UNITED STATES OF AMERICA

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

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UNITED STATES COAST GUARD

Complainant

v.

Glen Edward Stewart

Respondent

_____
Docket Number CG S&R 07-0387
CG Case No. 3000322

DECISION AND ORDER

Issued: July 3, 2008

Issued by: Hon. Bruce T. Smith, Administrative Law Judge

Appearances:

For Complainant:
MK1 Jeremiah Huss
USCG Sector New Orleans

For Respondent:
Danatus N. King, Esq.
Counsel for Respondent

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II. PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard") filed a Complaint dated August 6, 2007, against Glen Edward Stewart ("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) and 46 C.F.R. § 5.35. The Complaint alleged that Respondent provided a pre-employment urines sample that tested positive for marijuana metabolites.

Respondent did not file a timely Answer or a response to the Coast Guard's Complaint. On October 30, 2008, upon motion by the Coast Guard, Chief Administrative Law Judge Joseph Ingolia issued an Order that Respondent show cause why a default judgment should not be entered against him.

On or about November 27, 2007, the Respondent filed a handwritten submission which Chief Judge Ingolia regarded as a response to the Order to Show Cause. Thereafter, Chief Judge Ingolia ordered the Coast Guard to initiate contact with the Respondent and to inform the Respondent of his obligation to file an Answer and any appropriate motions.

On November 28, 2007, the Coast Guard complied with Chief Judge Ingolia's direction—sending the Respondent a copy of the Complaint, detailed information and a proposed settlement agreement.

On December 5, 2007, Respondent filed his Answer, through counsel, wherein he denied the allegations contained in the Coast Guard complaint and requested a hearing before an Administrative Law Judge. Respondent defended by denying that his specimen tested positive for marijuana and asserted that the test was conducted improperly.

Respondent's late Answer to the Complaint was accepted and on January 10, 2008 and Chief Judge Ingolia issued an Order requiring both sides to file a status report. The parties reported no settlement had been reached and that the case would go forward.

On January 24, 2008, the above-captioned case was reassigned to the undersigned Administrative Law Judge.

On February 8, 2008, the undersigned conducted a pre-hearing telephone conference with the parties and discussed a variety of procedural matters, inquired into whether a settlement had been reached, and discussed discovery, hearing dates and locations.

On March 20, 2008, the hearing commenced as scheduled in New Orleans, LA. Both parties appeared and presented their respective cases. Three (3) witnesses testified as part of the Coast Guard's case-in-chief. The Coast Guard offered seven (7) Exhibits into evidence, all of which were admitted.

Likewise, Respondent testified on his own behalf and called one (1) other witness to testify. Respondent offered eight (8) exhibits, all of which were admitted into evidence.

At the conclusion of the hearing, the undersigned informed the parties that each might file post-hearing briefs. The parties were directed that briefs were to be filed with the court and be exchanged between the parties by the close of business on April 4, 2008. The parties were also permitted to file reply briefs by April 11, 2008.

On April 3, 2008, Respondent filed a Post Trial Memorandum.

On April 11, 2008, the Coast Guard filed its written closing rebuttal.

III. FINDINGS OF FACT

1. Respondent holds a Coast Guard-issued merchant mariner's license number 1095579 and a Coast Guard-issued merchant mariner's document.
2. On or about June 29, 2007, Respondent reported to Pelican State Outpatient Center ("Pelican State") for a pre-employment drug screening and provided a urine specimen. (Tr. 184-185).
3. Ms. Jeanette C. Tate ("Ms. Tate") is an employee of Pelican State and has worked as a medical assistant and urinalysis collector at Pelican State since 2005. (Tr. 13-14). Ms. Tate received a "certificate of completion" for urinalysis collection training in 2002 and renewed that certificate in 2005. (CG Ex 1) (Tr. 14). Her certificate was current on June 29, 2007.
4. Ms. Tate collected Respondent's urine specimen on June 29, 2007. (Tr. 18-19).
5. On June 29, 2007, Ms. Tate completed a Custody Control Form ("CCF") (CG Ex 2a) wherein she inscribed only the words "J. Tate" at Step 4 on the CCF, instead of printing and signing her full name. (Tr. 34, 49).
6. Step 1 of the CCF "Step 2" improperly listed "Pelican State Outpatient" as Respondent's employer. The correct entry should have read "Turn Services." (CG Ex 2a) (Tr. 131).
7. Pelican State subsequently sent a specimen purported to be Respondent's to Kroll Laboratory for testing. (Tr. 60).
8. Dr. Michael McAlvanah, the Medical Review Officer ("MRO"), reviewed Respondent's purported test results. (Tr. 66).

