

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL D. WILSON

Respondent.

Docket Number: CG S&R 07-0221
CG Case No. 2909338

DECISION AND ORDER

Issued: December 12, 2007

Presiding: Honorable Parlen L. McKenna

Appearances:

Complainant

Ensign Byron Rios
Lieutenant Chester K. Warren
United States Coast Guard
Sector Hampton Roads
200 Granby Street
Norfolk, Virginia 23510-1888

Respondent Appeared Pro Se

[REDACTED]

PRELIMINARY STATEMENT

This suspension and revocation proceeding was instituted by the United States Coast Guard in the discharge of its duty to promote the safety of life and property at sea. It was brought pursuant to the legal authority contained in 46 U.S.C. § 7701-7705 and was conducted in accordance with the procedural requirements of 5 U.S.C. § 551-559, Part 5 of Title 46 and Part 20 Title 33 of the Code of Federal Regulations (C.F.R.).

The hearing in this matter was held in Roanoke, Virginia. Ensign Byron Rios and LT Chester K. Warren, USCG duly authorized Investigating Officers of Marine Safety Office, United States Coast Guard, appeared for and represented the Coast Guard. Respondent appeared personally and elected to represent himself. A record of the hearing was made by Toby Feldman Incorporate, a certified court-reporting firm. A list of the witnesses who testified and the exhibits entered into evidence are set forth in Attachment A.

On April 17, 2007, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7704 (c) alleging one (1) count of Use of or Addiction to the Use of Dangerous Drugs. Specifically, the Coast Guard alleges Respondent took a random drug test on March 22, 2007; and that the urine specimen subsequently tested positive for cocaine metabolite. Respondent filed an Answer on May 7, 2007, wherein he admitted all jurisdictional allegations and denied all factual allegations contained in the Complaint.

On May 9, 2007, the Chief Administrative Law Judge referred this case to the undersigned for hearing and disposition. A hearing was scheduled and convened on September 5, 2007, in Roanoke, Virginia. The Coast Guard Investigating Officer introduced into evidence the testimony of two (2) witnesses and six (6) exhibits. Respondent introduced into evidence his own testimony, and the testimony of two (2) other witnesses. Respondent did not proffer any documentary evidence for the record.

After careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the allegation of Use of or Addiction to the Use of Dangerous Drugs in violation of 46 U.S.C. 7704(c) is found not proved.

FINDINGS OF FACT

The following Findings of Fact and Conclusions of Law are prepared upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.¹

1. At all relevant times, Respondent was the holder of a MML issued by the United States Coast Guard. (See TR. at 19-20, 60; See IO Ex. 1).²
2. On March 22, 2007, Respondent participated in random chemical drug test at Carilion Occupational Medicine in Roanoke, Virginia. (See TR. at 8-9; See IO Ex. 2).
3. Cynthia Diane Ward, a medical assistant who works for Carilion Occupational Medicine, collected the urine sample from Respondent for the purposes of performing a DOT urinalysis drug test. (See TR. at 12-19; See IO Ex. 2).
4. Ms. Ward has performed urinalysis specimen collection, conducted in accordance with DOT regulations, for six (6) years. (See TR. at 13-14).
5. Ms. Ward followed collection procedures in accordance with DOT standards. (See TR. at 14-27; See IO Ex. 2). Procedures Ms. Ward followed include, but are not limited to, the following:

¹ Neither party submitted briefs, proposed findings of fact or proposed conclusions of law.

² Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at ___); Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (See IO Ex. ___).

- a. The collector verified the identity of Respondent, the specimen provider. (See TR. at 15).
 - b. Following collection, Ms. Ward checked the temperature of Respondent's specimen and ensured the sample measured between ninety (90) and one-hundred (100) degrees Fahrenheit. (See TR. at 24-25; See IO Ex. 2).
 - c. The collector placed the specimen into two (2) separate specimen bottles, referred to as a "split specimen." (See TR. at 22-23; See IO Ex. 2).
 - d. The collector sealed the specimen bottles in Respondent's presence. (See TR. at 17-18; See IO Ex. 2).
 - e. Respondent initialed the seal on each specimen bottle. (See TR. at 15, 22-24).
 - f. Ms. Ward completed the Custody and Control Form with Respondent's information. (See TR. at 16-17; See IO Ex. 2).
 - g. Respondent signed the Custody and Control Form. (See TR. at 26-27; See IO Ex. 2).
 - h. Each Custody and Control Form contains a specimen identification number. (See TR. at 16-17; See IO Ex. 2).
 - i. Carilion Occupational Medicine sent Respondent's split specimen to Quest Diagnostics for testing. (See TR. at 19, 38-39; See IO Ex. 2, 3, 5).
6. Ms. Wards testimony is found to be credible.
 7. Quest Diagnostics received Respondent's urine specimen via a Quest courier on March 23, 2007. (See TR. at 9, 19; See IO Ex. 5). The urine specimen arrived with the specimen seal intact. (See TR. at 40).
 8. Quest Diagnostic tested Respondent's urine in accordance with DOT guidelines. (See TR. at 40-42; See IO Ex. 5).

