

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

UNITED STATES COAST GUARD

Complainant

v.

JOSEPH P. EMM

Respondent.

Docket Number CG S&R 06-0343
CG Case No. 2712727

DECISION AND ORDER

Issued: JANUARY 30th, 2007

Issued by: Joseph N. Ingolia
Chief Administrative Law Judge

Appearances:

For Complainant

Lieutenant Jesse Holston, IO
Lieutenant Connie L. Williamson, SIO
Master Chief Peter Hackett, IO

For Respondent

Joseph P. Emm, pro se

I. PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard") filed a Complaint dated July 21, 2006, against Joseph P. Emm ("Respondent") seeking revocation of Respondent's license for use of or addiction to the use of dangerous drugs under 46 U.S.C. 7704(c). See also 46 CFR 5.35. The ALJ Docketing Center received Respondent's Answer on August 17, 2006, wherein Respondent denied certain factual allegations and requested a hearing before an Administrative Law Judge. The Coast Guard brought this action pursuant to the legal authority contained in 46 U.S.C. 7704, and the proceedings were conducted in accordance with the procedural requirements of 5 U.S.C. 551-59, 46 Code of Federal Regulations ("CFR") Part 5, and 33 CFR Part 20.

On October 17, 2006, the Coast Guard filed a Motion seeking permission to have telephonic testimony at the hearing. I denied this Motion because it did not include a Certificate of Service indicating that the Motion had been served upon the Respondent in accordance with 33 CFR 20.304(g)(3) and because it was ambiguous.

On October 20, 2006, the Coast Guard filed an Amended Motion regarding its Motion for Telephonic Testimony. The Coast Guard clarified its request and indicated that it sought an order accepting telephonic testimony in this proceeding in accordance with 33 CFR 20.707(a). I reserved ruling on the Amended Motion until the hearing because of time considerations contained in 33 CFR 20.309(d). I granted the Amended Motion at the hearing without objection.

TR. 4.

On November 2, 2006 starting at 9:30 a.m., the hearing commenced as scheduled in Baltimore, Maryland. Both parties appeared and presented their case. Three (3) witnesses testified as part of the Coast Guard's case in chief. The Coast Guard offered six (6) Exhibits into evidence, all of which were admitted.

As for Respondent's case, Respondent testified on his own behalf and recalled Coast Guard witness Donica Crawford ("Ms. Crawford"). Respondent offered no Exhibits for admission into evidence.

At the conclusion of the hearing, I informed each party that they could file proposed findings of fact and conclusions of law briefs; that any such filings would be due by the close of business on November 16, 2006; and that settlement discussions could continue and are encouraged until the Decision and Order is issued in this case. Tr. 121. On November 16, 2006, the Coast Guard filed its post hearing brief. Respondent did not exercise his right to file such a brief. To date, no settlements have been reached in this case.

II. FINDINGS OF FACT

1. The Respondent, Joseph P. Emm, holds a Coast Guard issued Merchant Mariner's Document that expires on January 20, 2010. TR. 4.
2. On March 27, 2006 the Respondent reported to the 75th Street Medical Center ("Center") in Ocean City, Maryland for a random drug test screening ("Drug Test"). TR. 25, 28, 92.
3. The Center is an urgent care facility, a family practice and a collection site for drug testing. Tr. 14. It is not a certified collection facility. TR. 39
4. The Center has been a collection site for over eleven (11) years, and is a collection site for many entities, such as the Coast Guard, the Maritime Consortium, EMSI and several other insurance companies. IO Ex. 6.
5. Ms. Donika Crawford has worked for the Center as a urinalysis collector since April of 2006. She has successfully completed training as a collector for the Center. Tr. 14, 15. Ms Crawford is not a certified urinalysis collector. TR. 35.

