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

UNITED STATES COAST GUARD
Complainant

vs.

RONALD ARTHUR LAWRENCE

Respondent

Docket Number 2009-0050
Enforcement Activity No. 3415053

DECISION AND ORDER

Issued: December 14, 2009

Hon. Parlen L McKenna

Appearances:

CWO Cynthia L. Reavis
Lt. Kristine Neely
Sector San Francisco
For the Coast Guard

KEN MOYAL, Esq.
For the Respondent

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PRELIMINARY STATEMENT

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

On February 10, 2009, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7704(c), alleging one count of Use of, or Addiction to the Use of Dangerous Drugs. Specifically, the Coast Guard alleged that: 1) Respondent took a drug test on December 23, 2008; 2) the urine specimen was collected by Ruth Illescas of Contra Costa Industrial Medical Clinic (CCIMC); 3) Respondent signed a Federal Drug Testing Custody and Control Form; 4) the urine specimen was analyzed by Medtox Laboratories, Inc. (Medtox) using procedures approved by the Department of Transportation; and 5) that the specimen subsequently tested positive for amphetamines, as determined by the Medical Review Officer (MRO), Dr. David Wren, Jr..[1] See CG Ex. 2.[2] On March 17, 2009, Respondent filed an Answer by which he admitted all jurisdictional allegations and denied the Complaint's factual allegations. See CG Ex. 3.

On April 8, 2009, the Chief Administrative Law Judge referred this case to the undersigned for hearing and disposition. The hearing in this matter was held on July 9, 2009 and

[1] Respondent's specimen came back positive for methamphetamines, not amphetamines. The Coast Guard's non-attorney representatives must pay closer attention to detail. This could have been a material error requiring dismissal. Here, however, there was no prejudice to Respondent and he had actual notice of the charge, was able to put forward his defense, and fully litigated the issues without objection to this defect. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. 1950); Appeal Decisions 2578 (CALLAHAN) (1996); 2545 (JARDIN) (1992); 2512 (OLIVO) (1990); 2422 (GIBBONS) (1986); and 2416 (MOORE) (1986).

[2] The Coast Guard's Exhibits are designated as CG Ex. [numeric], Respondent's Exhibits as Resp. Ex. [alphabetic], and the transcript of the proceedings as Tr. [xxx].

on September 16, 2009. Non-attorney representatives Chief Warrant Officer Cynthia L. Reavis and Lieutenant Kristine Neeley represented the Coast Guard. Mr. Ken Moyal, Esq. appeared on behalf of Respondent. The Coast Guard offered five (5) witnesses and twenty (20) exhibits were introduced and admitted into evidence. Respondent offered five (5) witnesses and eleven (11) exhibits were introduced, of which ten (10) were admitted into evidence.[3] Both parties' witnesses and exhibits are identified in Attachment A. Neither party submitted post-hearing briefs, proposed findings of fact or conclusions of law. Each party elected to make a closing argument on the record at the end of the second day of the hearing. See Tr. 545-560.

OVERVIEW

This case centers on questions concerning an onsite drug collection that occurred on December 23, 2008. Respondent's urine specimen collected on that date came back positive for "metabolized" methamphetamine.[4] In a drug case based solely upon such a urinalysis test result, a prima facie case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs; 2) respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16.

If the Coast Guard establishes its prima facie case by a preponderance of the evidence, a presumption of dangerous drug use arises, and the burden then shifts to the respondent to produce persuasive evidence to rebut the presumption. If the respondent fails to rebut the presumption, the undersigned may find the charge proved on the basis of the presumption alone. One way a respondent can successfully attack the Coast Guard's case is to establish by a

[3] Respondent's Exhibit G, an email from Ensign Samud Looney to Respondent dated February 12, 2009, was introduced and admitted during the second session but was not provided to the court at the end of that session. The court later asked Respondent's counsel to produce a copy of this exhibit but Respondent's counsel was unable to locate a copy of the email. The Coast Guard was also asked to provide a copy of the February 12, 2009 email but was unable to do so. Respondent's Exhibit G must thus be stricken from the record of these proceedings. The substance of this email, however, was considered in rendering this decision as it was discussed at both sessions. See Tr. 273-275, 438-442.

preponderance of the evidence a problem with one of the three (3) elements of the Coast Guard's prima facie case.