9. The chain of custody for Respondent's specimen was intact. (See TR. at 40).
10. The initial drug screening of Respondent's urine detected the presence of the cocaine metabolite. (See TR. at 42; See IO Ex. 5).
11. A confirmatory test verified the presence of cocaine metabolite, which measured 1738 nanograms per milliliter which is over the cut-off level of 150 ng/ml. (See TR. at 46-47; See IO Ex. 5).
12. Confirmatory testing was performed by gas chromatography mass spectroscopy. (See TR. at 41).
13. Quest Diagnostic reported the positive drug test to a medical review officer (MRO). (See TR. at 51).
14. Ms. Susan P. Mills testified in this proceeding as the forensic toxicologist for Quest Diagnostics. Ms. Mills testified that she is the responsible person under the federal guidelines at Quest for workplace drug testing (See TR. at 46).
15. Ms. Mills testified that Respondent's sample was tested in accordance with all federal regulations and that both the initial and confirmation tests were positive for cocaine metabolite (See TR. at 52-66).
16. While the test results are linear to the cutoff level, the record does not disclose what significance is attached to the fact that the test results are over ten (10) times above the cut-off level (See TR. at 66).
17. A positive test result of 1738.81 is not a borderline positive (See TR. at 65).
18. The testimony of Ms. Susan P. Mills is found to be credible.
19. Dr. James M. Vanderploeg, was the certified Medical Review Officer (MRO) in this case who verified Respondent's positive drug test. (See TR. at 50-51; See IO Ex. 6 at 9-10).

20. Dr. Vanderploeg is employed by Interactive Medical Connections and has worked as an approved MRO since 1989. (See IO Ex. 6 at 9).
21. Dr. Vanderploeg interviewed Respondent on March 30, 2007, to determine if a legitimate medical explanation existed for the positive drug test. (See IO Ex. 6 at 11).
22. Respondent denied using cocaine and did not know how he could have tested positive. Thus, Respondent did not supply Dr. Vanderploeg with a legitimate medical reason for the positive test result. (See IO Ex. 6 at 11-12).
23. Dr. Vanderploeg informed Respondent of his right to have the split sample tested. (See IO Ex. 6 at 11).
24. Respondent informed Dr. Vanderploeg that he wished to have the split sample tested. (Id.).
25. Respondent's split sample was sent to the laboratory at Veterans' Hospital in Minneapolis. (See IO Ex. 6 at 12-15). That laboratory confirmed the presence of cocaine metabolite in Respondent's split sample. (Id.).
26. Dr. Vanderploeg was not present at the September 5, 2007 hearing. However, his deposition was taken on August 31, 2007 and it was admitted into evidence without objection as IO Exhibit 6. Since the undersigned was not present at the deposition, no credibility determination can be made.
27. Respondent is a 58 year old man who holds a United States Coast Guard issued merchant mariner license bearing serial number 994928 (See TR. at 82 and I.O. Ex. 1).
28. Respondent utilizes said license to serve as a fishing guide on Smith Mountain Lake (See TR. at 81).