6. The Center trains all clinical staff members in the collection of urine drug screens and follows guidelines approved by the Department of Transportation ("DOT"). TR. 19, 38; IO Ex. 6.
7. In administering the Drug Test of the Respondent on March 27, 2006, the collector, Ms. Crawford, used the federal Custody and Control Form bearing identification number 200967537890093, and the Social Security number of the Respondent. Before beginning the Drug Test, she properly identified the Respondent and signed copy 1 of the Custody and Control Form. TR 27, 28; IO Ex 5, page 9.
8. In administering the Drug Test, the collector followed the fourth step set forth in the Center's list of procedures. IO Ex 1. She had the Respondent sign and/or initial the "paper work." It included the necessary initials and/or signatures that were placed on the test strips and seals that were placed on the Respondent's urine specimens as well the signing of the federal Control and Custody Form. TR. 15, 16, 19, 51; IO Ex 2.
9. In accordance with the Center's procedures, the labels and seals were placed on the bottles containing the urine samples by the collector in the presence of the Respondent. TR 16, 109, 110; IO Ex 1, Step 8. In addition, the specimen container and the lab copy of the Custody and Control Form were placed in the specimen bag and sealed in the presence of the Respondent. TR 16, 55, 56; IO Ex 1, steps 7, 8 and 9.
10. The Respondent signed a federal Custody and Control Form during the Drug Test that reads at step 6:

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 on this form and the label affixed to each specimen bottle is correct.

TR. 100, 101; IO Ex 2(emphasis added).

11. The Center subsequently sent the specimen purported to be the Respondent's to Quest Diagnostics for testing. Quest Diagnostics assumed custody of the specimen. IO Ex. 2. Quest Diagnostics is a duly certified testing laboratory. TR. 64.
12. Rudolph Jagdharry ("Mr. Jagdharry"), the certifying scientist at Quest Diagnostics, verified that the identification number on the Custody and Control form matched the number on the specimen container. TR. 67.
13. Respondent's specimen tested positive for cocaine metabolites. TR. 71, 72; IO Ex. 2, 3.
14. The cut-off level for a positive screening test for cocaine is 300 nanograms per milliliter. The test given the Respondent produced a level of 6,944 nanograms per milliliter. TR. 73.
15. Dr. James Vanderploeg ("Dr. Vanderploeg"), the Medical Review Officer ("MRO"), reviewed and verified that Respondent's purported sample screened positive for cocaine metabolites. TR. 80.
16. Only cocaine itself could produce test results consistent with Respondent's purported sample's test results. TR. 73.
17. The Respondent operates a water sports (para-sail) business and a tour charter boat named the Discovery that carries Seventy-Five (75) passengers. TR. 11.
18. The Respondent has held a Coast Guard document for almost twenty (20) years. During that period, he has undergone fourteen (14) random drug tests, none of which tested positive. TR. 9, 10, 11.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent holds a Coast Guard issued merchant mariner's document that expires on January 10, 2010. FF 1.
2. On March 27, 2006, Respondent reported to the testing Center for a random Drug Test. In administering the Drug Test the collector followed the Center's procedures which, in turn, follow the guidelines set forth for drug testing by the Department of Transportation in 49 CFR, Part 40 and 46 CFR 5.35. FF 6, 8, 9.
3. The Respondent's Drug Test tested positive for cocaine. It indicated he registered a measurement that far exceeded the cut-off level for cocaine use. FF 14.
4. The positive Drug Test creates a presumption that the Respondent is a drug user within the meaning of 46 CFR 16.21(b), which, on the basis of the record, he has failed to rebut. He has also failed to rebut the Coast Guard's prima facie case.
5. The Respondent's use of drugs violates the provisions of 46 USC 7704 (c) which requires that his merchant mariner's document and any other Coast Guard documents he may hold be revoked.

IV. DISCUSSION

This Suspension and Revocation proceeding is remedial and not penal in nature. It is "intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea." 46 CFR 5.5. The Commandant of the U.S. Coast Guard has delegated to Administrative Law Judges the authority to suspend or revoke a license, certificate, or merchant mariner's document for violations arising under 46 U.S.C. 7703 and 7704. See 46 CFR 5.35. Here, the Coast Guard charged Respondent under 46 U.S.C. 7704(c) and 46 CFR 5.35 alleging the use of dangerous drugs. In accordance with the law and regulations it must seek revocation

of the merchant mariner's document. Finally, it is noted that this proceeding is conducted in accordance with the procedures set out in the Administrative Procedures Act, at 5 USC 551, et seq, and with the provisions contained in 33 CFR, Parts 20 and 46 CFR, Part 5.

