box to be delivered by a courier directly to the laboratory. Later a courier did pick up these two (2) bottles and the entire package and any others of the rest of the crew and delivered them to his company for delivery to the tested and certified laboratory. The Collector credibly testified that the 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 urine specimen collection kit. There were plenty available to the Collector if he needed another collection kit.
25. When the sealed collection kit and Respondent's urine specimen arrived at the laboratory, it was examined and found to be properly sealed and closed. As stated on the government collection document, known as the "Federal Drug Testing Custody and Control Form", the specimen bottles were released to the laboratory courier for delivery to the laboratory.

26. The Collector credibly testified under oath that Respondent's urine sample was properly collected and in accordance with the rules and regulations, including 49 CFR Part 40.
27. Following the testimony of the first witness, the Collector, the second witness called to testify under oath by the U.S. Coast Guard Investigating Officers was Ms. Janet Putnam, "The Laboratory Director" and "Responsible Person" for the urine testing laboratory, Advanced Toxicology Network, located at Memphis, Tennessee. She testified credibly also and described the laboratory's methods and analysis of Respondent's urine specimen. The third witness called by the Coast Guard Investigating Officers to testify under oath was Dr. Daniel C. Drew, M.D. and Medical Review Officer (MRO) from Indianapolis, Indiana, affiliated with Nationwide Medical Review of Indianapolis, Indiana.
28. The Investigating Officers' documentary exhibits that were admitted into evidence by the undersigned judge included the following:
 29. Coast Exhibit 1 is a certified copy of the application for license and renewal of license by and for Respondent Joseph Patrick Wolfingbarger, filed by Respondent with a U.S. Coast Guard, Regional Examination Center (REC).
 30. Coast Guard Exhibit 2 is the certified copy of the U.S. Custody and Control Form completed and signed by the Collector of Respondent's urine specimen.
 31. Coast Guard Exhibit 3 is a certified copy of the Custody and Control Form from the said laboratory. It was signed and completed by the laboratory stating it found cocaine in Respondent's urine sample; together with the attached Litigation Package from this laboratory consisting of 18 additional pages.

32. Coast Guard Exhibit 4 is a certified copy of the said Custody and Control Form completed and signed by the MRO or Medical Review Officer, Dr. Daniel C. Drew, of Indianapolis, Indiana, stating he reported a “positive” for “cocaine” use also after this doctor advised Respondent the laboratory found Respondent’s urine sample positive and then interviewing Respondent.
33. Coast Guard Exhibit 5 is an extract from the official U.S. Federal Register dated August 4, 2004, showing the testing laboratory, Advanced Toxicology Network of Memphis, Tennessee is SAMHSA tested and certified, as a human urine testing laboratory. SAMSHA is short for the “Substance Abuse and Mental Health Services Administration”. It is part of the U.S. Department of Health and Human Services. It specializes in testing laboratories that apply and wish to be certified as human urine testing laboratories for our national government.
34. On a copy of the “Federal Drug Testing Custody and Control Form”, Respondent printed his name, signed his signature and the date of collection. Respondent also gave his telephone number and date of birth. The Respondent did not make any claims or written notations on the form on the day of collection that he saw the collection bottle or the collection kit unsealed nor did Respondent write about any other problems.
35. The official procedures list at the collection site contains about seven (7) pages of instructions for the Collector, which he followed. The Collector read the temperature of Respondent’s urine specimen before accepting it. It was read within the proper first four (4) minutes of production and it was within the proper temperature ranges for normal human urine, when read within four (4) minutes.