29. Respondent has never had a boating violation or accident; has a clean driving record; has a family that includes a wife, a son who works for the Federal Justice Department, a daughter who is in a doctorial program at Virginia Tech, and three (3) grandchildren. Respondent has been a member of Huddleston United Methodist Church for the last 42 years (See TR. at 81-82).
30. Respondent does not smoke or use hard liquor (See TR. at 82).
31. Respondent specifically denies ever knowingly using cocaine (See TR. at 82).
32. Respondent is in poor physical health; he is a diabetic and has high blood pressure; he has coronary artery disease; and he has had a heart attack(s) in the past (See TR. at 40-41).
33. Respondent is in a high risk category for another heart attack and death. Respondent is a male who is over 50; and he has a strong family history of diabetes; hypertension and coronary disease associated with blockages with cholesterol deposition (See TR. at 42-43).
34. Dr. Gaylord testified that it would be extremely imprudent for Respondent to use cocaine given his medical history; that Respondent is/was aware of his health risks; that using a stimulant such as cocaine could cause his heart to spasm in the coronary vessel which is 80 percent blocked; that such a spasm would prevent blood flow and cause a heart attach; and that the usage of a stimulant such as cocaine would place Respondent at an increased risk of death. (See TR. at 42-43).
35. Respondent's has successfully managed his high blood pressure. (See TR. at 41-42).
36. Respondent received treatment for concerns about coronary disease during March 2007. (See TR. at 41-42). No spikes in his blood pressure were noted during this time frame. (Id.).

37. Cocaine is a stimulant drug (See TR. at 42-43).
38. Dr. Gaylord's lay and medical expert testimony is found to be very credible.
39. Respondent's testimony is found to be very credible.
40. Respondent's urine specimen tested positive for cocaine metabolite. Respondent does not dispute the collection process, the chain of custody, or the fact that the laboratory test results were positive. Respondent does dispute that he ever knowingly used cocaine but cannot explain if or how the drug got into his body.
41. Given Respondent's serious coronary artery disease, high blood pressure, and past heart attack(s), it would not be reasonable to conclude that Respondent would risk his life by using cocaine. This finding is especially true given the care with which Respondent manages his medical conditions.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the duty to revoke a merchant mariner license for violations arising under 46 U.S.C. § 7704. See 46 CFR 5.19(b). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove the violations by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). In this case, the Coast Guard seeks to prove Respondent used a dangerous drug and revoke his Merchant Mariner's License.

a) Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). When the Coast Guard charges a respondent with Use of or Addiction to Dangerous Drugs, jurisdiction is established solely upon

a showing that Respondent is the holder of a license, certificate of registry, or merchant mariner's document.³ See Appeal Decision 2560 (CLIFTON) (1995). In this case, since the allegations of drug use arose while Respondent held a merchant mariner license, jurisdiction exists. (See TR. at 19-20, 60; See IO Ex. 1). Furthermore, Respondent admits to all jurisdictional allegations in his Answer.

b) Applicable Law

Marine employers shall establish programs for the testing of dangerous drugs, on a random basis, for employees who serve as crewmembers. See 46 CFR 16.230. A mariner's Coast Guard issued credential is subject to revocation upon proof, to include failing a random drug test, that the mariner is a user of or addicted to a dangerous drug, unless satisfactory proof of cure is established. 46 U.S.C. 7704(c); See Appeal Decision 2634 (BARRETTA) (2002).

In these proceedings, the Coast Guard bears the burden of proof and shall prove the allegations by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). In a drug case based solely upon urinalysis test results, a *prima facie* case of use of a dangerous drug is shown when three elements are proved: (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16." Appeal Decision 2603 (HACKSTAFF) (1998). If the Coast Guard establishes a *prima facie* case, a presumption of use of a dangerous drug arises.⁴ The burden then shifts to the respondent to produce persuasive evidence to rebut the presumption. See Appeal Decisions No. 2584 (SHAKESPEARE), No. 2379 (DRUM), No. 2589 (MEYER), No. 2592 (MASON) and No. 2603 (HACKSTAFF). The presumption imposes on the party against

³ "If it is shown that a holder [of a license, certificate of registry, or merchant mariner's document] 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." 46 U.S.C. 7704(c).

whom it lies, the burden of going forward with evidence to rebut or meet the presumption. 33 C.F.R. § 20.703(a). The presumption does not shift the ultimate burden of proof which remains with the Coast Guard. 33 C.F.R. § 20.703(b). In evaluating the evidence presented at the hearing, the trial judge is in the best position to weigh the testimony of witnesses and assess the credibility of evidence. See Appeal Decisions No. 2584 (SHAKESPEARE), No. 2421 (RADER), No. 2319 (PAVELIC), No. 2589 (MEYER), No. 2592 (MASON), and No. 2598 (CATTON). Moreover, the trial judge has broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in evidence. See Appeal Decisions No. 2560 (CLIFTON), No. 2519 (JEPSON), No. 2516 (ESTRADA), No. 2503 (MOULDS), No. 2492 (RATH), No. 2598 (CATTON), No. 2382 (NILSEN), No. 2365 (EASTMAN), No. 2302 (FRAPPIER), and No. 2290 (DUGGINS). Finally, the Administrative Law Judge's decision is not subject to reversal on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. See Appeal Decisions No. 2584 (SHAKESPEARE), No. 2570 (HARRIS), aff'd NTSB Order No. EM-182, No. 2390 (PURSER), No. 2592 (MASON), and No. 2560 (CLIFTON).