A. Burden of Proof and Presumption

The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. See Appeal Decision Nos. 2468 (LEWIN); 2477 (TOMBARI); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 101-3 (1981). To prevail under this standard, the Coast Guard must establish that it is more likely than not that the Respondent committed the violations alleged in the Complaint. 33 CFR 20.701-702(a). To satisfy the burden of proof, the Coast Guard may rely on direct and/or circumstantial evidence. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984).

In Coast Guard cases brought under 46 CFR 5.35, if the Coast Guard initially establishes the required elements by a preponderance of the evidence, it has made a prima facie case and the burden of proof of going forward shifts to the Respondent. To establish a prima facie case, the Coast Guard must show that (1) the Respondent was tested for a dangerous drug, (2) the Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 49CFR, Part 40. Appeal Decisions Nos. 2584 (SHAKESPEARE), 2379 (DRUM), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF), 2598 (CATTON) and 2583 (WRIGHT).

In this case, the Coast Guard has established a prima facie case. It proved that (1) Respondent was the person tested at the Center; (2) it proved that the Respondent tested positive for a dangerous drug, namely cocaine; it proved that (3) the test was conducted in accordance with 49 CFR Part 40. FF 7, 8, 9, 13, 14; See also Appeal Decisions Nos. 2584

(SHAKESPEARE), 2379 (DRUM), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF), 2598 (CATTON) and 2583 (WRIGHT).

At this point it is also important to recognize that because the Respondent tested positive for cocaine, a presumption arises that he is a drug user. 46 CFR 16.201(b). SHAKESPEARE, supra; MEYER, supra; MASON, supra, HACKSTAFF, supra, Appeal Decision 2379 (DRUM). So here, the burden of going forward shifts to the Respondent to produce persuasive evidence that contravenes the prima facie case made by the Coast Guard, and rebuts the presumption that he is a drug user. 46 CFR 16.201; 46 CFR 16.201(b); 33 CFR 20.703.

B. Respondent's Case

The Respondent may rebut the presumption involved with persuasive evidence that (1) calls into question any element of the prima facie case; (2) indicates an alternative medical explanation for the positive test result; or (3) indicates the use was not wrongful or not knowing. Appeal Decision 2560 (CLIFTON) (1995), Appeal dismissed sub. nom. Kramek v. Clifton, NTSB EM-180 (1995). Here, the Respondent denied ever using cocaine and stressed that he has tested negative approximately fourteen (14) times over his twenty (20) year tenure as a Coast Guard licensed mariner. FF 19; TR 9, 10. He did not, however, base his defense on this or on asserting an alternative explanation for the positive test result, or that the use was not wrongful or not knowing. Instead, the Respondent posited his defense and argument on calling into question particular elements of the Coast Guard's prima facie case. He generally alleged that the Drug Test did not satisfy the requirements of 49 CFR, Part 40 and focused on the collection procedure, the action of the collector and the collection facility itself.

The Respondent asserted several reasons why the test results were not valid. He argued that the collector, Ms. Crawford, was not "certified," and she agreed that she was not certified.

TR 38. That fact alone has no real relevance to this case because 49 CFR, Part 40 contains no such requirements. Rather, it requires a collector to be properly trained and to have a basic knowledge of Part 40. See 49 CFR 40.33. Here, Ms. Crawford's testimony indicates that while she was not familiar with Part 40 of the regulations, she was trained in collection procedures by the Center and that she always followed those procedures in administering a Drug Test. FF 2. Her testimony is corroborated in the record where the Director of Human Resources of the Center, Ginger Savage, certified that Ms. Crawford was trained and "passed training" for the collection of DOT drug tests. IO Ex. 6. Ms. Savage indicates that the Center's training program follows the guidelines approved by the DOT. Id. Finally, she notes that the Center has been a collection site "for over eleven (11) years without incidence" (sic), and that Ms. Crawford performed her duties "in accordance with the regulations" and also "without incidence" (sic). TR. 17, 35, 53; IO Ex 6. Based on the above and the remaining record in this proceeding, I have found as fact that the Center follows the guidelines approved by DOT in administering a drug test, that the Center properly trained Ms. Crawford as a collector, and that she followed DOT drug testing procedures when acting as collector in the Respondent's Drug Test. FF. 5-9.