9. Step 6 of the CCF at issue does not reflect whether Respondent's purported original urine specimen was ever tested or whether it tested positive for marijuana metabolites. (CG Ex 2b,6).
10. The MRO failed to complete "Step 6" of the CCF, which is where he should have entered the test results from Respondent's urine specimen test. (CG Ex 2b,6).
11. Dr. David Austin Green ("Dr. Green") is a lab director at Kroll Laboratory. (Tr. 159-160).
12. Apart from his entries on the CCF, the MRO generated three other documents relating to the urine sample at issue, but those documents did not conform to the requirements of 49 C.F.R. § 40.163(c). (CG Ex 4,5,7).
13. An entry on one of the non-conforming documents created by the MRO, indicated that "pt wishes split tested did not return calls to nurse regarding split." This notation means that on July 2, 2007, the Respondent requested that his split sample be tested. (CG Ex 5, 7).
14. The MRO reviewed Respondent's purported initial positive test results on or about July 6, 2007 and reviewed Respondent's purported split sample test results six months later on January 3, 2008. (CG Ex 5) (Tr. 72).
15. When Respondent requested his split specimen be tested the MRO told Respondent to contact Pelican State, the collection facility, and told Respondent that Respondent would be responsible for the $125.00 to $135.00 cost of the split sample test. (Tr. 108, 186).
16. The MRO completed "Step 7" of the CCF six months after the sample was provided. (CG Ex 6).

17. There was no proof that the Respondent's split sample was tested in accordance with Part 40.

18. The Kroll laboratory report identified Respondent's "Quantitative Value" was "20 (twenty) ng/ml (nanograms per milliliter)" (CG Ex 9, p. 93)

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent holds a Coast Guard-issued merchant mariner's license number 1095579 and a Coast Guard-issued merchant mariner's document.
2. The Respondent provided a urine sample to Pelican State on or about June 29 2007.
3. The Respondent's urine sample tested positive for a dangerous drug, i.e., marijuana.
4. The Coast Guard did not establish that Respondent was tested in accordance with Part 40.
5. The Coast Guard did not establish a prima facie case for use or addiction to the use of dangerous drugs based on a positive urinalysis because it did not establish that the drug test was conducted in accordance with 49 C.F.R. Part 40.

V. DISCUSSION

This Suspension and Revocation proceeding is remedial and not penal in nature and is "intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. The Commandant 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 C.F.R. § 5.19. Here, the Coast Guard charged Respondent under 46 U.S.C. §

7704(a) and 46 C.F.R. § 5.35 alleging his use of dangerous drugs. The Coast Guard seeks revocation of Respondent's merchant mariner's credentials.

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. Appeal Decision 2639 (HAUCK) (2003).

A. Burden and Standard of Proof

1. Generally

The Coast Guard bears the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 C.F.R. § 20.701-02. *See* Appeal Decision Nos. 2468 (LEWIN) (1988); 2477 (TOMBARI) (1988); *See also Dept. of Labor v. Greenwich Colleries*, 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 C.F.R. § 20.701-702(a). *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). 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). These proceedings are conducted under the provisions in 33 C.F.R. Part 20, 46 C.F.R. Part 5, and the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq*.

2. Drug Cases

The instant case was brought, *inter alia*, under the provisions of 49 C.F.R. Part 40.

The law is well settled that in order "to prove use of a dangerous drug, the Coast Guard must establish a prima facie case of drug use by the mariner." *See* Appeal Decision Nos. 2662 (VOORHEIS) (2007); 2592 (MASON) (1997); 2589 (MEYER) 1997); 2584 (SHAKESPEARE) (1996); 2583 (WRIGHT) (1995); 2529 (WILLIAMS) (1991); 2379 (DRUM) (1985); and 2282 (LITTLEFIELD) (1982).

Furthermore, when the Coast Guard's case is based solely upon urinalysis test results, a prima facie case can be made if and only if the Coast Guard initially establishes three required elements by a preponderance of the evidence. *See* Appeal Decision No. 2662 (VOORHEIS) (2007).