Here there is no question the Coast Guard established the first two elements of its prima facie case. If Respondent successfully rebuts the third leg of the government's prima facie case that the test was conducted in accordance with the regulations, the test must be thrown out and the charge dismissed.

Respondent presented evidence that the collection process and the MRO's verification call did not follow the requirements of the applicable regulations. Even if such errors are fully established, the effect of all of these errors are not enough to invalidate the test results because such errors do not establish a problem either with the integrity of the sample provided or the chain of custody. Such errors, however, do lend some credence to Respondent's allegation that the collector presented him with an unsealed, non-standard specimen collection cup of uncertain origin.

The use of such a collection cup, if established, would fatally impact the test results. Respondent and the collector have incompatibly divergent positions as to the collection cup that was used, and resolving this question settles the case.

This is a very close case and, except for a couple of issues discussed below, it could have come out either way. This is a very serious matter dealing with Respondent's livelihood and professional and personal reputation on the one hand and the need to protect the public from drug users in safety-sensitive positions on the other. After carefully weighing all of the evidence, I find Respondent's allegation that the collector failed to present him with a sealed specimen collection cup is not credible and not supported by the weight of the evidence. Respondent thus failed to rebut the Coast Guard's prima facie case by demonstrating that the test was not

[4] "Metabolized" means that the methamphetamine into the donor specimen collection cup had been processed through Respondent's body.

conducted in accordance with 46 C.F.R. Part 16. Therefore, the charge of use of, or addiction to the use of dangerous drugs, is hereby found **PROVED**.

FINDINGS OF FACT

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

1. At all relevant times, Respondent was the holder of a Merchant Mariners License number 1503397 and Merchant Mariner Document number xxx-xx-***[REDACTED]***. CG Ex. 2.
2. On December 23, 2008, Respondent served as a ferry boat captain for the Delta Ferry Authority (DFA) and was master of the M/V VICTORY II, which makes runs for the DFA between Jersey Island, Bradford Island, and Frank and Webb Tract Islands in a tributary of the San Joaquin River. CG Ex. 16.
3. Respondent has been the primary ferry boat captain for the DFA for approximately ten (10) years. Tr. 216.
4. Since the beginning of his employment with the DFA, Respondent has participated in approximately nine (9) drug tests in connection with such employment and all were negative with the exception of the December 23, 2008 test. Tr. 216-217; 238-239.
5. All of Respondent's approximately nine (9) drug tests, except for the one on December 23, 2008, were conducted at the Contra Costa Industrial Medical Clinic (CCIMC) facilities. Tr. 217.
6. Sometime in mid-November 2008, the DFA changed its collection policy to permit onsite collections for drug testing due in part to the remoteness of the place of employment and

the time (two-four hours) it took to send its employees to the CCIMC facilities for drug testing. Tr. 219-220.

7. Respondent participated in the DFA's meeting at which it was determined that the organization would move to a policy of conducting onsite collections. Tr. 220, 244.
8. Respondent was a key member of DFA's drug testing program, was "instrumental" in establishing the DFA's drug testing procedures, and was very aware of the random drug testing program as implemented in late 2008. Tr. 248-250.
9. In late November, Respondent attended a subsequent DFA meeting at which Coast Guard Ensign Samud Looney and several DFA personnel also attended to discuss the random drug testing protocol and onsite testing. Tr. 244-248.
10. During this late November meeting with Ensign Looney and other DFA personnel, it was discussed that the DFA would have at least one more random drug test for its employees before the end of the year. Tr. 247-248, 408.
11. At this meeting, it was also determined that fifty (50) percent of DFA's crew would be subjected to random drug tests each year, i.e., three (3) tests for its six (6) eligible employees. Tr. 246-248.
12. In the context of this policy change, with approximately thirty (30) days remaining in the calendar year, Respondent stated to his boss that he would be happy to take a random drug test at any time. Tr. 249.
13. Respondent underwent an onsite, random drug test on December 23, 2008, as part of his employment with DFA. CG Ex. 5.
14. On December 23, 2008, Respondent's son, Bobby, was serving as his deckhand on the ferry. Tr. 362.
15. Bobby provided a written statement, dated February 18, 2009, concerning the drug test on December 23, 2008. Resp. Ex. E.