Given the above, the Respondent's position regarding the action and certification of the collector in administering the Drug Test is rejected. Indeed, she followed the procedures and protocol set forth in IO Exhibit 1, which mirror the DOT regulations, and the fact that she did not read 49 CFR Part 40 itself is of no consequence. Section 40.33 requires that she "be knowledgeable about this part," and certainly this record clearly evidences that she was knowledgeable about the collection procedures required because of the training she received and the procedural steps she did follow.

Another position taken by the Respondent alleging that his Drug Test is invalid is predicated on the assertion that the collection Center itself was not certified. It too is rejected because there is no requirement in the DOT regulation that the Center needs to be certified. Section 40.81(a) of the DOT regulations does require laboratories like Quest Diagnostics, which is the laboratory in this case, to be "certified" by HHS under the National Laboratory Certification Program, but those laboratories are drug testing laboratories which actually test the samples not collection sites like the Center.

The last position taken by the Respondent is based on two allegations. The first is that he signed the specimen label and the Custody and Control Form before he gave his urine sample. In his testimony he was unsure as to exactly when the needed signatures or initials, as well as the signing of the Custody and Control Form, occurred. However, he stated he was certain that they were obtained "before the containers were sealed in my presence." TR. 106. Ms. Crawford, the collector, agrees that the signatures and initials required on the specimens as well as the Custody and Control Form were obtained before she sealed the containers and that they were obtained immediately after the Respondent gave his urine sample. TR 16. She testified further that she sealed the specimen bottles within seconds of obtaining the Respondent's signature and initials. TR. 50.

The Respondent's assertion that his signatures and initials were obtained before the specimen bottles were labeled and sealed is supported factually in the record. The question it posits is do those facts violate the DOT regulations? I think not. As has been noted, it has already been found as fact that the Center's procedures and the collector's actions conformed with DOT regulations. At Section 40.71 of the regulations the way the collector prepares the specimens is set forth. Eight steps are listed, the seventh is pertinent here. It provides:

You must then ensure that the employee initials the tamper-evidence bottle seals for the purpose of certifying that the bottles contain the specimen he or she provided.

Id. (emphasis added).

One may argue that the above provision mandates strict adherence to the numerical sequence set forth in Section 40.71(7) but that argument ignores the fact that the purpose of Step 7 is clearly to ensure that the donor has initialed the tamper-evidence seals as a way of certifying that the bottles contain the donor's specimen.

In this case when the donor initialed the specimen label makes no significant difference. What provides the assurances the regulatory provision requires is the fact that the specimen label seals are signed by the donor and he or she is aware that the bottles contain his or her specimen. On the record of this case, I have found that the donor/Respondent was present when the bottles were sealed bearing his initials. FF 9. That finding is discussed in further detail below where the Respondent's final argument is considered.

Finally, with respect to this issue, even if one agreed with the argument that section 70.71(7) of the regulation intends to mandate strict adherence to the numerical sequence set forth in the section, it is well settled that technical infractions of the regulations do not violate due process unless they breach the chain of custody in a way that violates the specimen's integrity. Appeal Decisions 2633 (MERRILL) (2002); 2603 (HACKSTAFF) (1988). Here, there is not a scintilla of evidence that the test was not that of the Respondent, that the specimens he gave tested anything other than positive, and that the specimens he gave were adulterated or compromised. That being so, I find that even if there was an infraction regarding section

40.71(7), it was a technical one that did not invalidate the Drug Test and the ultimate positive result for cocaine use.

The last issue raised by the Respondent is one of substance and its disposition will determine the outcome of this case. The Respondent argues that the collector did not seal the specimen container in his presence. He testified that the collector told him he could leave after he handed her the open specimen containers and before the collector sealed them or affixed the specimen label to them. TR. 85. His testimony raises the question of whether or not the collector failed to follow the Center's procedures and the provisions of 49 CFR 40.73(a)(7). IO Ex 1, Step 9.