If the Coast Guard proves its prima facie case, a presumption then arises that the Respondent used dangerous drugs and the burden of rebuttal then shifts to the Respondent. Appeal Decisions Nos. 2603 (HACKSTAFF) (1998); 2589 (MEYER) (1997); 2592 (MASON) (1997); 2584 (SHAKESPEARE) (1996); and 2379 (DRUM) (1985). If the Respondent does not produce any persuasive evidence in rebuttal, the Administrative Law Judge may find the allegation of dangerous drug use proved on the basis of this presumption alone. *See* Appeal Decision Nos. 2603 (HACKSTAFF) (1998), 2662 (VOORHEIS) (2007); 33 C.F.R. § 20.703.

A fortiori, if the Coast Guard does not prove a prima facie case of illegal drug use, no presumption arises – and Respondent is relieved of his burden of rebuttal.

The instant case is based solely upon the results of a urinalysis test. The Coast Guard failed to prove the three required elements of a prima facie drug case by a

preponderance of the evidence. Accordingly, the Coast Guard cannot rely upon the presumption that the Respondent used or was addicted to dangerous drugs. Absent this presumption, there was little or no collateral evidence that Respondent ever used or was addicted to dangerous drugs.

After careful consideration of the testimony at the hearing and of the entire record, I find that the Coast Guard did not establish by a preponderance of the evidence that Respondent used or was addicted to the use of dangerous drugs. The charge is found NOT PROVED.

B. Use of or Addiction to the use of Dangerous Drugs

1. The Coast Guard Failed to Prove a Prima Facie Case

As recited above, to establish a prima facie case based solely on a urinalysis test, 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 49 C.F.R. Part 40. Appeal Decisions Nos. 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2598 (CATTON) (1996); 2584 (SHAKESPEARE) (1996); and 2583 (WRIGHT) (1995). Each of the three elements is discussed in turn, as each relates to the Respondent, here.

a. Element One: The Respondent Was the Individual Who Was Tested for a Dangerous Drug

Proof of the first element "involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number . . . which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of the sample." Appeal Decision Nos. 2662 (VOORHIES) (2007); 2603 (HACKSTAFF) (1998).

The Coast Guard alleges that on June 29, 2007, the Respondent submitted to a pre-employment drug test.

In support of that allegation, the Coast Guard produced Ms. Jeanette Tate, the Pelican State specimen collector, who broadly discussed various general urine specimen collection procedures. Ms. Tate testified that Respondent was present at Pelican State on June 29, 2007 and that he provided a urine sample. (Tr. 19-23) (CG Ex 6). Ms. Tate also testified that Respondent's sample was assigned a specimen ID number. (Tr. 26).

Likewise, Respondent admitted under oath that he presented himself to the Pelican State testing facility and provided a urine specimen. (Tr. 185) (CG Ex 6, Step 5).

Thus, the Coast Guard proved by a preponderance of the evidence that the Respondent was the person who was tested for a dangerous drug on June 29, 2007.

b. Element Two: Test Results Show That a Party Has Tested Positive for the Presence of a Dangerous Drug

Here, the Coast Guard offered some evidence that a urine sample tested positive for the marijuana metabolite. An examination of the CCF (CG Ex 2a) reveals that at Step 5a, a presumptive employee of a testing facility indicated that the Respondent's specimen tested positive for the marijuana metabolite. However, there was no testimony from an appropriate custodian of records to authenticate the signature of the putative employee. Neither was there testimony from the person who made the handwritten entries at Step 5a of the CCF. (CG Ex 2a)This is proof of the thinnest variety and Coast Guard Exhibit 2a might not have survived a timely objection based upon a lack of foundation.

It is also noteworthy that the "positive" test result reflected at Step 5a of the CCF (i.e., the "laboratory copy") (CG EX 2a) was not reflected at Step 6 of the patient's or MRO's copy of the CCF. (CG Ex 2b, 6). This discrepancy suggests a failure of the

MRO in the administrative processing of the Respondent's CCF...although the MRO did testify that the Respondent's test result was "positive." (Tr. 66).

Whether this omission constitutes something more than a technical violation is a question a higher appellate authority will have to answer.

Most troubling is the Kroll laboratory report (CG Ex 9, p 93) which reports the "Quantitative Value" of marijuana metabolite in Respondent's sample was "20 ng/ml" or twenty nanograms per milliliter. Yet 40 C.F.R. §40.87 defines a "positive" result as 50 ng/ml. One might easily presume that this reported result ought to be interpreted as a "negative" test result! The Coast Guard offered no testimony to explain this incongruity and the Respondent's counsel failed to make inquiry regarding the result.