c) *Prima Facie* Case Established

In this case, the record establishes that Respondent was the person who was tested for dangerous drugs; that the collector established proof of the identity of the person providing the specimen; that there was a link between Respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample; and that the chain of custody was maintained throughout the collection process up to the arrival at the laboratory testing facility. (See 46 C.F.R. § 16.350); (Also see TR. at 15-36; and I.O. Ex. 2).

⁴ 46 C.F.R. § 16.201(b) provides that if "an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs."

Respondent's urine specimen was tested at Quest Diagnostics in Norristown, Pennsylvania. Once again, the chain of custody was determined to be intact. Initial testing detected the presence of the cocaine metabolite in Respondent's urine specimen. (See TR. at 42; See IO Ex. 5). A confirmatory test verified the presence of cocaine metabolite, which measured above the regulated minimum positive of 150 nanograms per milliliter. (See TR. at 46-47; See IO Ex. 5); see 49 CFR 40.87.

Dr. Vanderploeg, the Medical Review Officer (MRO), received and verified the laboratory's initial two (2) test results. (See TR. at 50-51; See IO Ex. 6 at 9-10). Dr. Vanderploeg interviewed Respondent in an effort to determine if a legitimate medical explanation existed for Respondent's positive drug test. (See IO Ex. 6 at 11). Dr. Vanderploeg failed to discover a satisfactory medical explanation for Respondent's positive drug test. (Id.).

Following the verification of Respondent's positive drug test, Dr. Vanderploeg informed Respondent of his right to have the split sample tested. (See IO Ex. 6 at 11; See 49 CFR 40.153). Respondent requested the split sample be tested and the sample was sent to a laboratory at Veterans' Hospital in Minneapolis.⁵ (See IO Ex. 4, 5, & 6 at 12-15). Veterans' Hospital in Minneapolis confirmed the presence of the cocaine metabolite in Respondent's split sample. (Id.). Given all the above, I find that the Coast Guard established a *prima facie* case of dangerous drug use.

d) Respondent Rebutted the Coast Guard's prima facie case

When a *prima facie* case is proven, the burden of going forward with evidence is shifted to the respondent. Appeal Decision 2603 (HACKSTAFF) (1998). The respondent then needs to

⁵ Respondent does not remember requesting a test of the split sample. (See IO Ex. 6 at 14-15). Respondent states, "to the best of my knowledge I never asked to have my split sample tested." (Id.). However, Dr. Vanderploeg testified that Respondent did request that the split sample be tested and Dr. Vanderploeg's notes indicate that Respondent requested a split sample test. (See IO Ex. 4, 6 at 14-15). Dr. Vanderploeg's testimony is deemed credible.

establish, by a preponderance of the evidence, that he is not a user of dangerous drugs. Id. It is the responsibility of the judge to determine what evidence is reliable and probable and to determine how much weight particular evidence is assigned. Id.; Appeal Decision 2382 (NILSEN) (1985).

In this case, Respondent does not rebut the evidence submitted by the Coast Guard. Respondent makes no argument and produces no evidence that the urine specimen collection or testing procedures were flawed.⁶ Instead, Respondent attempts to rebut the Coast Guard case through the use of character evidence and medical testimony. Generally, the sole use of character evidence would not be persuasive enough to rebut a *prima facie* case of drug use. However, in this case, Respondent's use of character evidence and medical testimony provide very compelling evidence which rebuts the Coast Guard *prima facie* case.