The testimony of the collector is in direct conflict with that of the Respondent. She stated that she followed the Center's procedures in all cases. IO Ex 2. As has also been noted, she also stated she had the Respondent sign the paperwork in advance. She testified that the Respondent was present when she placed the labels the donor had previously signed on his specimens and sealed them in his presence. She stated the specimen container and lab copy of the Custody and Control Form were placed in the specimen bag and sealed in the presence of the Respondent. FR. 16, 109, 100; IO Ex. 1, Steps 7, 8, 9. Further, in various parts of the record she stated that she gave donors their copy of the Custody and Control Form after sealing and bagging the specimen and told them they were free to go; that she never goes outside the protocol of the Center; that she followed that procedure with the Respondent's test; that there was no reason to alter normal procedures in the Respondent's Test; that between the time the Respondent signed the label that was still on the form and the time she put it on the cap, the Respondent did not leave the area and there was no possible way she could have switched the labels. TR. 16 – 18, 35, 36, 56.

In assessing the difference in the testimony of the Respondent and the collector, it is important to note that determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 PASSARO (2003). Also, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. PASSARO, supra; Appeal Decision 2639 (HAUCK) (2003).

In this case the credibility determination and the weight to be given to the testimony involved is not a matter of truth versus untruth, but rather how the efficacy of that testimony fits with the other evidence of record and I have so found. Here, the collector's testimony is clearly supported by the rest of the record. Her testimony that she followed company procedures that mirrored federal guidelines is supported and corroborated by other evidence of record that includes exhibits establishing she was properly trained, that she has been employed as a collector without any history of error and that the collection center has been in business over eleven (11) years without incident. In addition, the record of the case indicates that the samples she collected were sent to Fed Ex, were delivered to Quest Laboratories, and were properly tested – all within a normal time frame, without any delay and without any break in the chain of custody. TR 11-15. In addition, the record establishes that after the specimens were sealed there was no evidence that they were or could have been tampered with before they were given to Fed Ex.

On the other hand, the Respondent's testimony stands alone; there is no corroboration of any nature. In the face of a positive test result showing use of a high level of cocaine, is his assertion that he never used drugs, that the result might be due to some foreign substance or to a faulty Drug Test. In addition, his testimony is somewhat inconclusive where, for example, he

believes he signed the paperwork before giving his sample, but then indicates it may have been after he gave his sample. Finally, he signed the federal Custody and Control Form that certifies he gave his specimen to the collector, he did not adulterate it, that it was sealed in his presence, and that the information on the form was correct. FF 10.

In considering the above testimony and the entire record in this case, I believe the testimony of the collector was accurate and more credible than that of the Respondent. I find that the Respondent was given a Drug Test that conformed with the requirements of 49 CFR, Part 40 and that he tested positive for the drug, cocaine. Further, the positive Drug Test created a presumption that he was a drug user within the meaning of 46 CFR 16.201(b), a presumption which he has failed to rebut. I have found that he failed to rebut the Coast Guard's prima facie case, as well. Finally, the Respondent's use of drug violates the provisions of 46 USC 7704(c) and mandates revocation.

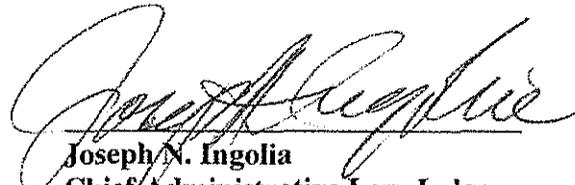
After careful consideration of the entire record, I find that the Coast Guard's case against the Respondent is **PROVED**. In so holding, it is noted that under 46 CFR 5.901 the Coast Guard provides clemency where a person's license has been revoked. Further, 33 CFR 20.904 provides that the Respondent may, under certain circumstances, enunciated therein, file a motion to reopen the proceeding.

ORDER

WHEREFORE,

IT IS HEREBY ORDERED, that the Respondent's Merchant Mariner's License 110884 and all other credentials issued to him by the U.S. Coast Guard are hereby REVOKED.

Service of the Decision and Order upon the U.S. Coast Guard and the Respondent serves notice to the parties' of their right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as Attachment C.



Joseph N. Ingolia
Chief Administrative Law Judge
United States Coast Guard

Done and Dated on this 30th day of January 2007
Washington, DC

Copy:
Sector Baltimore, Attn: LT Jesse Holston, IO
Joseph P. Emm, Respondent

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

Commander
Sector Baltimore, Attn: LT Jesse Holston, IO
2401 Hawkins Point Road
Baltimore, MD 21226-1791
(Fax #) 410-576-2583

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Federal Express (overnight courier) and U.S. First Class Mail:

Joseph P. Emm
[REDACTED]
[REDACTED]

Dated on this 30th day of January 2007.