36. Respondent's urine sample was received at the laboratory, dated and signed for by the laboratory's accessioner, with the accessioner's signature. 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, who signed it. That person reported after the two required tests on Respondent's urine sample a positive for cocaine or cocaine metabolites. The laboratory's findings and positive for cocaine report were then sent to the MRO's office. Subsequently this MRO contacted Respondent. The MRO in this case interviewed Respondent personally and advised Respondent he tested positive for cocaine use. This MRO and doctor found no credible medical or other excuse for the Respondent's urine sample to have tested positive for cocaine use at the said laboratory. The MRO then also found and reported the findings of a positive for cocaine use by the Respondent on or after the date the MRO advised and interviewed the Respondent. This MRO then printed his name and signed the "Federal Drug Testing Custody and Control Form" also reporting a positive finding of cocaine use by Respondent. This MRO and M.D. agreed with the finding of cocaine use by Respondent.
37. When it came time for Respondent's attorney to present his case, he chose to call Respondent to testify in his own behalf and did not call two other character witnesses that he had listed as potential witnesses. Respondent was sworn in and took the stand and testified in his own behalf and was questioned by Respondent's attorney Musgrave, the Investigating Officer and the Judge.

38. The findings include that the Respondent failed a urine drug test by a properly certified and tested laboratory following his proper and careful urine sample collection. After the two required tests by the laboratory, it was affirmed also by the MRO after this doctor advised Respondent of the laboratory's report and he interviewed Respondent and found that Respondent had no proper medical excuse for the failure of the urine drug test showing cocaine use. Respondent tested positive for cocaine use from a urine sample collected from Respondent on the date of the collection.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was a holder of a U.S. Coast Guard issued Merchant Mariner's License and serving as a vessel Captain and Person-In-Charge of a vessel and about an eight (8) person crew on the date of the collection of Respondent's urine sample or specimen, on Wednesday, August 18, 2004, after which Respondent's random drug test was found positive for cocaine metabolites. The reason the test is called random is that the people on the vessel or boat do not know in advance that there is going to be a test for the crewmembers aboard the vessel, including the vessel's captain, Mr. Joseph Patrick Wolfingbarger, Respondent. The vessel and crew are selected at random to be tested.
2. The Complaint alleged, "Use of or Addiction to the Use of Dangerous Drugs", namely cocaine, that is a violation of 46 U.S. Code 7704, including 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 U.S. 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 personally on Respondent by a Coast Guard Investigating Officer well before the hearing date.

DISCUSSION

The U.S. Administrative Procedure Act (APA), 5 U.S. Code Sections 551 to 559, applies to U.S. Coast Guard suspension and revocation trial-type 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 hearing 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) (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, 371-372 (1970) (Harlan, J., concurring) (brackets in original)). Under U.S. Coast Guard procedural rules, the Coast Guard Investigating Officers bear the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701 and 20.702(a). Therefore, the Coast Guard Investigating Officers must prove with reliable, probative and substantial evidence that Respondent more likely than not committed the violations charged.

In this case, the Coast Guard Investigating Officers alleged Respondent took a random (or short notice) drug test by providing his urine sample. Respondent completed and signed a copy of the Federal Drug Testing and Control Form. Respondent's urine specimen was collected and analyzed using procedures approved by the U.S. Department of Transportation and U.S. Department of Health and Human Services. Respondent's urine specimen tested positive for cocaine metabolites. (Entire transcript). A cocaine metabolite is part of what is left in the human's urine after the human body processes ingested cocaine for up to about 72 hours. A U.S. Coast Guard issued License, Certificate of Registry, or Merchant Mariner's Document (MMD) must be revoked if it is proven that the holder and user of this license has been a user of, or addicted to, a dangerous drug, unless Respondent can prove satisfactory cure. 46 U.S. Code 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. Code 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. Code

802(17). Based on the entire record, including Respondent's positive tests results for cocaine metabolites, I conclude that Respondent did use a dangerous drug, namely cocaine.

The Coast Guard Investigating Officers met their burden of proof by a preponderance of the credible, reliable, probative and substantial evidence by showing that Respondent is a User of a Dangerous Drug. In addition to Respondent's positive drug test, the Coast Guard Investigating Officers showed through testimony and documentary exhibits in evidence that the drug test was performed properly and the specimen container was unsealed no earlier than necessary. Respondent was unable to credibly rebut this evidence. Respondent claimed that he took some over-the-counter medications or fat reducers from Wal-Mart, but he did not state it contained any cocaine in it. Neither of these arguments is supported by credible evidence. Wal-Mart would be violating criminal laws if it sold cocaine in any products, including fat reducing or over-the-counter products that would cause a human being to test positive for cocaine use.