First, Respondent establishes his good character by testifying on his own behalf. Respondent is fifty-eight (58) years old and has worked as a fishing guide for forty (40) years. (See TR. at 60-61). He has lived his entire life in Bedford County, Virginia and has been very active in the community, including being a member of Huddleston United Methodist Church for forty-two (42) years, a basketball coach, and a school teacher. (Id.). Respondent has never been charged with a boating violation, is not a smoker, and does not drink hard liquor. (Id.). Furthermore, Respondent testified that he has never used cocaine. (Id.). The undersigned finds Respondent's testimony, when combined with his demeanor and appearance, both compelling and credible. Indeed, in looking at Respondent at the hearing, I could not help but compare

⁶ Respondent briefly challenge one aspect of the collection process. Respondent could not remember if the urine specimen collector checked the temperature of the specimen and asked the collector if she checked the temperature. (Tr. at 24-27). Respondent stated, "I'm not disputing the correctness of it just documenting the procedure policy and the way it was done." (Tr. at 26). The collector produced a document, signed by Respondent on the day of the collection, establishing that the temperature of the specimen was ninety-four (94) degrees. (Tr. at 24-27).

Respondent with an older version of Andy Griffith in Mayberry. Thus, the accusation of drug use by this man clearly does not appear appropriate.

In addition to Respondent's own testimony, Mr. Lacey Putney testified on Respondent's behalf.⁷ (See TR. at 54-56). Mr. Putney is a delegate to the Virginia House of Delegates and has served in the House for forty-six (46) years. (See TR. at 55-56). Mr. Putney has known Respondent for over forty-five (45) years. (See TR. at 55). For forty (40) years, Respondent lived in Mr. Putney legislative district. (Id.). Mr. Putney is very familiar with Respondent's reputation and testified that Respondent is "a man of truthfulness and veracity and also as a law abiding citizen." (Id.). Mr. Putney was shocked to hear Respondent was charged with use of a dangerous drug. (Id.).

Finally, Respondent's family physician, Dr. John Gaylord, testified on Respondent's behalf. (See TR. at 28-33). Dr. Gaylord has known Respondent since 1989, and is both a friend of Respondent as well as Respondent's physician. (See TR. at 30-31). Dr. Gaylord treats patients with drug abuse problems and is familiar with the physical effects cocaine has on a persons' appearance and physiologically. (See TR. at 28-33). Such effects include, "wide eyes, enlarged pupils, tachycardia or increased heart rate, sweating and . . . elevation of blood pressure." (See TR. at 32). Dr. Gaylord testified that he has no reason to think that Respondent has ever been on drugs. (See TR. at 30-31). Dr. Gaylord testified that during his interactions with Respondent as a physician and friend, Respondent "is always punctual, he's always reliable, h[e] is always reasonable, well groomed, no pressured speech, no sweating, no indications to me that he would be using illegal drugs". (Id.).

⁷ The Transcripts spells this witness' name as "Lacey Butney." (Tr. at 54). However, the correct spelling of this witness' name is "Lacey Putney." (Respondent's Witness List).

In addition to Respondent's outward appearance and mannerisms failing to indicate illegal drug use, Dr. Gaylord also testified that Respondent's physical health is so bad, that if he were to use cocaine, it could kill him. Respondent is a diabetic, has high blood pressure, and has coronary artery disease. (See TR. at 31). Dr. Gaylord testified that Respondent does an excellent job controlling these health problems and that Respondent understands the risks of failing to maintain his health to include suffering a heart attack or death. (See TR. at 31-33). Using cocaine would be very imprudent for someone with Respondent's medical condition, as it would increase Respondent's blood pressure and create spasms in the coronary vessels, therefore increasing the risk of death. (See TR. at 32-33). Dr. Gaylord testified that he has never noticed any spikes in Respondent's blood pressure, including the time period when Respondent took the random drug test. (Id.). The undersigned has taken into consideration that Dr. Gaylord is a friend of Respondent, and that by testifying as a physician under oath in this proceeding, he risks his medical license if he were to testify falsely. That being said, I find Dr. Gaylord's testimony to be truthful and highly credible. Moreover, the Coast Guard did not conduct any cross-examination of Dr. Gaylord in an attempt to test his credibility or impeach his testimony.

As a general rule, a respondent who only presents character testimony will be unable to successfully rebut the Coast Guard's *prima facie* case. However, in this case, Respondent has provided highly credible character witnesses corroborated by uncontroverted medical evidence. First, a Virginia State delegate who has known Respondent for over forty-five (45) years testified in favor of Respondent. Ordinarily, politicians still in office would not risk the adverse consequences attendant with testifying under oath in court supporting a "drug user". Therefore, the very fact that Mr. Putney went out of his way to debunk the allegations of Respondent's drug use speaks volumes. In this regard, I find Mr. Putney's testimony was credible and compelling.