Thus, the Coast Guard has narrowly met its burden of proof relative to the second element: there is some proof that the Respondent's urine specimen tested positive for the presence of a dangerous drug.

c. Element Three: The Drug Test Was Conducted in Accordance with 49 C.F.R. Part 40

It was the Coast Guard's responsibility to prove that the urine specimen testing procedures were accomplished in compliance with the rules set forth in 49 C.F.R. Part 40.

Here, the Coast Guard failed to meet its burden of proof.

The Coast Guard offered no meaningful proof whatsoever that the test-at-issue was conducted in accordance with 49 C.F.R. Subpart f, § 40.81, *et. seq*.

Although the Coast Guard did call a Dr. David Green of Kroll Laboratories to testify, the Coast Guard only asked Dr. Green general questions pertaining to chain-of-custody and general paperwork procedures at his lab -- and little else. (Tr. 159-172).

The Coast Guard offered Exhibit 9 – a sheaf of some 101 papers, commonly referred to as a "litigation package" -- but solicited absolutely little meaningful or

probative testimony from Dr. Green whether that "litigation package" related in any way to this Respondent or whether the test(s) were conducted in accordance with Part 40.

The Coast Guard did not ask, and Dr. Green did not explain, whether Kroll Laboratories conducted the alleged tests in accordance with Part 40; nor with subpart f; nor which scientific test(s) were employed; nor an explanation of the results(s) from any such test(s); nor an explanation of the contents of the "litigation package;" nor whether the Respondent's reported twenty nanogram-per-milliliter level fell below the cutoff level defined in 40 C.F.R. § 40.87 so as to warrant a "negative" result; nor whether or how the test results relate in any way to THIS Respondent. Dr. Green's references to THIS Respondent were vague, at best.

I cite with particularity p. 93 of CG Ex 9, which purports to be the Kroll "drug test report." No meaningful testimony was offered to establish whether that report relates to THIS Respondent or whether any test was conducted in accordance with Part 40.

I further note that p. 93 of CG Ex 9 i.e., the Kroll lab report, fails the dictates of §40.97(b)(1),(2), which define the necessary contents of a lab report. The lab report, here, is insufficient, because it omits the following required elements: "(B) Employer's name; (C) Medical Review Officer's name [per se];…(J) Date certifying scientist released the results; (M) Remarks section, with an explanation of any situation in which a correctable flaw has been corrected: i.e, the incomplete collector's name ("J. Tate"). Moreover, the lab report contains references to a "supplemental report" and a "corrected report" – both references raise an inference that an original report was generated and was in error or that it revealed different results. There is no explanation of these notations.

Most damning is the apparent incongruity between the Respondent's reported 20 ng/ml test result and the 50 ng/ml screening level required by 40 C.F.R. §40.87. This

disparity suggests either that the test should have been reported as a "negative" or that the test was not performed in accordance with Part 40. What is certain is that the Coast Guard failed to elicit any testimony from Dr. Green to explain this anomaly..

In short, Coast Guard Exhibit 9 consists of 101 pages of undecipherable charts, graphs, numbers and scientific jargon without sufficient testimonial support, explanation or foundation from an appropriate expert witness who could establish whether the testing was actually performed in accordance with Part 40.

I also note an utter absence of proof relating to the alleged testing on the Respondent's "split sample." There was no proof offered that the "split sample" was tested in accordance with Part 40.

For these reasons, I conclude that the Coast Guard has failed to prove that the drug test(s), here, were conducted in accordance with 49 C.F.R. Part 40.

C. Collateral Issues

It is well-settled Coast Guard law that "minor technical violations" of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decision 2633 (MERRILL) (2002); Appeal Decision 2603 (HACKSTAFF) (1998).

Respondent cites a number of flaws in the Coast Guard's case. Not all of them, however, are "fatal flaws." Several are no more than minor technical flaws.

I note, for instance, that 49 C.F.R. § 40.45(c)(2) requires that the CCF, (here Coast Guard Exhibits 2a, 2b & 6) "…must include the names, addresses, telephone numbers and fax numbers ***of the employer*** and the MRO…" Here, Coast Guard Exhibits 2a, 2b & 6 reveal an obvious error. In "Step 1" of the CCF, the "employer" is listed as "Pelican State Outpatient Center" – the agency which collected the Respondent's urine

sample. The Respondent's employer was "Turn Services," which was not identified on any portion of the CCF. Such an error, although suggestive of inattention to detail, does not rise to a level which offends due process by a breach in the chain-of-custody or violates the specimen's integrity. Thus, such an error is a non-fatal flaw.