Title 46 U.S. Code 7704(c) provides that a U.S. Coast Guard issued U.S. merchant mariner's license, certificate of registry or document should ordinarily 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 successfully completing drug rehabilitation cure 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 Officers (IOs) 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 Trial-Type 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 License at the time of this urine specimen collection. 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, including 46 U.S. Code 7704(c).

A. RESPONDENT WAS TESTED FOR DANGEROUS DRUGS.

The evidence proved that on the date of the collection, the Respondent gave his urine specimen to a trained and experienced urine specimen Collector for a random drug test. Additionally, the evidence demonstrates an unbroken chain of custody of Respondent's urine sample from the time Respondent gave his urine sample or specimen to the Collector through all phases of the testings, by the tested and certified testing laboratory. Respondent's urine sample was properly collected by the Collector. The Collector released the carefully sealed urine sample to the certified testing laboratory. The urine sample arrived at the testing laboratory with the two specimen bottles' seals intact. The laboratory performed the required initial test and also the required second confirmatory test known as the Gas Chromatography and Gas Spectrometry test (GCMS test) on a portion of Respondent's urine sample. Both tests resulted in a positive for cocaine use. The Coast Guard Investigating Officers introduced evidence that Respondent took this random drug test on August 18, 2004, a Wednesday. Respondent's

urine sample subsequently tested positive twice for use of a dangerous drug, by the tested and certified laboratory. The Coast Guard Investigating Officers have made a prima facie case and proved this element.

B. RESPONDENT TESTED POSITIVE FOR A DANGEROUS DRUG.

Based upon the evidence, Respondent's urine sample tested positive for a dangerous drug, namely cocaine, by a tested and certified drug-testing laboratory, 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 laboratory to contain more than enough nanograms of Benzoyllecgonine for two (2) positive tests showing cocaine use. As the laboratories are required under 49 CFR 40.87(a & c) to report a confirmed concentration of Benzoyllecgonine greater than 150 nanograms per milliliter (ng/ml) as a positive result for cocaine. The MRO interviewed Respondent, notified Respondent of the positive laboratory results and report and then agreed with the certified laboratory's findings. The Coast Guard Investigating Officers have 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 should be conducted in accordance with the procedures detailed in 49 CFR Part 40. The U.S. Coast Guard Commandant has held in appealed decisions that the Investigating Officers have made a prima facie showing of this element when the Investigating Officers introduced credible 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 specimen was collected by a trained, experienced and careful Collector; a split sample was collected. There was no unbroken chain of custody of these samples. The laboratory performed the required initial test and the required confirmatory test and found cocaine in Respondent's urine under both tests above the minimums required for positive results. Both tests confirmed the finding for cocaine. The laboratory was previously tested and certified by the U.S. Department of Health and Human Services by one of its major subdivisions specializing in such matters. After the laboratory's two (2) tests resulted in two (2) positives, the MRO received the laboratory's results and findings and then advised of the laboratory's positive findings of cocaine use, interviewed Respondent and found no medical excuse for cocaine use and then the MRO verified the laboratory's test results. Therefore, the Investigating Officers have proved a prima facie case by proving that the drug tests were conducted in accordance with 49 CFR Part 40 and the other applicable laws.

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). (For example, when a vessel strikes a fixed or stationary 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)).

