UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

v.

Rockford Glyn Daire

Respondent.

Docket Number CG S&R 08-0231
CG Case No. 3205776

DECISION AND ORDER

Issued: December 2, 2008

Issued by: Hon. Parlen L. McKenna

Appearances:

For Complainant

LT Bill Fitzgerald and LT Michael Benson,
USCG Sector Anchorage

For Respondent

Rockford Glyn Daire, pro se

I. TABLE OF CONTENTS

II. PRELIMINARY STATEMENT

A. History

The United States Coast Guard ("Coast Guard") filed a Complaint dated May 14, 2008, against Rockford Glyn Daire ("Respondent") seeking revocation of Respondent's Merchant Mariners Document ("MMD") for use of or addiction to the use of dangerous drugs under 46 U.S.C. 7704(c) and 46 CFR 5.35. Specifically, the Complaint alleges that on November 9, 2005, Respondent took a Non-DOT periodic drug test as requested by Crowley Maritime Corporation; that Respondent's urine specimen was collected by R&R Testing Services and analyzed by Quest Diagnostics; that Respondent's specimen subsequently tested positive for Marijuana (THC) and was verified by Dr. Benjamin Gerson,[1] a certified Medical Review Officer; and that the Medical Review Officer's positive determination deems Respondent a user of a dangerous drug.

The ALJ Docketing Center received Respondent's Answer on May 14, 2008, wherein Respondent generally denied the Complaint, asserted that he was not a drug user, and requested a hearing before an Administrative Law Judge. On May 16, 2008, the Chief Administrative Law Judge assigned this matter to the undersigned for adjudication.

On July 14, 2008, the Coast Guard filed a Motion for Continuance. In support thereof, the Coast Guard stated that the original investigator has permanently departed Sector Anchorage; that the Investigations Division is left with only one investigating officer; that the Coast Guard intends on issuing an amended complaint; that a continuance would allow Respondent more time to prepare his defense; and that the Coast Guard is pursuing settlement discussions with Respondent. Almost immediately thereafter, Respondent filed an Answer objecting to the

[1] See discussion of the Coast Guard's error in pleading with respect to this factual allegation infra Sec. IV. B. 2. iii.

continuance. Respondent stated that:

> This whole matter has caused me hardship; I have lost my job, not able to work in my field of experience. The Coast Guard has had since April 27, 2007 to take action against me. I feel I have not had a right to a speedy Administrative Hearing.

On July 15, 2008, the Coast Guard's Motion for Continuance was denied.

On July 21, 2008, the Coast Guard filed an Amended Complaint seeking revocation of Respondent's document. The Amended Complaint again alleges that Respondent used or was addicted to the use of dangerous drugs under 46 U.S.C. 7704(c) and 46 CFR 5.35. The Amended Complaint also adds a Misconduct charge for violation of Crowley Maritime's company policy under 46 U.S.C. 7703(1)(B) and 46 CFR 5.27.[2]

In support of the Misconduct charge for violation of Crowley Maritime's company policy, the Coast Guard alleges that Respondent was acting under the authority of his document when Crowley Maritime required Respondent to take a periodic drug test as a condition of employment; and that the Medical Review Officer's positive determination deems that Respondent had used Marijuana in violation of said company policy.

On July 21, 2008, the ALJ Docketing Center received Respondent's Amended Answer[3] wherein he generally denied the Amended Complaint and requested an administrative hearing.

---

[2] In the Amended Complaint, the Coast Guard mistakenly described the statutory authority contained in 46 U.S.C. 7703(1)(B) as "Conviction for a Dangerous Drug Law Violation." At the hearing, Respondent pointed out this error and the Coast Guard agreed to strike this statutory authority. It was thus stricken. Upon later review, it was determined that 46 U.S.C. 7703(1)(B) was the correct statutory authority for this charge but that the Coast Guard had simply entered an incorrect description thereof on the Amended Complaint. Given that 46 U.S.C. 7703(1)(B) refers to "Incompetence, Misconduct, or Negligence," the Amended Complaint shall again contain this statutory authority and the correct description thereof to support the Misconduct Charge. Despite this error in pleading, the factual allegations contained in the charge for Misconduct were "adequate to enable the respondent to identify the act or offense alleged so that a defense can be prepared." Appeal Decision 2585 (COULON) (1997).

[3] Respondent did not sign the original Amended Answer, but signed it at the hearing on August 6, 2008. Tr. at 7.

On July 21, 2008, the Coast Guard filed a Motion for Telephonic Testimony and submitted its witness and exhibit list (with attachments). On July 25, 2008, the Coast Guard filed a Motion to Amend Discovery (with attachments) to include additional exhibits. The undersigned reserved ruling on these Motions until the hearing because there was insufficient time for Respondent to file his Answer prior to the hearing.

B. Hearing

1. Hearing Generally

On August 6, 2008, the hearing commenced in Anchorage, AK. Both parties appeared and presented their case. Lieutenant Bill Fitzgerald and Lieutenant Michael Benson appeared for the Coast Guard and Respondent appeared pro se. Mr. Dewayne Harris accompanied Respondent at his table, but did not act in a representative capacity. Three (3) witnesses testified as part of the Coast Guard's case in chief. The Coast Guard offered eleven (11) exhibits into evidence, all of which were admitted.

At the hearing, Respondent testified on his own behalf and cross examined several Coast Guard witnesses. Respondent offered five (5) exhibits for admission into evidence, all of which were admitted.

In addition to the scheduled witnesses, the parties mutually agreed to call two (2) additional witnesses whose testimony became relevant as the hearing proceeded.

At the conclusion of the hearing, each party was informed that they may file briefs with proposed findings of fact and conclusions of law; that any such filings are due by the close of business thirty (30) days from receipt of the transcript; and that settlement discussions may continue and are encouraged until the Decision and Order is issued. On October 12, 2008, the

Coast Guard filed its post hearing brief. Respondent did not exercise his right to file a brief. To date, no settlement has been reached.

2. Amended Complaint

At the beginning of the hearing, the undersigned addressed whether the Amended Complaint would be allowed. Respondent was then given an opportunity to amend his Amended Answer to admit the jurisdictional elements contained therein. Respondent indicated that the listed address was correct; that he holds the MMD in question; and that the Coast Guard has jurisdiction over him. Tr. at 11-12. Respondent, however, made clear that he did not want to admit the offenses charged or any guilt with respect to the Amended Complaint. Tr. at 12-13. The undersigned reassured Respondent that admitting the jurisdictional allegations was not in any way an admission of guilt. Tr. at 9-13.

The undersigned next reviewed the numbered factual allegations contained in the Amended Complaint. With respect to the factual allegations regarding Use of Dangerous Drugs, Respondent stipulated to the following numbered factual allegations:

1. On November 9, 2005 Respondent took a periodic drug test;
2. A urine specimen was collected by R&R testing Services; and
3. Respondent signed a Forensic Drug Testing Custody and Control Form.