Importantly, such character testimony standing alone or in conjunction with Respondent's own testimony, under most circumstances would not be sufficient to rebut the *prima facie* case. However, in addition to the above, Dr. Gaylord provided expert medical testimony. Being a friend of Respondent cuts both ways with respect to credibility. On one hand, Dr. Gaylord knows Respondent well and is able to testify as to the fact that Respondent is not a drug user. On the other hand, I have to guard against the testimony being slanted because of that friendship. In this case, Dr. Gaylord's testimony, both as a friend of Respondent and as a medical physician is found to be credible. Indeed, the Coast Guard made no effort to impeach the doctor's testimony. The doctor testified that Respondent has never acted in a way that would indicate he was a user of dangerous drugs. Furthermore, Dr. Gaylord testified that Respondent has successfully managed his high blood pressure and coronary artery disease; and that it would not be possible to manage these health conditions if Respondent was a user of cocaine. Indeed, Respondent's positive test results of ten (10) times the initial cutoff level do not correlate with his medical condition and Dr. Gaylord's finding that Respondent manages such conditions very well.⁸ Therefore, the medical and character testimony of Dr. Gaylord, in conjunction with the character testimony of the Virginia State Delegate Putney, Respondent's own testimony, Respondent's physical appearance, and Respondent's standing in the community, clearly tips the scales in favor of a finding of charge not proved. Therefore, Respondent has successfully rebutted the presumption of drug use. Accordingly, the Coast Guard's allegation of Use of a Dangerous Drug is found Not Proved.

⁸ Dr. Gaylord has informed Respondent of the risks of coronary artery disease and heart attacks. Thus, Dr. Gaylord rejects any assertion of cocaine use because of the increased "risk of another heart attack or death". (See TR. at 40-41).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. 7704(c), 46 CFR Part 5, and 33 CFR Part 20.
2. Respondent is the holder of U.S. Coast Guard Merchant Mariner License, Serial Number 994928.
3. On March 22, 2007, Respondent participated in a random drug test and tested positive for cocaine metabolite.
4. Respondent's positive drug test created the presumption that he is a user of dangerous drugs. 46 CFR 16.201(b).
5. Respondent successfully rebutted the presumption that he is a user of dangerous drugs. 46 CFR 16.201(b).
6. Respondent rebutted the statutory/regulatory presumption that he is addicted to or is a user of dangerous drugs by reason of the expert medical testimony of Dr. Gaylord, augmented by Respondent's testimony, Virginia State Delegate Lacey Putney's testimony, and the lay testimony of Dr. Gaylord.
7. The factual allegation "Use of or Addiction to the Use of Dangerous Drugs" against Respondent is found **NOT PROVED** by a preponderance of the reliable and credible evidence.

ORDER

IT IS HEREBY ORDERED that the allegation of "Use of or Addiction to the Use of Dangerous Drugs" against Respondent is found not proved.

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

(Attachment B).



HON. PARLEN L. MCKENNA
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

Done and dated on this 12th day of December 2007
Alameda, California

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD WITNESSES

IO Witness 1	Cynthia Diane Ward
IO Witness 2	Susan P. Mills

RESPONDENT WITNESSES

Respondent Witness 1	Dr. John Gaylord, III
Respondent Witness 2	Virginia State Delegate Lacey Putney
Respondent Witness 3	Michael Wilson

EXHIBIT LIST

COAST GUARD EXHIBITS

See IO Ex. 1	Copy of Respondent's Merchant Mariner's License
See IO Ex. 2	Copy of the Federal Drug Testing Custody and Control Form with Respondent's Signature
See IO Ex. 3	Copy of Positive Drug Test Letter for the Respondent from the Maritime Consortium, Inc.
See IO Ex. 4	Copy of positive split sample test result letter for the Respondent from the medical review officer
See IO Ex. 5	Lab Litigation Package
See IO Ex. 6	Telephonic deposition upon oral examination of James Vanderploeg, MD

ATTACHMENT B

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

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

33 CFR 20.1002 Records on appeal.

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

33 CFR 20.1003 Procedures for appeal.

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

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

33 CFR 20.1004 Decisions on appeal.

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