By contrast, major technical violations (i.e., "fatal flaws") are those that impugn either the chain of custody or the integrity of the specimen. For example, in Appeal Decision 2653 (ZERINGUE) (2005), the Commandant upheld the ALJ's decision invalidating a drug test because, *inter alia*, the collector did not obtain the donor's identification at the collection station. Likewise, in Appeal Decision 2603 (HACKSTAFF) (1998), the Commandant held that a drug test was invalid because there was no evidence identifying the signature of the putative collector of the specimen; no evidence that she had identified the donor; no authentication of the collection form from the collector; and no evidence whatever from the collector about the collection form in question.

In its post-hearing brief, the Coast Guard suggests that 49 C.F.R. § 40.199(b) is "the" exclusive list of "fatal flaws" in the maritime drug testing program. In reality, § 40.199(b) only provides specific guidance to an MRO and does not address itself to any other actor or step in the specimen collection or testing process. I also note that § 40.199(b) is neither an exclusive nor exhaustive list of "fatal flaws" which might occur in the process. Other regulatory sections within Part 40 also describe "fatal flaws." 49 C.F.R. § 40.83(c)(3), for instance, specifically identifies another "fatal flaw" not listed in § 40.199(b). Hence, § 40.199(b) is not "the" exclusive list of "fatal flaws" in the maritime urine testing program—and it is doubtful that such an exclusive and definitive "list" could ever be compiled.

Contrary to the Coast Guard's assertion, 49 C.F.R. § 40.83(c)(3) specifically requires the testing laboratory to:

> "inspect each specimen and CCF for the following ***'fatal flaws'***…(3) ***The collector's printed name and signature are omitted from the CCF…"***
>
> (emphasis added)

The DOT-approved CCF, apparently crafted to comport with § 40.83(c)(3), clearly requires the collector to provide both a signature and her first, middle-initial, and last names.

Absence of a collector's printed name *and* signature from the CCF is specifically defined as a "fatal flaw" per § 40.83(c)(3) and § 40.83(d) dictates that if the testing lab finds this flaw, it must document the finding and stop the testing process. This result must then be rejected per the strictures of 49 C.F.R. § 40.97(a)(3). I am mindful that § 40.83(c)(3) doesn't specifically require the collector's full first, middle initial and last name; only the "printed name."

In the case at bar, the specimen collector was a woman named "Jeanette C. Tate." She testified that she did not print her full first, middle initial and last names on the CCF. (Tr. 34) (CG Ex 2a, 2b, 6). Indeed, the CCF at issue does NOT contain the collector's printed first, middle initial and last names in Step 3 of the CCF. (CG Ex 2a, 2b, 6). Plainly, the collector was cutting a corner by the use of her first initial, and that would seem to violate the "requirement" for first, middle initial and last name as directed by the CCF. Whether this is a "fatal flaw" as that term is specifically used in 49 C.F.R. § 40.83(c)(3) is a question for a higher appellate authority. Thus, the issue is preserved, here.

There is no indication that the testing laboratory noted this potentially-correctible error, as was required by § 40.83(d) and § 40.97(a)(3) or that the sample was marked "rejected" as required by the regulation.

There exists a clear semantic incongruity which must be resolved by higher appellate authority. On the one hand, prior appellate cases say that errors that do not impugn either the chain-of-custody or specimen integrity will not cause the government's case to fail. Appeal Decision No. 2668 (MERRILL) (2007). Yet, on the other hand, the regulations clearly speak of "fatal flaws" – even though some do not seem to affect either the chain-of-custody or a specimen's integrity. Perhaps the collector's failure to print her entire name is only a ministerial error and one which doesn't seem to affect either the chain-of-custody or the specimen's integrity – but the regulations suggest this may have been a "fatal flaw." (At the very least, the collector's inattention to detail seems to undercut the integrity of the collection process.)

Another, perhaps more egregious flaw in this case was the MRO's failure to complete Step 6 of the CCF at issue. (CG Ex 2b, 6). Step 6 is the portion of the CCF wherein the MRO makes a determination whether test subject's urine specimen tested negative, positive, etc. CG Ex 2b and 6 clearly reveal that the MRO failed to complete that section of the CCF.