Respondent then renewed his previous denials of factual allegations four through seven. Specifically, Respondent denied:

4. The urine specimen subsequently tested positive for Marijuana Metabolites;
5. The test results were subsequently verified positive for Marijuana Metabolite by Dr. Benjamin Gerson, a certified Medical Review Officer; and

6. The Medical Review Officer's positive determination deems Respondent had used Marijuana in violation of 46 USC 7704 and 46 CFR 5. 35.

With respect to the factual allegations underlying the Misconduct charge, Respondent renewed his previous denial.

3. Motion for Telephonic Testimony

Finally, the undersigned addressed the Coast Guard's pending Motion for Telephonic Testimony. After having an opportunity to review this Motion, Respondent did not object and the Motion was granted. Tr. at 10.

III. FINDINGS OF FACT

1. Rockford G. Daire, the Respondent herein, was at all times the holder of Merchant Mariner Document ("MMD") No. 011521. Tr. at 6. Respondent's Document expires on June 6, 2008. Tr. at 6. The document authorizes him to serve as: Able Body Seaman-Unlimited; Wiper; Steward's Department (Food Handler); Tank-PIC; and (Barge-DL). Tr. at 6;

2. On May 14, 2008, the Coast Guard filed a Complaint against Respondent's MMD alleging use of or addiction to the use of a dangerous drug (THC-Marijuana metabolites). See Record;

3. Respondent was fully advised of his right to counsel and stated on the record that he wished to proceed pro se. Tr. at 6;

4. On May 14, 2008, Respondent filed an Answer to the above-noted charge and denied the jurisdictional and factual allegations therein. IO Ex. 11;

5. On July 21, 2008, the Coast Guard filed an Amended Complaint against Respondent's MMD alleging use or addiction to the use of a dangerous drug (THC-Marijuana metabolites) and for Misconduct for violation of Crowley Maritime's company policy. IO Ex. 10;

6. On July 21, 2008, Respondent filed an Amended Answer to the above-noted charges and denied the jurisdiction and factual allegations therein. IO Ex. 10;

7. At the August 6, 2008 hearing, Respondent changed his plea with respect to the charge for use or addiction to the use of dangerous drugs to admit to the jurisdictional allegations and the first three specifications of the factual Amended Complaint - - that on November 9, 2005, Respondent took a periodic drug test, that a urine specimen was collected by

R&R Testing Services, and that Respondent signed a Forensic Drug Testing Custody and Control Form. Tr. at 6-10. Respondent maintained his previous denial of factual specifications four (4) through (6) with respect to this charge. Tr. at 6-10;

8. At the August 6, 2008 hearing, Respondent maintained his previous denial of all the factual allegations with respect to the charge for violation of Crowley Maritime's company policy. Tr. at 6-10;

9. Respondent's urine specimen was collected by Ms. Rhonda Wade of R&R Testing Services on November 9, 2005. Tr. at 11-13, 20-25. Ms. Wade meets the requirements of a collector under 49 CFR Part 40. See Tr. at 10, 20-25. Ms. Wade's business practice is to always conduct collections in accordance with 49 CFR Part 40. Tr. at 25-56. Respondent's urine specimen was collected in substantial accordance with all DOT guidelines and requirements contained in 49 CFR Part 40. See Tr. at 10, 20-25. Procedures Ms. Wade followed include, but are not limited to, the following:

    a. The collector verified the identity of Respondent, the specimen provider. See Tr. at 20-21;

    b. Ms. Wade processed Respondent's sample on non-federal custody and control forms that were in substantial accordance to those approved under 49 CFR Part 40. Tr. at 24. The only significant difference between the form Ms. Wade used and DOT approved forms is that the former includes the donor's name and social security number. Tr. at 25; IO Ex. 1. The DOT approved forms convert this information to numeric designations. See Tr. at 25;

    c. Following collection, Ms. Wade checked the temperature of Respondent's specimen and ensured the sample measured within the appropriate temperature range. See Tr. at 20-21;

    d. Ms. Wade took a single sample. Tr. at 24. The testing laboratory has the capability to retest a sample because positive samples or portions of positive samples remaining after testing are stored for at least 13 months. Tr. at 40 & 44. In this case, Quest Diagnostics still has the sample. However, the record does not indicate that Respondent requested a retest. Tr. at 44;

    e. Ms. Wade sealed the specimen bottle in Respondent's presence. See Tr. at 20-21;

    f. Respondent initialed the seal on the specimen. See Tr. at 20-21;

    g. Ms. Wade completed the Custody and Control form with Respondent's information. See Tr. at 20-21; IO Ex. 1;

h. Respondent signed a Forensic Custody and Control Form during the drug test that reads at step 5:

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 and numbers provided on this form and the label affixed to each specimen bottle is correct.
IO Ex. 1; See Tr. at 20-21;

i. Each Custody and Control Form contains a section for donor name and donor social security or tax identification number. IO Ex. 1; and see Tr. at 24-25;

10. Ms. Wade's testimony is found to be credible. Tr. at 20-24;

11. R&R Testing Services sent Respondent's specimen to Quest Diagnostics. Tr. at 35;

12. Quest Diagnostics is a duly certified DOT testing laboratory; it is a secure facility; and has a policy that all records are protected; the chain of custody is always maintained; a specimen would be rejected if there were any signs of tampering or compromise; and it processes every sample in accordance with the requirements of 49 CFR Part 40. Tr. at 37-52;

13. Quest Diagnostics received Respondent's urine specimen via courier on November 12, 2005. IO Ex. 2 at 2-5;

14. The sample urine specimen bottle arrived in a sealed package with seals intact. See Tr. at 41;

15. Quest Diagnostics tested Respondent's urine specimen in accordance with DOT guidelines. See Tr. at 42-52;

16. The chain of custody for Respondent's specimen was intact. See Tr. at 24, 40-42, 63-64; IO Ex. 1-3;

17. The Testing Laboratory used an Olympus Analyzer, which is a large automated spectrometer that uses re-agents to detect the presence of drugs, to initially test Respondent's sample. Tr. at 47. The instrument is calibrated on each day of use and a series of controls are run with each batch of specimens to verify that calibration. Tr. at 47. All quality control data was within the acceptable limits before the laboratory accepted the results of Respondent's initial drug screening. Tr. at 48. The initial drug screening of Respondent's urine detected the presence of marijuana metabolite (THC) above the cutoff level. Tr. at 48-49; IO Ex. 2;

18. A confirmatory test verified the presence of marijuana metabolite (THC), above the cutoff level of 15 ng/ml. Tr. at 47-48. The actual results were 55 ng/ml. Tr. at 49; IO Ex. 2;

19. Quest Diagnostics performed the confirmatory test in accordance with 49 CFR Part 40 utilizing gas chromatography mass spectrometry. Tr. at 48-49;