16. The onsite drug test took place at Webb Tract Island. CG Ex. 5.
17. Ms. Ruth Illescas, an employee of CCIMC, was the collector for Respondent's onsite drug test on December 23, 2008. Tr. 88-89; CG Ex. 14.
18. Ms. Illescas began working for CCIMC as a medical assistant in April 2002. Tr. 81-82.
19. Ms. Illescas completed Substance Abuse Program Administrators Association's (SAPAA) online training in drug collection procedures in March 2003. Tr. 84-85.
20. During her employment at CCIMC, Ms. Illescas has conducted several hundred specimen collections for drug testing at CCIMC facilities. Tr. 87-88.
21. Prior to conducting Respondent's onsite collection on December 23, 2008, Ms. Illescas had done one or two other onsite collections. These collections occurred approximately two years before Respondent's onsite collection. Tr. 88-89, 154-156.
22. Ms. Illescas stated that onsite collections follow the same standard procedures as collections done at CCIMC facilities. Tr. 189-190.
23. Ms. Illescas testified that she always follows standard procedures as outlined in the drug testing regulations. Tr. 91-99.
24. Ms. Illescas testified that she had never conducted a drug test collection without checking the identification of the sample's donor. Tr. 93-94.
25. Respondent testified that on October 13, 2008, Ms. Illescas allowed an employee of the DFA to be tested at the CCIMC facility without having proof of identification since Respondent vouched for his identity. Tr. 406-407.
26. Ms. Illescas got lost on her way to the collection site and had to call a representative of the DFA four or five times for directions to the onsite collection site. Tr. 109-110, 163.
27. Ms. Illescas did not realize at the time she arrived at the Jersey Island ferry landing that she would have to travel via the ferry to the Webb Tract Island site to conduct the onsite collection. Tr. 112, 164-165.

28. Ms. Illescas admitted to being scared of going on the ferry on her way to conduct the onsite collection. Tr. 118.

29. Ms. Illescas was surprised by the lack of facilities at the onsite collection site at Webb Tract Island. Tr. 113-114, 166.

30. Ms. Illescas brought a red biohazard box containing four specimen collection kits, a clipboard with a patient registration sheet and the consent form, pens, evidence tape, and bluing agent to use for the onsite collection. Tr. 101-102, 107-108, 136.

31. Respondent and his son claimed not to have seen the red biohazard bucket Ms. Illescas brought to the collection site. Tr. 389-390, 421, 432. This testimony is accepted as credible.

32. Ms. Illescas testified that from the moment she started the collection process near the portable toilet on site, she did not go back to her car until the collection was complete. Tr. 135-136, 139-140. This testimony is rejected as not credible.

33. Respondent and his son testified that Ms. Illescas retrieved certain items from her car during the collection, including plastic baggies to use as gloves for transferring Respondent's specimen to the split sample bottles and the actual collection cup itself. Tr. 373-375, 377, 379, 417-418, 425. The testimony is accepted as credible.

34. It is more likely than not that Ms. Illescas parked her automobile within four (4) to six (6) feet of the portable toilet as Respondent and his son claimed (see Tr. 366-367, 412) and not twenty (20) to thirty (30) feet away from the portable toilet, as Ms. Illescas claimed (see Tr. 118-119, 135-136, 172).

35. Ms. Illescas testified that she chose one of the Medtox specimen collection cups and unsealed it in Respondent's presence for him to provide the urine specimen. Tr. 136-137, 149. This testimony is rejected as not credible. It is more likely than not that the collector walked a few feet to her automobile, grabbed a sealed Medtox collection cup

kit, opened it while at the car and walked the few feet back to Respondent for presentation of the opened Medtox specimen collection cup.