Veronica A. Dickey
Sr. Paralegal Specialist to
Chief Judge Joseph N. Ingolia

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS

I. Coast Guard's Exhibits. IO Ex. 1 through IO Ex. 6

1. 75th Street Medical Center's Collection Procedure
2. Custody and Control Form
3. Documentation Package from Quest Diagnostics
4. Dr. Vanderploeg's Medical Credentials
5. Litigation Package
6. Letter from Ginger Savage verifying Donica Crawford successfully completed training.

II. Respondent's Exhibits

Respondent did not offer any Exhibits.

III. Coast Guard's Witnesses

1. Donica Crawford, Collector.
2. Rudolph Jagdharry, Certifying Scientist at Quest Diagnostics
3. Dr. James Vanderploeg, Medical Review Officer

IV. Respondent's Witnesses

1. Respondent, Mr. Joseph P. Emm
2. Donica Crawford, Collector

ATTACHMENT B – STATUTES AND REGULATIONS

A. Statutes

5 U.S.C. § 551. Definitions

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

- (5) "rule making" means agency process for formulating, amending, or repealing a rule;
- (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
- (7) "adjudication" means agency process for the formulation of an order;
- (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
- (9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;
- (10) "sanction" includes the whole or a part of an agency--
- (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
 - (B) withholding of relief;
 - (C) imposition of penalty or fine;
 - (D) destruction, taking, seizure, or withholding of property;
 - (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
 - (F) requirement, revocation, or suspension of a license; or
 - (G) taking other compulsory or restrictive action;
- (11) "relief" includes the whole or a part of an agency--
- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
 - (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
 - (C) taking of other action on the application or petition of, and beneficial to, a person;
- (12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;
- (13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

* * *

46 U.S.C. § 7703. Bases for suspension or revocation

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder--

(1) when acting under the authority of that license, certificate, or document--

(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

(B) has committed an act of misconduct or negligence;

(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document;

(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49;

(4) has committed an act of incompetence relating to the operation of a vessel; or

(5) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

* * *

46 U.S.C. § 7704. Dangerous drugs as grounds for revocation

[(a) Repealed. Pub.L. 101-380, Title IV, § 4103(a)(2)(B), Aug. 18, 1990, 104 Stat. 511]

(b) If it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or merchant mariner's document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be suspended or revoked.

(c) 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.

* * *

B. Regulations

33 CFR 20.304 Service of documents.

(a) The ALJ shall serve upon each party to the proceeding a copy of each document issued by the ALJ in it. The ALJ shall serve upon each interested person, as determined under § 20.404, a copy of the notice of hearing. Unless this part provides otherwise, the ALJ shall upon request furnish to each such interested person a copy of each document filed with the Hearing Docket Clerk or issued by the ALJ.

(b) Unless the ALJ orders otherwise, each person filing a document with the Hearing Docket Clerk shall serve upon each party a copy of it.

(c) If a party filing a document must serve a copy of it upon each party, each copy must bear a certificate of service, signed by or on behalf of the filing party, stating that she or he has so served it. The certificate shall be in substantially the following form:

I hereby certify that I have served the foregoing document[s] upon the following parties (or their designated representatives) to this proceeding at the addresses indicated by [specify the method]:

(1) [name, address of party]

(2) [name, address of party]

Done at _____, this ____ day of _____, 19__ or 20__.

[Signature]

For

[Capacity].

(d) This table describes how to serve filed documents.

Table 20.304(D).--How To Serve Filed Documents

Type of filed document	Acceptable methods of service
------------------------	-------------------------------

- (1) Complaint (i) Certified mail, return receipt requested.
 (ii) Personal delivery.
 (iii) Express-courier service that has receipt
 capability.
- (2) Default Motion (i) Certified mail, return receipt requested.
 (ii) Personal delivery.
 (iii) Express-courier service that has receipt
 capability.
- (3) Answer (i) Mail.
 (ii) Personal delivery.
 (iii) Express-courier service.
 (iv) Fax.
- (4) Any other filed
 document (i) Mail.
 (ii) Personal delivery.
 (iii) Express-courier service.
 (iv) Fax.
 (v) Other electronic means (at the discretion of the
 ALJ).