20. Only marijuana or other prohibited substances containing THC could cause these results. Tr. at 51-52;

21. Dr. Louis Jambor, laboratory director for Quest Diagnostics, testified in the proceeding as the person in charge of quality assurance. Tr. at 35-36. Dr. Jambor testified that Respondent's sample was tested in accordance with all federal regulations and that both the initial and confirmatory tests were positive for marijuana metabolite (THC). Tr. at 42, 47-48;

22. The testimony of Dr. Jambor is found to be credible. Tr. at 36-46;

23. Quest Diagnostics reported the positive drug test to Dr. Randy Barnett, a medical review officer who contacted Respondent on November 14, 2005. IO Ex. 5. Respondent denied using marijuana, and could not offer a medical or otherwise legitimate reason for the positive drug test results. See Entire Record;

24. Dr. Barnett relied on his handwritten notes on the MRO worksheet to refresh his memory in affirming that he called Respondent about the positive test results. Tr. at 64;

25. The Testimony of Dr. Randy Barnett is found to be credible. Tr. at 62-70;

26. Dr. Benjamin Gerson owned the MRO laboratory employing Dr. Randy Barnett at the time in question. Tr. at 88. According to the MRO laboratory's policy in effect at that time, Dr. Gerson's name was automatically stamped on every MRO Final Report in the field for MRO by virtue of him owning the laboratory. Tr. at 89-96. This was a formality and the actual MRO for any given sample was displayed on the MRO Worksheet. Id.;

27. The testimony of Dr. Gerson is found to be credible. Tr. at 88-93;

28. The testimony of Melissa Liberatore – Dr. Barnett's nurse assistant – is found credible. Tr. at 93-96;

29. The Coast Guard's error in pleading with respect to the identity of the MRO was a clerical error. IO Ex. 10 at 2;

30. There were no "fatal flaws" present during the collection or testing procedure for Respondent's specimen. See Entire Record, See 49 CFR 40.83(c)-(d); 40.199(a)-(b);

31. There is no convincing record evidence indicating that Respondent ever objected to the test or felt forced to comply with the urinalysis at issue in this case. See Entire Record;

32. Respondent's employer at the time of this incident was Crowley Maritime. Tr. at 17;

33. Crowley Maritime had an employee policy which, among other things, required drug tests in a variety of situations and proscribed that an employee would be discharged if found to be in violation of the policy. IO Ex. 8;

34. Respondent signed an agreement/waiver of rights concerning the company policy at issue in this case. IO Ex. 7;

35. An Alaska employee rights tribunal ("Tribunal") declared Crowley Maritime's company policy invalid. Resp't Ex. E;

36. The Tribunal further declared that Respondent could not be terminated from his employment for what it defined as misconduct because of the policy's inherent invalidity. Resp't Ex. E.

IV. DISCUSSION

This Suspension and Revocation proceeding is remedial in nature and 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 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 5.19. Here, the Coast Guard charged Respondent under 46 U.S.C. 7704(a) and 46 CFR 5.35 alleging his use of dangerous drugs. The Coast Guard also charged Respondent under 46 U.S.C. 7703(1)(B) and 46 CFR 5.27 alleging Misconduct for violation of a company policy prohibiting drug use. The Coast Guard seeks revocation of Respondent's merchant mariner's document.

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 Administrative Law Judge. See Appeal Decision 2640 (PASSARO) (2003). Also, the Judge 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 record as long as there is sufficient evidence to reasonably justify the findings reached. Appeal Decisions 2640 (PASSARO) (2003); 2639 (HAUCK) (2003).

A. Burden and Standard of Proof

1. Generally

The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 CFR 20.701-702. See also Appeal Decision 2468 (LEWIN) (1988); 2477 (TOMBARI) (1988); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994). To prevail under this standard, the Coast Guard must establish that it is more likely than not that Respondent committed the violations alleged in the Complaint. See 33 CFR 20.701-702(a). See also 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). This proceeding was conducted under the provisions in 33 CFR Parts 20, 46 CFR Part 5, and the Administrative Procedure Act, 5 U.S.C. 551 et. seq.

2. Drug Case

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 Decisions 2662 (VOORHEIS) (2007), 2657 (BARNETT) (2006), and 2592 (MASON) (1997). 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 the three required elements set forth below. See Appeal Decision 2662 (VOORHEIS) (2007).

If the Coast Guard makes its prima facie case, it is at this point that a presumption arises that Respondent used dangerous drugs and the burden of going forward to produce persuasive

evidence in rebuttal then shifts to Respondent. See 46 CFR 16.201(b), Appeal Decisions 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997), 2589 (MEYER) (1997), 2584 (SHAKESPEARE) (1997), and 2379 (DRUM) (1985). If Respondent does not produce 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 33 CFR 20.703, Appeal Decisions 2662 (VOORHEIS) (2007), 2603 (HACKSTAFF) (1998).

As discussed below, the Coast Guard initially met its burden and established all required elements of a prima facie case. A presumption therefore arose that Respondent used dangerous drugs and the burden of going forward shifted to Respondent. After careful consideration of the testimony at the hearing and of the entire record, I find that Respondent failed to rebut this presumption. The Coast Guard therefore established that it is more likely than not that Respondent used or was addicted to the use of dangerous drugs. This charge is therefore found PROVED.

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

1. Coast Guard's Prima Facie Case

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 CFR Part 40. Appeal Decisions 2662 (VOORHEIS) (2007), 2603 (HACKSTAFF) (1998), 2598 (CATTON) (1998), 2592 (MASON) (1997), 2589 (MEYER) (1997), 2584 (SHAKESPEARE) (1997), and 2583 (WRIGHT) (1997). These elements will be discussed in turn.

a. Respondent Was Tested

With respect to the first element, the Coast Guard demonstrated that Respondent was the one that took the drug test on the day in question. Proof of this 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." See Appeal Decisions 2662 (VOORHIES) (2007), 2657 (BARNETT) (2006), and 2603 (HACKSTAFF) (1998).

In the instant case, Respondent does not dispute this fact. At the hearing, Respondent stipulated that on November, 9, 2005, R&R Testing Services ("Collection Facility") collected his urine as part of a periodic drug test. Tr. at 11-13. Furthermore, the Coast Guard produced the Forensic Drug Testing Custody and Control Form ("CCF") for which Respondent's signature and social security number appeared. See IO Ex. 1, 3, & 4. Respondent stipulated that he signed this form, which indicates that it was Respondent that appeared at the Collection Facility on November 9, 2005, for a urinalysis test. See Tr. at 11-13.

b. Respondent Urine Specimen Tested Positive for Marijuana Metabolites

The Coast Guard showed that Respondent's sample screened positive for marijuana metabolites. To prove this fact, the Coast Guard called Dr. Louis Jambor. Dr. Jambor was the director of Quest Diagnostics, which is the testing laboratory that tested Respondent's sample. See Tr. at 35-36; IO Ex. 4. Dr. Jambor testified that Respondent's sample indeed tested positive for marijuana in both an initial test and a confirmatory test. Tr. at 47-50.