36. Respondent and his son testified that the specimen collection cup presented by the collector to Respondent was not sealed and did not have a plastic covering. Tr. 376, 418-419. This testimony is accepted as credible.

37. Both Respondent and his son testified that the cup used for the collection did not have a temperature strip. Tr. 379-380, 482. This testimony is rejected as not credible.

38. Despite her testimony to the contrary, it is more credible that Ms. Illescas did not instruct Respondent to wash his hands prior to providing the specimen and in any event Respondent did not wash his hands before the collection commenced given the apparent lack of a water source onsite. Tr. 103, 184, 423-424.

39. Ms. Illescas used two sterile Medtox bags from two other Medtox collection kits as gloves to handle the specimen provided by Respondent. Tr. 139, 195.

40. Ms. Illescas stated that when she returned from the onsite collection, all of her supplies were still in the red biohazard box and did not remember leaving certain items onsite. Tr. 146, 182-183.

41. Ms. Illescas left the evidence tape and bluing agent behind when she left the collection site. Tr. 389-390, 432-434; Resp. Ex. H and I.

42. Upon returning to CCIMC, Ms. Illescas expressed concerns to Ms. Patricia Thomas, CCIMC Administrator, about the onsite collection in that there was no access to water to have Respondent wash his hands and that she did not have gloves. Tr. 146-147; 186-187.

43. Ms. Illescas admitted that such errors were “minor” ones that would not put her job in jeopardy. Tr. 202-203.

44. The chain of custody form indicates the site of collection being Oakley, California, as Ms. Illescas was not sure where the collection site was located. Tr. 159-160. Oakley, California was incorrectly listed by Ms. Illescas as the collection site. See CG Ex. 14.
45. Ms. Illescas would be at risk of losing her job if she used a cup other than the standard collection cup for collection of a specimen. Tr. 190, 201-203.
46. Ms. Illescas admitted to not packing gloves for the onsite collection and characterized this failure to pack gloves as an "oversight." Tr. 197.
47. On December 23, 2008, Respondent was wearing two jackets. Tr. 382-383, 413.
48. Ms. Illescas did not instruct Respondent to remove his jackets or exterior clothing before providing the sample. Tr. 383-384, 421.
49. It is more likely than not that Ms. Illescas placed the collection cup containing Respondent's sample either on a metal chair located next to the portable toilet or on the ground as she walked a few feet to her automobile to open two other Medtox collection kits to obtain the plastic transmittal bags to use as gloves. Tr. 386, 425-426.
50. Respondent provided a written statement, dated February 12, 2009, concerning the drug test on December 23, 2008, which took the form of a letter to the MRO complaining about alleged errors in the collection process. Resp. Ex. D.
51. Respondent initially stated in his February 12, 2009 written statement that Ms. Illescas pulled the collection cup from the back seat of her automobile (see Resp. Ex. D), but testified at the hearing on August 9, 2009 that she pulled it from under the front seat. Tr. 417-418, 467.
52. Respondent's wife types all of his correspondence for him. Tr. 485.
53. Respondent dictated his February 12, 2009 written statement to his wife to type, but he did not proofread the statement as typed before sending it to Dr. Wren. Tr. 485-487.

54. Respondent's urine specimen was subsequently sent for testing to Medtox, where the testing of Respondent's urine was done correctly. Tr. 14.

55. The chain of custody of Respondent's urine specimen remained intact from transmittal of the specimen to Medtox and through the specimen's testing. Tr. 25-26.

56. Medtox received Respondent's urine sample (both the primary and the split sample) in an acceptable condition. Tr. 48.

57. The flip top lids on the split specimen vials containing Respondent's urine sample were not separated from the vials and were still connected to the specimen vials at Medtox. Tr. 49, 142.