I do not find the Respondent's testimony credible. After carefully observing all the witnesses' testimony, I find that the Collector, the Laboratory Representative and the MRO medical doctor testified credibly but Respondent did not. There is no credible and convincing evidence in the record to support the claims that Respondent makes. Respondent made a claim that he was using some substance from Wal-Mart that was fat reducing or weight reducing and that it may have contained cocaine. However, if Wal-Mart was selling cocaine in fat reducing products, it would be subject to criminal prosecutions. I do not find this credible. As Respondent has not offered any credible or convincing 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. This is in violation of the applicable law, including 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. Statutory and regulatory provisions: 46 U.S. Code 7701, 46 U.S. Code 7704, including 7704(1)(B), and 46 CFR Part 5, including 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 Respondent Wolfingbarger 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 urine sample 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 applicable statutes, rules and regulations, the Investigating Officers have the burden of proving all elements of the Complaint that was served personally on Respondent. 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 a 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 U.S. 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, the Coast Guard Commandant on appeal found no basis to overturn that Administrative Law Judge's determination and decision. 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 a federally tested and certified laboratory, using a federal government tested and certified laboratory. 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. The Judge's conclusions will not be overturned unless they are without

support in the record and are inherently incredible. Commandant's 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.

Commandant's 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 or order.

SANCTION

Title 46 U.S. Code 7704(c) usually requires revocation of a U.S. Coast Guard issued merchant mariner's license if the holder of the credential is a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof of cure of drug use. 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 by passing drug tests about every two months after the successful completion of the drug rehabilitation program. Commandant's Appeal Decision 2535 (SWEENEY) (1992). These were the cure procedures approved by the Commandant in this case of a harbor pilot in the San Francisco area. Commandant's Appeal Decision 2535 (SWEENEY) supra.

Since the Respondent did not offer any previous evidence of substantial involvement in the cure process, the usual sanction is revocation of his Coast Guard issued Merchant Mariner's License. Unless Respondent Joseph Patrick Wolfingbarger files proof before or within thirty (30) days after the date that this Decision and Order is served upon Respondent or his attorney that Respondent has enrolled or will within thirty (30) days of receipt of this Decision enroll in a proper Drug Rehabilitation Course, satisfactory to the Senior Investigating Officer of the U.S. Coast Guard, Marine Safety Detachment Cincinnati, 3653 River Road, Cincinnati, Ohio 45204, telephone 513-921-9033, facsimile 513-921-1376, 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 License 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 License is to be immediately delivered by mail, DHL, Fed-Ex or hand to the Senior Investigating Officer or to an Investigating Officer of the U.S. Coast Guard, Marine Safety Detachment in the Cincinnati, Ohio region at office stated above.

THOMAS E. P. MCELLIGOTT
U.S. ADMINISTRATIVE LAW JUDGE
DEPARTMENT OF HOMELAND SECURITY
U.S. COAST GUARD

Done and dated on January 17, 2006
Houston, Texas

[REDACTED]

ATTACHMENT B

LIST OF WITNESSES AND EXHIBITS

LIST OF WITNESSES

Investigating Officer's (IO's):

- | | |
|-----------------------------|--|
| 1. Mr. John Crivello | Collector of Respondent's urine specimen,
Collector for West Kentucky Drug Screen, Inc.,
Paducah, Kentucky |
| 2. Ms. Janet Putnam | Laboratory Director and Responsible Person for
Advanced Toxicology Network, Memphis,
Tennessee |
| 3. Dr. Daniel C. Drew, M.D. | Medical Review Officer (MRO) for Nationwide
Medical Review, Indianapolis, Indiana |

Respondent's

- | | |
|--------------------------------|-------------|
| 1. Mr. Joseph P. Wolfingbarger | Respondent. |
|--------------------------------|-------------|

LIST OF EXHIBITS

<u>Exhibits</u>	<u>Description</u>
<u>Investigating Officer's (IO's):</u>	
Exhibit 1	Certified copy of Respondent's "Application for License as Officer, Staff Officer, Operator, and Merchant Mariner's Document"
Exhibit 2	Certified copy of the "Federal Drug Testing Custody and Control Form" from the Collector
Exhibit 3	Certified copy of the "Federal Drug Testing Custody and Control Form" and the litigation package from the laboratory
Exhibit 4	Certified copy of the "Federal Drug Testing Custody and Control Form" and the Positive Report from the MRO
Exhibit 5	Extract from Federal Register dated August 4, 2004 showing Advanced Toxicology Network SAMHSA certified

Respondent's:

None