Dr. Jambor indicated that the initial test was processed with an Olympus Analyzer, which he described as a large automated spectrometer that uses re-agents to detect the presence of

drugs. Tr. at 47. He indicated that the instrument is calibrated on each day of use and that a series of controls are run with each batch of specimens to verify that calibration. Id. He further indicated that all quality control data was within the acceptable limits before the laboratory accepted the positive results of this analysis. See Id.

Dr. Jambor then outlined the process for the confirmatory test. He indicated that when Respondent's sample screened positive in the initial test, the Testing Laboratory discarded the original aliquot and then went back to the original specimen to retrieve a new aliquot for the confirmatory test, as is laboratory procedure for any sample that tests positive for drugs. Tr. at 48. He further indicated that laboratory personnel re-verified all the identifying parameters on the sample before pouring a separate aliquot for the confirmation. Id. Dr. Jambor indicated that Respondent's sample was then processed for the confirmatory test with a gas chromatography/mass spectrometry ("GC/MS"), which he described as the best tool science has to offer for this process. See Tr. at 48-49. Dr. Jambor affirmed that the CG/MS revealed that Respondent's sample contained marijuana metabolites at a rate of 55 nanograms per milliliter whereas the cut off is 15 nanograms per milliliter. Tr. at 49. He further indicated that only marijuana or other prohibited substances containing THC could cause the positive results at issue in this case. Tr. at 51-52. Dr. Jambor testified as to other scientific information leading to his conclusion that Respondent's sample tested positive for marijuana metabolites. Tr. at 37-54. Dr. Randy Barnett was the MRO and verified the positive results.[4] See Tr. at 61-64. Respondent was unable to offer a medical explanation for the presence of marijuana metabolite in the sample. See Tr. at 81. This element of the Coast Guard's prima facie case is found proved.

[4] Note that in the Coast Guard's pleadings it listed Dr. Benjamin Gerson as the MRO. As discussed infra IV. B. 2. iii., this is a mistake resulting from Dr. Gerson's name being stamped on every MRO form during a certain period by virtue of him owning the laboratory. Tr. at 94. Despite this non-fatal flaw, I find that it was Dr. Barnett, not Dr. Gerson that was the MRO on this case.

c. In Accordance With 49 CFR Part 40

Finally, the Coast Guard showed that Respondent's urinalysis was processed in accordance with 49 CFR Part 40.[5] Curiously, the Coast Guard indicated during opening statements at the hearing that the urinalysis test in question was not a "DOT" or "Part 40" test. Tr. at 15. At that point, the undersigned posed the question to the Coast Guard of whether it was "familiar with the effect of not using a DOT test," and the Coast Guard replied that it would "lose the presumption." Tr. at 15. The Coast Guard's statements are apparently rooted in the fact that Respondent's urinalysis was administered and processed with non-federal forms and that a split sample was not taken at the collection facility.

While the Coast Guard stopped short of stipulating that it would lose the presumption or that the test was not done in "accordance with" Part 40, it is worth noting that a stipulation to this effect would have no force. These are clearly questions of law and parties' stipulations thereto would be inoperative and not binding since a court cannot be controlled by agreement of counsel on a subsidiary question of law. Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 289-90 (1917) (citations omitted); see also Appeal Decision 2268 (HANKINS) (1981). The Coast Guard's representations as to the state of the law with respect to these issues are rejected on their face and given no weight.

After careful consideration of past Commandant Decisions, it is clear that the Coast Guard's restatement of the law related to this element is misguided anyway. The relevant question here is whether the urinalysis test was actually conducted in substantial accordance with 49 CFR Part 40, and the question of whether the test is loosely referred to as a Part 40/DOT test,

[5] For the purpose of the Coast Guard establishing a prima facie case, the Coast Guard sufficiently established that the test was in all material respects in compliance with 49 CFR Part 40. Respondent calls this fact into question in his rebuttal, and this will be discussed later in this Decision and Order.

done with federal or non-federal forms, or whether a split sample was taken is not dispositive. See Appeal Decision 2662 (VOORHEIS) (2007).

Despite the Coast Guard's representation then, the test will be analyzed, compared to, and contrasted with what is required under 49 CFR Part 40 to determine whether or not it was done in substantial accordance therewith. The question of whether there will be a presumption of drug use will flow from this analysis.

With respect to this element, the Coast Guard offered proof of the collection process, proof of the chain of custody, proof of the qualifications of the laboratory and individuals involved, and proof of how and with what equipment Respondent's sample was tested. Coast Guard witness Ms. Rhonda Wade testified that she collected Respondent's specimen in accordance with 49 CFR Part 40. See Tr. at 22. She did not have a specific recollection of Respondent's sample, but indicated that it is her uniform business practice to conduct all collections in accordance with 49 CFR Part 40. See Tr. at 25-26. Ms. Wade noted that this was not a federal drug test in that the forms were different and that a split specimen was not collected. See Tr. at 24. With respect to the forms, she said the only differences between the form used in this test and those used in a federal test is that the donors name cannot appear on the federal form, whereas on the form used in this collection, there was a space for Respondent's name. See Tr. at 24. She indicated that this difference related to privacy and had nothing to do with the chain of custody. See Tr. at 25.

Ms. Wade's testimony was that she always collects specimens in accordance with 49 CFR Part 40 was sufficient and there need not be a specific recollection of Respondent or Respondent's actual sample. In any case, Respondent stipulated that the collection was done properly. See Tr. at 20-22.

The Coast Guard next called Dr. Louis Jambor, the laboratory director at Quest Diagnostics. Tr. at 35-36. Dr. Jambor is also in charge of quality assurance for Quest Diagnostics. Tr. at 35-36. During his testimony, Dr. Jambor indicated that this laboratory is a duly certified DOT testing laboratory; that it is a secure facility; that specimens and records are kept secure at all times; that the chain of custody is always maintained; that a specimen would be rejected if there were any signs of tampering or compromise; and that the laboratory processes every sample in accordance with the requirements of 49 CFR Part 40. Tr. at 37-52. Dr. Jambor elaborated on the specifics of how the laboratory tests specimens and that Respondent's test was not treated differently. See Tr. at 37-52. It was clear from Dr. Jambor's testimony that the laboratory tested Respondent's sample properly and in accordance with 49 CFR Part 40. See Tr. at 37-52.

In presenting its case, the Coast Guard pointed out that there were several possible distinctions between how this test was conducted and what is required under 49 CFR Part 40. Specifically, the Coast Guard indicated that Respondent's sample was not split into two aliquots at the collections facility, that DOT forms were not used, and that this test did not require the MRO to be in the presence of the form when verifying the test results. Instead, the Coast Guard acknowledged that the collection facility simply sent the single specimen to the testing laboratory for processing and that the entire process was done with non-federal forms. The record is unclear as to whether the MRO had the CCF when verifying the results – a fact that is to be held against the Coast Guard.