58. Respondent's specimen tested positive for metabolized methamphetamine at a concentration of 3,844 nanograms per milliliter and metabolized amphetamine at a concentration of 459 nanograms per milliliter. Tr. 52; CG Ex. 15, 18, 21.

59. The metabolized amphetamine was present above 200 nanograms per milliliter in Respondent's specimen, but did not exceed the threshold of 500 nanograms per milliliter to report the amphetamine as positive. Tr. 53; CG Ex. 15, 18.

60. Drugs like amphetamine and methamphetamine have a limited window of detection in urine – approximately three days. Tr. 59-60.

61. Dr. David Wren, Jr. was the MRO who reviewed and verified Respondent's positive test result. Tr. 277-280; CG Ex. 21.

62. Dr. Wren has been a certified MRO for approximately seven and a half years. Tr. 278.

63. Dr. Wren asked Respondent to bring in a list of the medications Respondent claimed he was using that might have led to the positive result. Tr. 287-288; CG Ex. 21.

64. Respondent never produced such a list, nor did Respondent provide any bottles of medication to the MRO. Tr. 288.

65. Respondent claims he did not produce the list to the MRO because the MRO told him that he was not aware of any medicines that would contain methamphetamine. Tr. 477. This claim is found credible based on the MRO's substantive testimony on drugs containing the substance in question. See Tr. 284.

66. Respondent did not tell Dr. Wren anything about any alleged collection errors during the December 30, 2008 verification call. Tr. 477.

67. The MRO's drug test verification call with Respondent on December 30, 2008 lasted approximately two minutes. Tr. 306-307.

68. During the verification call, Dr. Wren failed to inform Respondent that the call was a verification call or that the information provided by Respondent would be used in making a determination as to whether or not he was going to validate the results of the December 23, 2008 drug test. Tr. 429-430.

69. The MRO does not believe that Ms. Illescas would lie about the procedures she used for the onsite collection and has found her to be forthright and honest. Tr. 295.

70. Respondent had a second drug test conducted at CCIMC on December 31, 2008, and the results of that test were negative. Tr. 290-291. Given the approximately three (3) day detection window, Respondent's second drug test is not exculpatory.

71. On December 31, 2008, Respondent complained to Ms. Vicki Owens, a CCIMC employee, about the collection procedures on December 23, 2008, including the lack of the collection kit being sealed and Ms. Illescas' use of plastic bags for gloves and claims that she told Respondent that if the collection happened as he depicted it would be an invalid test. Tr. 434, 477-478, 493-498.

72. Ms. Owens denies telling Respondent that his complaints, if true, about the collection would invalidate the test. Tr. 499-500.

73. On or about January 2, 2009, Respondent spoke with CCIMC's office manager and related his version of the collection on December 23, 2008, including the allegation that Ms. Illescas used an unsealed collection cup she pulled from under her car seat. Tr. 444-445, 475.

74. On January 9, 2009, the MRO wrote a return to work letter for Respondent based on the drug test of December 31, 2008 being negative. Tr. 291; Resp. Ex. J.

75. Sometime in February 2009, Respondent expressed to Mr. David Forkel, a DFA director, concerns about the collection methods used during the onsite collection, specifically, that there was not a proper collection cup and that Ms. Illescas had used plastic bags as gloves and that she had never asked Respondent to wash his hands. Tr. 234.

76. Mr. Forkel considered Respondent's positive drug test out of character. Tr. 238.

77. Mr. Forkel was shocked that Respondent's drug test came back positive and considers Respondent an excellent employee who never deviated from the rules or regulations surrounding his license. Tr. 223.

78. Mr. Forkel would have Respondent return to work for the DFA if the charges in the matter are not proven and would have no concerns about Respondent operating a DFA vessel. Tr. 251-252.

79. Sometime in February 2009, Respondent expressed to Ensign Samud Looney his concerns about the collection process, including the collection cup used, and Ms. Illescas' use of plastic bags for gloves. Tr. 272.