I do note that the MRO did complete Step 7 of the CCF regarding the testing of the split sample, albeit ***more than six months after the sample was provided***. (CG Ex 6).

49 C.F.R. § 40.137 provides specific guidance to the MRO and plainly states:

> (a) As the MRO, you ***must*** verify a confirmed positive test result for marijuana…unless the employee presents a legitimate medical explanation for the presence of the drug(s)/metabolite(s) in his…system.
>
> (emphasis added)

49 C.F.R. § 40.163 also provides specific guidance to the MRO and requires:

> (a) As the MRO, it is your responsibility to report ***all*** drug tests to the employer.
> (b) You may use a signed or stamped and dated legible photocopy of Copy 2 of the CCF to report test results.
> (c) If you do not report test results using Copy 2 of the CCF for this purpose, you must provide a written report (e.g., a letter) for ***each test result***.
>
> (emphasis added)

Subsection (c) then identifies a "laundry list" of the essential elements such a letter must contain when used in lieu of the CCF.

In the instant case, the MRO failed to meet the requirements of <u>either</u> 49 C.F.R. §§ 40.137 or 40.163. An examination of the CCF at issue (CG Ex 2b and 6), plainly reveals that the MRO failed to verify the positive drug test for marijuana at Step 6. An examination of the same document also reveals that the MRO failed to report ALL and EACH test(s) provided in Step 6.

While it is true that the MRO did generate other documents which relate to the urine sample at issue, neither CG Ex 4, 5 or 7 meet the requirements specified in 49 C.F.R. § 40.163 (c), *supra*, for written reports in lieu of the preferred CCF. For instance, § 40.163(c) requires such a report to bear a specimen ID number, which CG Ex 4, 5 and 7 lack. Neither do these documents specify a reason for the test, as required by § 40.163(c). Nor do those documents reveal the date the MRO received Copy 2 of the CCF, again in violation of § 40.163(c).

Again, a higher appellate authority will have to define whether these errors are "fatal," and thus, I have preserved the issue here.

More troubling than the absence of an MRO review at Step 6, is the six-month delay in the testing of the split specimen. CG Ex 7 reveals that the MRO may have reviewed the test results from the Respondent's primary sample on or about July 6, 2007.

Yet the same document also reveals that the MRO didn't review the test results of the re-confirm or split sample until January 3, 2008, a delay of nearly six months.

Specifically, CG Ex 7 reveals an undated entry by the, MRO which reads:

pt wishes split tested did not return calls to nurse regarding split

A reading of CG Ex 7 reveals that this notation was the result of the MRO's telephone contact with the Respondent at 5:16 pm on July 2, 2007. (CG Ex 5) (Tr. 66). The MRO also testified that on July 2, 2007, the Respondent asked to have his split sample tested. (Tr. 67).

Respondent's request should have triggered the procedures outlined in 49 C.F.R. § 40.171, which mandates:

> (d) When the employee makes a timely request for a test of the split specimen under paragraphs (a) and (b) of this section, you must, as the MRO, immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second HHS-certified laboratory. You must also document the date and time of the employee's request.

Here, CG Ex 7 and the MRO's testimony reveals that the Respondent made a timely request (per 49 C.F.R. § 40.171(a) within 72 hours from the time of his notification) that his split sample be tested.

Yet, the Coast Guard produced no evidence to establish that the MRO complied with the requirements of 49 C.F.R. § 40.171, *supra*. Neither does the record reflect any evidence that the MRO complied with the dictates of 49 C.F.R. §§ 40.153, which specifies how the MRO must notify an employee of his right to have a split specimen tested.

Interestingly, the MRO testified that when the Respondent asked the MRO to have his split sample tested:

> The patient stated that he did wish to have this tested. ***And I informed him that he would have to contact Maple at Pelican State and gave him the phone number.*** (Tr. 67).
>
> (emphasis added)

Pelican State was the location where the Respondent's urine specimen was originally obtained. By directing the Respondent to "contact Maple at Pelican State," it appears that the MRO placed the burden of having the split sample tested upon the Respondent, quite in contravention of the very clear guidance contained in 49 C.F.R. § 40.171.