It is well established that minor technical violations of 49 CFR Part 40 that do not impugn the chain of custody or the specimen's integrity, do not invalidate the test. Appeal Decisions 2668 (MERRILL) (2007); 2633 (MERRILL) (2002); and 2603 (HACKSTAFF)

(1998). While these requirements are important, I fail to see how these discrepancies would impugn the chain of custody or the specimen's integrity and nothing was presented or apparent from the record to indicate otherwise. On the contrary, Ms. Wade and Dr. Jambor testified as to the rigorous safeguards that were observed at the collection facility and the testing laboratory to protect these interests for Respondent's sample. Tr. at 22-26 & TR. AT 40-44. The fact remains that the fundamentals of the test were done in accordance with 49 CFR Part 40 and the record is clear that the specimen's integrity and the chain of custody were preserved.

I therefore find that the Coast Guard has established all three required elements of its prima facie case and that the corresponding presumption is invoked that Respondent used dangerous drugs. The burden of going forward now shifts to Respondent to rebut this presumption.

2. Respondent's Case

i. Generally

Respondent may rebut this presumption 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. Commandant v. Clifton, NTSB Order No. EM-180 (1995). Respondent generally denied ever using marijuana and stressed that he has successfully worked in the maritime industry for twenty (20) years and has had countless negative random drug screenings during that period. Tr. at 16. Respondent also presented evidence that he underwent a private drug screening process within a few days of learning of the positive test result in this case and that the private drug screening was negative for Marijuana. Tr. at 102. These were not, however, his sole bases for his defense. Respondent instead focused

his defense and arguments on objecting to the Coast Guard's delay in bringing this action; alleging a discrepancy regarding the identity of the MRO; and on calling into question an element of the Coast Guard's prima facie case. Specifically, Respondent called into question whether the test conformed to 49 CFR Part 40.

ii. Old Test

Respondent first asserted what could be considered an affirmative defense indicating that the test in question is several years old. Tr. at 17. Pursuant to 33 CFR 20.702, Respondent "bears the burden of proof" in asserting his affirmative defense. Appeal Decision 2640 (PASSARO) (2003). In this case, Respondent testified that his employer immediately terminated his employment upon receiving the positive test results in 2005, but asserted that the Coast Guard "just decided to take action" on this drug screening that was nearly three years later. Tr. at 17.

A careful review of 49 CFR Part 40 reveals that it does not impose an expiration period for positive test results. Furthermore, there is no statute of limitation for the Coast Guard to initiate a suspension and revocation proceeding based on use or addiction to the use of dangerous drugs. See 46 U.S.C. 7704(c); 46 CFR 5.55(a)(1). Instead, Coast Guard regulations expressly authorize that service can be effectuated at "any time" in cases such as this. See Id.

That being said, the fact that the Coast Guard waited at least two and a half years is at least irregular. This could raise the doctrine of laches, which may be applied in these proceedings when there has been an inexcusable delay in commencing an action resulting in prejudice to Respondent. Appeal Decisions 2566 (WILLIAMS) (1995), 2385 (CAIN) (1985). Inexcusable delay may be found where the record shows intentional misconduct or oppressive design by the government. Id. While the reason for the delay remains unclear, Respondent

offered little more than a general objection thereto and did not produce anything to indicate intentional misconduct or oppressive design by the government. See Entire Record. Furthermore, a careful review of the entire record reveals that Respondent was not in any way prejudiced by the delay. Id. Respondent had what appeared to be a fresh recollection of the collection and testing procedure and was able to produce numerous records and other evidence in support of his position. Id.

Respondent simply did not meet his burden of proof with respect to his affirmative defense relating to the Coast Guard's delay in bringing this proceeding. This defense is therefore rejected.

iii. MRO Discrepancy

Respondent next asserted that there was "[i]nconsistent information from the testing lab" involving the identity of the MRO. Tr. at 16. Specifically, Respondent indicated that Dr. Benjamin Gerson was the MRO that notified him of the positive test results, not Dr. Randy Barnett as the Coast Guard alleged at the hearing. Tr. at 17-19. Respondent argues that because "this error occurred at the testing laboratory, it does call into question the integrity of the sample results." Tr. at 16.

Indeed, the MRO Final Worksheet displays the name Dr. Benjamin Gerson as the MRO whereas the MRO Worksheet displays Dr. Randy Barnett as the MRO. IO Ex. 5; IO Ex. 6. To further complicate and as previously discussed supra note 4, the Coast Guard listed Dr. Gerson as the MRO in its Amended Complaint. IO Ex. 10 at 2. However, there was credible testimony at the hearing explaining this perceived anomaly.

Dr. Gerson owned the MRO laboratory and explained his laboratory's policy for filling out these forms. Tr. at 88-96. He indicated that it was laboratory policy for his name to be

automatically stamped on every MRO Final Report as MRO regardless of who actually performed the function of MRO because he owned the laboratory. Tr. at 89-91.

To further explore this issue, Ms. Melissa Liberatore was called to testify. Tr. at 92. Ms. Liberatore was Dr. Barnett's nurse assistant and was familiar with the way in which the MRO laboratory filled out its forms. Tr. at 92. Ms. Liberatore's testimony was that Dr. Gerson's name appearing on every MRO Final Report was merely a formality and that the actual person who performed the duty of MRO appears on the MRO Worksheet. Tr. at 95-97. That person is Dr. Randy Barnett. IO Ex. 5.

When questioned at the hearing, Dr. Barnett testified that he did not remember calling Respondent to inform him of the positive test results, but nevertheless affirmed that he had done so. Tr. at 64 -66. Dr. Barnett relied on hand written notes in his handwriting indicating this on the MRO Worksheet. Tr. at 64; see IO Ex. 5. He indicated that he indeed called Respondent with the positive test results and acted as MRO in this case. Tr. at 64.

In support of Respondent's position that Dr. Gerson was the MRO (not Dr. Barnett), Respondent indicated that the person who called him about the positive test results asked him when was the last time he "smoked dope." Tr. at 66. Respondent cross examined Dr. Barnett at the hearing as to whether he recalls this conversation and whether he uses such terminology when contacting donors. Tr. at 66. Dr. Barnett indicated that he would not have used such terminology, but again indicated that he did not remember the conversation. Tr. at 66. Instead, Dr. Barnett relied on the hand written notes in affirming that he was the MRO and the person that contacted Respondent about the positive test results. Tr. at 64; see IO Ex. 5.

When questioned at the hearing regarding the identity of the MRO, Dr. Gerson affirmed that he was not the MRO who contacted Respondent. Tr. at 88-92. Dr. Gerson indicated that he

was not performing MRO duties at the time Respondent was contacted and that Respondent's name was not familiar to him. Tr. at 89. Dr. Gerson further testified that Dr. Barnett and others were performing this functionality at the time Respondent was contacted. Tr. at 89.

I find the testimony of Dr. Barnett, Dr. Gerson, and Ms. Liberatore credible that Dr. Barnett was indeed the MRO for Respondent's sample and that Dr. Gerson's name appearing on the MRO Final Report was just a formality. This finding is further supported by Dr. Barnett's handwritten notes to this effect appearing on the MRO Worksheet. IO Ex. 5.