(e)(1) Unless the ALJ orders otherwise, if a party files a document under § 20.302, the party must serve a copy to the person indicated in this table.

Table 20.304(e)--Who Receives Copies of Filed Documents

If a party--	Then the serving party must serve--
Is represented	The counsel or other representative.
Is not represented	The party.

(2) Service upon counsel or representative constitutes service upon the person to be served.

(f) The serving party must send service copies to the address indicated in this table.

Table 20.304(f)--Where To Send Service Copies

If the party--	Then the serving party must send the copies to--
Is represented	The address of the counsel or

representative.
Is not represented The last known address of the residence
or principal place of business of the
person to be served.

(g) This table describes when service of a filed document is complete.

Table 20.304(g)--When Service Is Complete

If method of service used is-- Then service is complete when the
document is--

- (1) Personal delivery (Complaint or
Default Motion) (i) Handed to the person to be served.
(ii) Delivered to the person's office
during business hours.
(iii) Delivered to the person's
residence and service made to a
person of suitable age and
discretion residing at the
individual's residence.
- (2) Personal delivery (all other filed
documents) (i) Handed to the person to be served.
(ii) Delivered to the person's office
during business hours.
(iii) Delivered to the person's
residence and deposited in a
conspicuous place.
- (3) Certified Mail or express-courier
(Complaint or Default Motion) .. (i) Delivered to the person's
residence and signed for by a
person of suitable age and
discretion residing at the
individual's residence.
(ii) Delivered to the person's office
during business hours and signed
for by a person of suitable age
and discretion.
- (4) Mail or express-courier service
(all other filed documents) (i) Mailed (postmarked).
(ii) Deposited with express-courier
service.
- (5) Fax or other electronic means Transmitted.
-

(h) If a person refuses to accept delivery of any document or fails to claim a properly addressed document other than a complaint sent under this subpart, the Coast Guard considers the document served anyway. Service is valid at the date and the time of mailing, of deposit with a contract service or express-courier service, or of refusal to accept delivery.

* * *

33 CFR 20.309 Motions.

(a) A person may apply for an order or ruling not specifically provided for in this subpart, but shall apply for it by motion. Each written motion must comply with the requirements of this subpart for form, filing, and service. Each motion must state clearly and concisely--

(1) Its purpose, and the relief sought;

(2) Any statutory or regulatory authority; and

(3) The facts constituting the grounds for the relief sought.

(b) A proposed order may accompany a motion.

(c) Each motion must be in writing; except that one made at a hearing will be sufficient if stated orally upon the record, unless the ALJ directs that it be reduced to writing.

(d) Except as otherwise required by this part, a party shall file any response to a written motion 10 days or less after service of the motion. When a party makes a motion at a hearing, an oral response to the motion made at the hearing is timely.

(e) Unless the ALJ orders otherwise, the filing of a motion does not stay a proceeding.

(f) The ALJ will rule on the record either orally or in writing. She or he may summarily deny any dilatory, repetitive, or frivolous motion.

* * *

46 CFR 5.5 Purpose of administrative actions.

The administrative actions against a license, certification or document are remedial and not penal in nature. These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.

* * *

46 CFR 5.19 Administrative Law Judge.

(a) An Administrative Law Judge shall mean any person designated by the Commandant pursuant to the Administrative Procedure Act (5 U.S.C. 556(b) for the purpose of conducting hearings arising under 46 U.S.C. 7703 or 7704.

(b) The Commandant has delegated to Administrative Law Judges the authority to admonish, suspend, with or without probation, or revoke a license, certificate or document issued to a person by the Coast Guard under any navigation or shipping law.

* * *

46 CFR 5.35 Conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs.

Where the proceeding is based exclusively on the provisions of title 46, U.S.C. section 7704, the complaint will allege conviction for a dangerous drug law violation or use of dangerous drugs or addiction to the use of dangerous drugs, depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46, U.S.C. section 7704, and the approximate time and place of the offense.

* * *

49 CFR 40.31 Who may collect urine specimens for DOT drug testing?

(a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.

(b) A collector must meet training requirements of § 40.33.

(c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.