49 C.F.R. § 40.171 required the MRO, and not the Respondent, to take immediate action upon the Respondent's request for testing of the split sample. 49 C.F.R. § 40.171(c) mandates that "when the employee makes a timely request for a test of the split specimen . . . you must, as the MRO, immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second . . . laboratory [and] also document the date and time of the employee's request."

There is no indication whatsoever that the MRO followed this requirement. Indeed, the MRO improperly directed the Respondent to undertake responsibility for split-sample testing.

Likewise, 49 C.F.R. § 40.173 imposes upon the employer the burden to ensure the split-sample testing occurs. In fact, nowhere within the procedures outlined in 49 C.F.R. §§ 40.171 to 40.185 is a Respondent obliged to ensure the split sample is tested, other than making a timely request to the MRO – which the Respondent, here, clearly did.

Here, the MRO improperly imposed upon Respondent the burden to pay for the split specimen test. 49 C.F.R. § 40.173 makes clear that the employer bears the burden to

ensure that the split-sample testing is conducted, regardless of who ultimately pays for that test.

However, the MRO testified that he had a conversation with Respondent wherein Respondent requested this be done, but that the MRO told Respondent that he would have pay between $125.00 and $135.00 for his split-sample to be tested. (Tr. 108). Nowhere within the Part 40 procedures is a Respondent ever obliged to perform any function to ensure a split sample is tested after making a timely request to the MRO. Since Respondent clearly made such a request, the MRO's attempt to direct Respondent to take action was misguided and in contravention to the regulatory scheme set forth in Part 40. *See* 49 C.F.R. 40.171-40.185.

The six-month delay occasioned by the MRO's errant instruction to Respondent calls into question the reliability of the testing procedures employed in this case.

Thus, the MRO's attempt to direct Respondent to take any action was misguided and in contravention to the regulatory scheme set forth in 49 C.F.R. §§ 40.171 to 40.185.

Respondent also correctly pointed out that the Coast Guard failed to produce any evidence whatsoever regarding whether the laboratory that tested Respondent's split sample did so in compliance with the split sample requirements detailed in 49 C.F.R. §§ 40.175-40.185. Nor was there any evidence offered to establish whether the MRO timely complied with the requirements of 49 C.F.R. §§ 40.187, which details the actions an MRO is to take upon receipt of the test results from split-sample testing. CG Ex 6 reveals a six-month delay from the time the Respondent requested a split-sample test until the MRO noted the results of that split-sample test on the CCF.

Here, it is clear that both the sample collector and the MRO breached significant obligations set forth in Part 40. At the very least, the lapses discussed above reflect inattention to detail that undercuts the integrity of the entire process.

Again, whether these breaches constitute a violation of the chain-of-custody or whether they impugn the integrity of the urine sample or testing procedures is a question that must be resolved by a higher appellate authority. If these shortcomings are not regarded as fatal, then the question is raised, "Why have specific regulations if they can be breached without consequence?"

To reiterate, the Coast Guard failed to prove that the Respondent's urine sample was tested in accord with Part 40. The Coast Guard only proved general policies and procedures and never sufficiently proved Respondent's drug test was conducted in accord with Part 40. It is the absence of such proof, coupled with the breaches of procedures enumerated above, the Coast Guard's effort to make a prima facie case has failed.

I therefore find that the Coast Guard did not establish the third element of the prima facie case by a preponderance of the evidence.

D. Respondent's Attempted Impeachment of the MRO

During the course of the hearing, Respondent attempted to impeach the testimony of the MRO, with a surreptitiously-made recording of telephone conversations between Respondent and the doctor. At the hearing, the physician testified that these recordings were made without his knowledge or permission. In an abundance of caution, the undersigned disallowed the putative recording out of concern for a potential violation of 18 U.S.C. § 2511, commonly referred to as the "federal wiretap statute."

The statute permits a private person, not acting under color of law, to record a conversation of which he is a part "unless such communication is intercepted for the

purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of any State." 8 U.S.C. § 2511(2)(d).

Respondent's counsel said that his purpose in using the recording was to prove differing versions of telephone conversations between the Respondent and the MRO; wherein the MRO allegedly failed to properly advise the Respondent of payment procedures in regard to the testing of the split urine sample. Respondent's counsel argued that his client was not acting under color of law and, thus, was entitled to secretly record his client's conversation with the doctor.

The undersigned determined that the necessary and detailed legal analysis of various state criminal, tort and ethics laws, and the findings-of-fact which would have been necessitated thereby, would have caused an unnecessarily delay of the instant proceedings and I therefore excluded the recording from evidence.