Despite this perceived anomaly, I do not find that the laboratory produced inconsistent information which would call into question the integrity of the positive test results. Furthermore, I find that the Coast Guard's error in pleading (i.e. erroneously listing Dr. Gerson as the MRO instead of Dr. Barnett) was nothing more than a clerical error. I therefore do not believe that there was a discrepancy with respect to this factual assertion and find that it does not weigh against the validity of the test.

iv. Deviations from 49 CFR Part 40

Respondent next attacked the third element of the Coast Guard's prima facie case and argued that specific aspects of the urinalysis were not done in accordance with 49 CFR Part 40. Specifically, Respondent asserted that there was only a single specimen taken at the collection facility and that the entire test was not done on DOT approved forms. Tr. at 14. The Coast Guard and Respondent jointly stipulated to both of these facts. Tr. at 14.

As discussed below, there is no doubt that both of these happenings are in contravention of what is required under 49 CFR Part 40. See infra. However, it is well settled Coast Guard law that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decisions

2668 (MERRILL) (2007); 2633 (MERRILL) (2002); 2603 (HACKSTAFF) (1998). While there is no clear precedent for determining how this element is to be shown, the question remains whether these deviations from what is required under 49 CFR Part 40 are minor technical infractions, or whether they are something more and would invalidate the test.

In analyzing these facts, I note that it is highly important that a drug test conform as closely as possible to 49 CFR Part 40. These Regulations indeed require that all DOT drug tests be performed and processed with DOT approved forms. 49 CFR 40.45. Notwithstanding this section, it would seem to make no significant difference to the sample or the chain of custody whether the test was processed on non-DOT forms as long the entire process mimics the requirements of 49 CFR Part 40. Coast Guard witness Ms. Wade testified that the only perceived difference between DOT forms and the forms used in this case have to do with the donor's privacy. Tr. at 24-25. Specifically, the forms in this case displayed Respondent's name, whereas a DOT approved form would display an assigned specimen number to keep the donor's name private. Tr. at 24. Whether the form is called a federal/DOT form or whether the donor's privacy is protected is immaterial for the purpose of this analysis. Thus, there is no indication that these discrepancies would tend to breach the chain of custody or violate the specimen's integrity. Respondent's argument challenging the type of forms used is rejected.

Respondent is also correct in that 49 CFR Part 40 requires that a split specimen be taken at the collection facility and that this was not done for his collection. 49 CFR 40.71(a). However, I fail to see how this discrepancy would impugn the specimen's integrity or breach the chain of custody of Respondent's sample. Instead, the purpose of this requirement would seem to be either to verify or contradict a positive sample on the chance that there was a problem. See generally, Baffert v. California Horse Racing Bd, 332 F.3d 613 (Cal.) (2003).

49 CFR Part 40 contemplates this very situation in the section where it discusses "Fatal Flaws." See e.g., 49 CFR 40.83(c)(2), 40.83(h). Pursuant to that section and others like it, a testing laboratory is still required to test a donor's sample even when there is a "fatal flaw" in the original sample (e.g. seal broken or evidence of tampering), so long as a split sample can be redesignated as the original sample and be processed as such. See Id. To put it differently, if there is a major problem with Sample A, then Sample B must still be used and processed as if it were Sample A. Id. There would be no opportunity for split sample testing upon a positive result in that situation, but the positive result of Sample B would nevertheless stand so long as it was properly redesignated as Sample A. See Id.

Another similar scenario would be if the testing laboratory discovers that Sample B is unavailable or would be insufficient for testing in the event that a split sample was requested. In that case, the unusable Sample B would be declared as such and Sample A would be processed and stand alone as the only sample available for testing. 49 CFR 40.83(h). There would be no opportunity for a split sample test in this hypothetical either but the positive result from Sample A would nevertheless stand. Id.

This case is similar to the hypothetical situations outlined above in that there was no split sample available for testing on the chance that something went wrong with the original sample. However, I have already found that the specimen's integrity and chain of custody were intact with respect to Respondent's sample and there was thus no apparent need for a split sample in this case. If on the other hand, there was evidence to show that the specimen's integrity or the chain of custody were compromised, then the results of this test would have to be discarded because there was no split sample available for testing. But since that is not the case here, I do

not see that the Collection Facility's failure to collect a split sample as anything more than a minor technical infraction of 49 CFR Part 40.

Indeed, the Commandant affirmed a past Administrative Law Judge decision in which a mariner was found to have used dangerous drugs based on a single sample drug test. See Appeal Decision 2612 (DEGOUGH) (1999), aff'd, Commandant v. DeGough, NTSB Order No. EM-188 (2000). Furthermore, there have been numerous Commandant Decisions which found other discrepancies to be minor technical infractions of 49 CFR Part 40 when they do not impugn the specimen's integrity or breach the chain of custody. See, e.g., Appeal Decision 2668 (MERRILL) (2007) (finding that the MRO attempting to contact Respondent after seven days, rather than waiting the fourteen-day period required by 49 CFR 40.33(c)(5) is clearly a technical error); but see e.g., Appeal Decision 2662 (VOOREIS) (2007) (affirming the Administrative Law Judge's finding that the first link in the chain of custody was never established because the Coast Guard did not call the specimen collector as a witness and was otherwise unable to establish that the requirements of 49 CFR Part 40 relating to identifying the donor were met).

In the instant case and as already outlined throughout this Decision and Order, the specimen's integrity and the chain of custody for Respondent's specimen were intact during the entire process. The fact that there was no split sample taken at the Collection Facility does not disturb this finding.

Furthermore, Coast Guard witness Dr. Jambor testified that there is always the opportunity to retest a sample because when there is a positive result, the unused remainder of the single samples is stored for at least 13 months. Tr. at 40 & 44. In this case, Respondent has not asked that the remaining sample be retested even though the laboratory still retains the remainder of the sample. See Entire Record. In any event, the retention of the sample cures or at

least mitigates the fact that a single sample was taken in this case as long as the sample and chain of custody were uncompromised.

After a careful review of the record, I find that Respondent was unable to produce and there was no other convincing evidence to indicate that the single sample was tampered with, mixed up with another sample, or was otherwise compromised. See Entire Record. I therefore find that this deviation from the requirements of 49 CFR Part 40, along with any other deviations therefrom, is nothing more than minor technical infractions of the rules. As such, these deviations will not invalidate the test.

3. Fatal Flaws

Respondent did not assert this defense, but any discussion of a urinalysis test containing minor technical infractions surely warrants a discussion of "fatal flaws." The term "fatal flaw" has a specific meaning in the federal drug testing regulations. Appeal Decision 2653 (ZERINGUE) (2005). According to common usage in judicial decisions, the term "fatal flaw" would refer to anything which addresses a flaw or mistake that demonstrates an insufficiency of proof. See Id. In the strict sense, however, and as appropriately used with respect to federal drug testing regulations, a "fatal flaw" is a flaw that can occur during the testing procedure which would require the testing laboratory or MRO to reject the specimen or cancel the test. See Id.; 49 CFR 40.83(c)-(d); 40.199(a)-(b).