(d) You must not act as the collector for the employee being tested if you work for a HHS-certified laboratory (e.g., as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

* * *

49 CFR 40.33 What training requirements must a collector meet?

To be permitted to act as a collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) Basic information. You must be knowledgeable about this part, the current "DOT Urine Specimen Collection Procedures Guidelines," and DOT agency regulations applicable to the employers for whom you perform collections, and you must keep current on any changes to these materials. The DOT Urine Specimen Collection Procedures Guidelines document is available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington DC, 20590, 202-366-3784, or on the ODAPC web site (<http://www.dot.gov/ost/dapc>).

(b) Qualification training. You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(2) "Problem" collections (e.g., situations like "shy bladder" and attempts to tamper with a specimen);

(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;

(c) Initial Proficiency Demonstration. Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are "error-free." This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by--

(i) Regularly conducting DOT drug test collections for a period of at least a year;

(ii) Conducting collector training under this part for a year; or

(iii) Successfully completing a "train the trainer" course.

(d) Schedule for qualification training and initial proficiency demonstration. The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a collector before August 1, 2001, and you have already met the requirements of paragraphs (b) and (c) of this section, you do not have to meet them again.

(2) If you became a collector before August 1, 2001, and have yet to meet the requirements of paragraphs (b) and (c) of this section, you must do so no later than January 31, 2003.

(3) If you become a collector on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) Refresher training. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) Error Correction Training. If you make a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(i) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(ii) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(iii) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were "error-free."

(g) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

* * *

49 CFR 40.71 How does the collector prepare the specimens?

(a) All collections under DOT agency drug testing regulations must be split specimen collections.

(b) As the collector, you must take the following steps, in order, after the employee brings the urine specimen to you. You must take these steps in the presence of the employee.

(1) Check the box on the CCF (Step 2) indicating that this was a split specimen collection.

(2) You, not the employee, must first pour at least 30 mL of urine from the collection container into one specimen bottle, to be used for the primary specimen.

(3) You, not the employee, must then pour at least 15 mL of urine from the collection container into the second specimen bottle to be used for the split specimen.

(4) You, not the employee, must place and secure (i.e., tighten or snap) the lids/caps on the bottles.

(5) You, not the employee, must seal the bottles by placing the tamper-evident bottle seals over the bottle caps/lids and down the sides of the bottles.

(6) You, not the employee, must then write the date on the tamper-evident bottle seals.

(7) You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the "Remarks" line of the CCF (Step 2) and complete the collection process.

(8) You must discard any urine left over in the collection container after both specimen bottles have been appropriately filled and sealed. There is one exception to this requirement: you may use excess urine to conduct clinical tests (e.g., protein, glucose) if the collection was conducted in conjunction with a physical examination required by a DOT agency regulation. Neither you nor anyone else may conduct further testing (such as adulteration testing) on this excess urine and the employee has no legal right to demand that the excess urine be turned over to the employee.

* * *

49 CFR 40.81 What laboratories may be used for DOT drug testing?

(a) As a drug testing laboratory located in the U.S., you are permitted to participate in DOT drug testing only if you are certified by HHS under the National Laboratory Certification Program (NLCP) for all testing required under this part.

(b) As a drug testing laboratory located in Canada or Mexico which is not certified by HHS under the NLCP, you are permitted to participate in DOT drug testing only if:

(1) The DOT, based on a written recommendation from HHS, has approved your laboratory as meeting HHS laboratory certification standards or deemed your laboratory fully equivalent to a

laboratory meeting HHS laboratory certification standards for all testing required under this part;
or

(2) The DOT, based on a written recommendation from HHS, has recognized a Canadian or Mexican certifying organization as having equivalent laboratory certification standards and procedures to those of HHS, and the Canadian or Mexican certifying organization has certified your laboratory under those equivalent standards and procedures.

(c) As a laboratory participating in the DOT drug testing program, you must comply with the requirements of this part. You must also comply with all applicable requirements of HHS in testing DOT specimens, whether or not the HHS requirements are explicitly stated in this part.

(d) If DOT determines that you are in noncompliance with this part, you could be subject to PIE proceedings under Subpart R of this part. If the Department issues a PIE with respect to you, you are ineligible to participate in the DOT drug testing program even if you continue to meet the requirements of paragraph (a) or (b) of this section.

ATTACHMENT C – 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 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.