A second reason for excluding the recording is that Respondent's attempt was premature. It is unlikely Respondent could have laid an appropriate evidentiary foundation for an impeachment, given that the witness angrily denied that he had given anyone permission to record his conversation with the Respondent.

Finally, the undersigned notes that the Respondent did cross-examine the MRO regarding his conversations with the Respondent. I also note that the Respondent personally testified regarding his recollections of his conversations with the MRO, Dr. McAlvanah. Thus, the requirements of due process were observed.

E. Respondent's Post-Hearing Motion to Strike

Respondent filed a Post-Hearing Motion to Strike the Coast Guard's post-hearing proffer/argument regarding evidence of Respondent's alleged prior use of marijuana or any prior adverse administrative action that resulted therefrom.

I GRANT Respondent's Motion to Strike and sustain his objections to the Coast Guard's "evidence" and argument. Plainly, the administrative record had closed and it was inappropriate for the Coast Guard to attempt to argue or offer evidence pertaining to Respondent's alleged prior use of marijuana or any prior adverse administrative action that flowed from that alleged use after the record had closed. The Coast Guard did NOT attempt to offer that information during either its case-in-chief nor during cross-examination nor upon rebuttal. Therefore, the undersigned did not consider that "evidence" or argument nor any inferences that might have been drawn therefrom.

VI. CONCLUSION

After careful consideration of the testimony and documentary evidence offered at the hearing, and of the entire record, I find that the Coast Guard's case against Respondent is NOT PROVED.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED that this case is dismissed with prejudice and that Respondent's license is to be immediately returned to Respondent.

PLEASE TAKE NOTE that issuance of this Decision and Order serves as the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and Dated on this 3rd day of July, 2008
New Orleans, LA

_____

Honorable Bruce T. Smith
Administrative Law Judge
United States Coast Guard

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS

I. Coast Guard's Exhibits. IO Ex. 1 through IO Ex. 7

1. Copy of Ms. Tate's D.O.T. Collection Certification
1a. Copy of Ms. Tate's "Certificate of Completion"
2a. "Copy 1 – Laboratory" copy of CCF
2b. "Copy 2 – MRO" copy of CCF
3. Dr. Michael J. McAlvanah AAMRO Registry
4. DOT/USCG Periodic Drug Testing Form
5. Pelican Urgent Care internal document
6. Kroll "Federal Drug Testing Custody ad Control Form"
7. Pelican Urgent Care internal document
8. Excerpt Federal Register, June 7, 2007
9. "Litigation Package"

II. Respondent's Exhibits

NOTE: Respondent did not offer items sequentially. Likewise, he did not mark them correctly. The numbers used on the Exhibit stickers were those that corresponded to a deposition taken prior to the hearing. For continuity, the ALJ elected to maintain those numbers, vice the appropriate letters.

3. "Discrepancy Report"
4. "Pelican State" internal document, signed by MRO
5. "Federal Drug Testing Custody and Control Form"
8. "Office Depot Fax Transmission" cover sheet
8b. Respondent's handwritten letter
8c. "Office Depot Fax Transmission" cover sheet
9. "MRO Fax Cover"
10. "Pelican State outpatient Center" letter dated January 21, 2008
11. "Pelican State Outpatient Center" letter dated January 31, 2008
12. "ElSohly Laboratories" Invoice

III. Judge's Exhibits. ALJ I

1. Multi page form with carbon press through

IV. Coast Guard's Witnesses

1. Jeanette C. Tate, Collector
2. Dr. Michael McAlvanah, Medical Review Officer
3. Dr. David Austin Green, Lab Director for Kroll Laboratory

V. Respondent's Witnesses

1. Respondent, Mr. Glen Edward Stewart
2. Caryn Swenson
3. Maple Biggs

ATTACHMENT B – SUBPART J, APPEALS

33 C.F.R. 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 C.F.R. 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 C.F.R. 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 C.F.R. 7.45.

33 C.F.R. 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 C.F.R. 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.

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:

Commanding Officer
USCG Sector New Orleans
Attn: MK1 Jeremiah Huss, IO
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Danatus N. King, Esquire
Danatus N. King & Associates
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New Orleans, LA 70119
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Done and dated this 3rd day of July, 2008 at
Baltimore, Maryland

Lauren Meus
Paralegal Specialist