Examining the list of fatal flaws and whether this sample should have ever been processed is helpful in determining whether the ultimate test results in this case can be used to support a charge for use or addiction to the use of dangerous drugs. Specifically, if the testing laboratory should have rejected the specimen because of a "fatal flaw," but did not (or if the MRO should have canceled the test, but did not), then a strong shadow of doubt would be cast

over the positive test results at issue in this case. This is a shadow of doubt that would perhaps be insurmountable, unless and as discussed previously in this Decision and Order, there was a split sample available to be redesignated as the original sample. See e.g., 49 CFR 40.83(h). If on the other hand, there were no "fatal flaws," then the analysis as to whether the test results could support a finding of use of dangerous drugs would hearken back to whether any deviations from what is required under 49 CFR Part 40 violated the specimen's integrity or breached the chain of custody.

The Regulations specify that the testing laboratory must reject the specimen or the MRO must cancel the test if any of the following conditions occur:

- The specimen ID numbers on the specimen bottle and the CCF do not match;
- The specimen bottle seal is broken or shows evidence of tampering, unless a split specimen can be redesignated (see paragraph (h) of this section);
- The collector's printed name and signature are omitted from the CCF (emphasis in original);
- There is an insufficient amount of urine in the primary bottle for analysis, unless the specimens can be redesignated (see paragraph (h) of this section). 49 CFR 40.83(c)-(d).

- There is no printed collector's name and no collector's signature (emphasis in original);
- The specimen ID numbers on the specimen bottle and the CCF do not match;

* * * * *

- The specimen bottle seal is broken or shows evidence of tampering (and a split specimen cannot be redesignated, see section 40.83(g)); and
- Because of leakage or other causes, there is an insufficient amount of urine in the primary specimen bottle for analysis and the specimens cannot be redesignated (see Section 40.83(g)). 49 CFR 40.199(a)-(b).

A careful review of the entire record reveals and as previously outlined throughout this Decision and Order, none of the above-mentioned conditions occurred here. Thus, there is nothing in this list that should have triggered the Testing Laboratory or the MRO to have rejected this sample or canceled the test. Instead, any deviations from the requirements of 49 CFR Part

40 amounted to nothing more than minor technical infractions of the rules because they did not impugn the specimen's integrity or breach the chain of custody.

4. Voluntariness

The Coast Guard asserted that this test was ordered in connection with a periodic employment drug test. Tr. at 11. However, an ambiguity manifested itself at the hearing as to whether this fact was true and as to whether the test was properly ordered under 46 CFR Part 16. Tr. at 30. Respondent offered evidence that the employee policy which mandated the test was invalid as determined by an Alaska employee rights tribunal. Resp't Ex. E. This raises the question of usability of a drug test mandated by an invalid company policy and/or one in which came to fruition through a method not contemplated by 46 CFR Part 16 (i.e. random, post casualty, etc.). Respondent did not specifically raise this issue, but I indicated that I would examine whether, and to what extent, this issue would affect the usability of this test in a suspension and revocation proceeding. Tr. at 30.

The Coast Guard provided a post hearing brief wherein it asserted that the answer to this question would turn on whether the test was voluntary. The Coast Guard essentially argued in its brief that if the test is voluntary, then it can be used and if not, then probably not. I agree. See Appeal Decisions 2668 (MERRILL) (2007); 2633 (MERRILL) (2002); 2545 (JARDIN) (1992).

In Jardin and Merrill, the Commandant held that the test was voluntary despite the employee's subjective believe that his employment would be terminated unless he submitted to the test because the employee never objected to the test. See Appeal Decisions 2668 (MERRILL) (2007); 2633 (MERRILL) (2002); 2545 (JARDIN) (1992). In these cases, the Commandant would not invalidate the tests because they were deemed voluntary. Id.

In the instant case, Respondent signed an agreement/waiver of rights concerning the company policy requiring the employee to submit to the drug test. IO Ex. 7. Furthermore, I am not aware of any evidence or assertions indicating that Respondent ever objected to the test or felt forced to comply. See Entire Record.

I therefore find that the test in question was voluntary and is not disqualified by virtue of possibly not being the type of test contemplated by 46 CFR Part 16.

Respondent has not successfully rebutted any of the three required elements of the Coast Guard's prima facie case or the corresponding presumption that Respondent used dangerous drugs.

After careful consideration of the testimony at the hearing and of the entire record, I find this charge PROVED.

C. Misconduct

The Coast Guard charged Respondent with Misconduct under 46 CFR 5.29 and 46 USC 7703(1)(B) alleging that he failed a drug test in violation of his employer's company policy which forbids employees from using drugs.[6] Misconduct is defined as a "behavior which violates some formal, duly established rule. Such rules are found in . . . statutes, regulations, the common law, the general maritime law, . . . and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 CFR 5.27. Furthermore, a charge for Misconduct cannot be found proved unless the Coast Guard establishes that Respondent was acting under the authority of his Coast Guard license during the alleged Misconduct. 46 U.S.C. 7703(1).

This is distinguished from the previous charge of use or addiction to the use of dangerous drugs, which is a holder offense. With that charge, "status aboard the vessel does not matter as it

is his status as the holder of a merchant mariner's document" that establishes jurisdiction. Appeal Decision 2668 (MERRILL) (2007). With this charge, the Coast Guard must go further and show that Respondent was not only a holder, but also acting under the authority of his Coast Guard credentials.

In the instant case, the Coast Guard alleges that Respondent violated his employer's company policy which forbids employees from using dangerous drugs. There was evidence indicating that Crowley employed Respondent at the time in question; that it had a company policy prohibiting drug use; and that Respondent violated that policy by testing positive for drug use in 2005. Even assuming that evidence to be true, however, the company policy in this case is questionable at best. Respondent presented evidence at the hearing that an Alaska employee rights tribunal declared the company policy to be invalid. Resp't Ex. 5. The tribunal further decreed that Respondent could not be fired from his job for "misconduct" as defined in the company policy simply because of the policy's inherent invalidity. Resp't Ex. 5. Despite the general rule that a company policy can be a formal duly established rule for the purpose of a Misconduct charge under 46 CFR 5.29, there is a dark shadow of doubt cast on the one in this case. See Appeal Decision 2675 (MILLS) (2008). Moreover, the Coast Guard essentially offered no evidence with respect to the Misconduct charge as a whole and certainly offered nothing to shore up the validity of this company policy. As such, I find that the company policy in question is not a formal duly established rule for the purpose of a Misconduct charge under 46 CFR 5.29.

Given my finding that the Coast Guard failed to establish that Respondent breached a formal, duly established rule, I must find that the charge of Misconduct is NOT PROVED.

[6] See supra n.2 for description of the Coast Guard's error in pleading and explanation of the Amended Complaint.

Therefore, there is no need to analyze or make a finding as to whether Respondent was ever acting under the authority of his Coast Guard issued document.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The burden of proof in this case is on the Coast Guard.
2. Respondent holds a Coast Guard issued merchant mariner's document that expires on June 6, 2008.
3. On November 9, 2005, Respondent reported to R&R Testing Services for a drug screening.
4. R&R Testing Services collected Respondent's urine specimen in substantial accordance with the requirements of 49 CFR Part 40.
5. R&R Testing Services forwarded Respondent's specimen to Quest Diagnostics for processing.
6. Quest Diagnostics analyzed Respondent's specimen testing for the presence of drugs and determined that Respondent's specimen tested positive for marijuana metabolites.
7. Quest Diagnostics analyzed Respondent's specimen in substantial accordance with the requirements of 49 CFR Part 40.
8. The specimen's integrity and chain of custody of Respondent's specimen were preserved during the collection and testing process.
9. By the submission of reliable and probative evidence, the Coast Guard met it burden of proof in this case. The burden of going forward then shifts to Respondent to rebut the Coast Guard's prima facie case.
10. Respondent did not produce any documentary evidence to rebut the Coast Guard's prima facie showing.

11. The burden of proof for establishing an affirmative defense is on Respondent.
12. Respondent did not put forth any testimony that might explain why his urine specimen tested positive for marijuana metabolite (THC).
13. 49 CFR Part 40 does not contain an expiration period for positive drug test results.
14. Coast Guard statutes and regulations expressly authorize this action to be brought several years after Respondent's sample tested positive for marijuana.
15. Respondent failed to produce convincing evidence of intentional misconduct or oppressive design by the Coast Guard in delaying the initiating of this proceeding.
16. Respondent failed to produce convincing evidence that he was in any way prejudiced by the Coast Guard's delay in initiating this proceeding.
17. There was no actual discrepancy regarding the identity of the MRO in this case.
18. Respondent failed to meet his burden to establish an affirmative defense.
19. Respondent failed to rebut the Coast Guard's showing that his urinalysis was processed in substantial accordance with 49 CFR Part 40.
20. Respondent failed to rebut the Coast Guard's prima facie case.
21. The charge of use of or addiction to the use of dangerous drugs is hereby found PROVED.
22. Respondent's merchant mariner's document be, and it hereby is, REVOKED.
23. Crowley Maritime's company policy was not shown to be a formal duly established rule and therefore cannot support a charge for Misconduct.
24. The charge of Misconduct alleging Respondent violated Crowley Maritime's company policy prohibiting drug use is therefore found NOT PROVED.

VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 CFR 5.569(a); Appeal Decision 2622 (NITKIN) (2001). Title 46 of the Code of Federal Regulations, Part 5, Section 569, provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of the Table is to provide guidance to the Judge and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. Once the Coast Guard proves a mariner used or was addicted to the use of dangerous drugs, his credentials must be revoked unless cure is proven. See 46 U.S.C. 7704(c); 46 CFR 5.569; Appeal Decision 2535 (SWEENEY) (1992), but see, Appeal Decision 2678 (SAVOIE) (2008) (holding that despite a Coast Guard regulation requiring revocation for conviction of possession of drugs, a Judge can impose a reduced sanction because of a 2004 amendment to the underlying statutory authority). Absent evidence of cure, an Administrative Law Judge has no discretion and must revoke Respondent's license or document. Appeal Decision 2634 (BARRETTA) (2002).

In contrast, where Respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program," an Administrative Law Judge may stay the revocation and continue the Suspension and Revocation hearing. Appeal Decision 2657 (BARNETT) (2006); See also Review Decision 18 (CLAY) (1992).

The record simply does not indicate that Respondent has demonstrated any involvement in the cure process or enrollment in a rehabilitation program. This makes sense, however, given that Respondent has maintained his innocence throughout this proceeding. It is worth noting that Respondent's drug use proved in this case happened several years ago and there have been no subsequent reports or allegations of drug use since then. On the contrary, Respondent offered

evidence of a subsequent negative drug test and appears by all accounts to be a highly functioning member of the maritime community. Tr. at 102. While these facts are well taken in Respondent's favor, the Administrative Law Judge unfortunately has no discretion in cases brought under 46 U.S.C. 7704 (c) to grant any leniency to Respondent.

The Commandant took up this exact issue in Appeal Decision 2638 (PASQUARELLA) (2003). In that case, Respondent Pasquarella moved for the return of his document six (6) months prior to completing the cure process. I granted that request and ordered the return of Respondent Pasquarella's merchant mariner papers after he offered persuasive evidence that he was not a danger to life and property at sea.

The Coast Guard filed an appeal and the Commandant reversed my ruling. Because of this case and others, it is clear that the judge cannot modify the Sweeney cure requirements even if the facts would warrant such action.

I therefore find that the only available sanction is REVOCATION.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED that Respondent's Coast Guard issued credentials are **REVOKED**.

IT IS HEREBY FURTHER ORDERED that Respondent is to immediately deposit his Coast Guard issued credentials to the Coast Guard if he has not done so already.

PLEASE TAKE NOTE that if Respondent wishes to secure the return of his credentials, he must petition the Coast Guard for Administrative Clemency in accordance with the procedures set forth in 46 CFR Part 5, Subpart L.

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

/s/ Parlen L. McKenna
Honorable Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

Done and Dated on this 2nd day of December 2008,
Alameda, CA

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS

I. Coast Guard's Exhibits. IO Ex. 1 through IO Ex. 11

1. Copy 3 – Collector Copy of Custody and Control Form
2. Litigation Package
3. Copy 1 – Laboratory Copy of Custody and Control Form
4. Quest Labs Report
5. Medical Review Officer Worksheet
6. Medical Review Officer Final Report
7. Crowley Maritime Services Drug Testing Acknowledgment Form
8. Crowley Maritime Services Drug and Alcohol Procedure
9. Department of Health List of Laboratories Meeting Minimum Federal Standards
10. Amended Complaint, With Stricken Charge
11. Signed Amended Answer

II. Respondent's Exhibits. Resp't Ex. A through Resp't Ex. E.

A. On-site Test Referral, Consent and Acknowledgement Form
B. Non-D.O.T. Chain of Custody Form Dated 5/19/2006
C. Non-D.O.T. Chain of Custody Form Dated 12/19/2006
D. Inland Union of the Pacific Letter Dated 11/22/2005
E. Alaska Department of Labor Appeal Tribunal Decision

III. Coast Guard's Witnesses

1. Rhonda Wade, Specimen Collector
2. Louis Jambor, M.D., Laboratory Director of Quest Diagnostics
3. Randy Barnett, M.D., Medical Review Officer

IV. Respondent's Witnesses

1. Respondent, Mr. Rockford G. Daire

V. Mutual Witnesses

1. Benjamin Gerson, M.D., Owner of MRO Laboratory
2. Melissa Liberatore, Nurse Assistant to Dr. Randy Barnett