80. Mrs. Carrie Lawrence, Respondent's spouse, testified that Respondent complained to her before the drug test result was provided that there were problems with the collection process, including that Ms. Illescas did not have all her materials and could not find a cup to collect the sample and took one out of her car. Tr. 347, 427-428.

81. The Coast Guard attempted to impeach Mrs. Lawrence's testimony with questions about Respondent's arrest record. Tr. 350.[5]

PRINCIPLES OF LAW

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

A. Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). When the Coast Guard charges a respondent with the Use of or Addiction to Dangerous Drugs, jurisdiction is established solely upon a showing that Respondent holds a license, certificate of registry, or merchant mariner's document. See 46 U.S.C. 7704(c) ("If it is shown that a holder [of a license, certificate of registry, or merchant mariner's document] has been a user of, or addicted to, a dangerous drug,

[5] The Coast Guard attempted to discredit Mrs. Lawrence's character testimony by asking questions concerning her knowledge of Respondent's arrest record. See Tr. 349. The Coast Guard had every right to probe Mrs. Lawrence's degree of knowledge and familiarity with Respondent and the basis for her testimony as to Respondent's character. See, e.g., Michelson v. United States, 335 U.S. 469 (1948); United States v. Monteleone, 77 F.3d 1086, 1089-90 (8th Cir. 1996) (discussing the use of such impeaching evidence in the criminal context). However, the means of doing so by non-attorney Coast Guard investigating officers were questionable in that 1) no foundation was laid in the record for the allegations of an arrest and 2) the arrest was for behavior that had no connection to the conduct at issue (alleged indecent acts in front of a child, obstructing a police officer, and for receiving stolen property). See Tr. 352. Respondent rebutted the potentially damaging credibility evidence against Mrs. Lawrence by explaining the circumstances of the arrest (providing the context of a contentious divorce) and noting that no conviction resulted from this incident. While the risk of tainting a jury with such evidence is not present in this context, the undersigned expects more from the government. In the future, the Coast Guard is encouraged to tread more carefully in a non-criminal proceeding when dealing with potentially inflammatory evidence, which is of little, if any, probative value to the issues at hand.

the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."); Appeal Decision 2560 (CLIFTON) (1995).

In this case, because the allegations of drug use arose while Respondent held a merchant mariner's license, jurisdiction is established. See Coast Guard Ex. 2. Furthermore, Respondent's Answer admits all jurisdictional allegations. See Coast Guard Ex. 3.

B. Establishing a Prima Facie Case of the Use of Dangerous Drugs

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

In these proceedings, the Coast Guard bears the burden of proof and must prove the allegations by a preponderance of the evidence to prevail. 33 C.F.R. §§ 20.701, 20.702(a). In a drug case based solely upon urinalysis test results, a prima facie case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs; (2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002).

C. Rebutting the Presumption

If the Coast Guard establishes a prima facie case by a preponderance of the evidence, a presumption of dangerous drug use arises, and the burden then shifts to the respondent to produce persuasive evidence to rebut the presumption. See Appeal Decisions 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2584 (SHAKESPEARE) (1997); and 2379 (DRUM) (1985). Such a presumption imposes on the party

against whom it applies the burden of going forward with evidence to rebut or meet the presumption. 33 C.F.R. § 20.703(a).

To be clear, the presumption established by the failure of a urine test for dangerous drugs is rebuttable. A respondent faced with overcoming the presumption of use of a dangerous drug "may rebut the presumption by producing evidence (1) that calls into question any of the elements of the prima facie case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or not knowing." Appeal Decision 2560 (CLIFTON) (1995). If a respondent's evidence sufficiently rebuts the presumption, then the burden of presenting evidence of a respondent's drug use returns to the Coast Guard, which bears the ultimate burden of proof on this issue. Id.; 33 C.F.R. § 20.703(b).

D. Standard of Proof and Evaluation of the Evidence

In determining whether the government has established a prima facie case and whether a respondent has successfully rebutted the presumption that arises when a prima facie case has been established, the undersigned must make relevant findings that are supported by reliable, probative, and substantial evidence. See Appeal Decisions 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); and 2584 (SHAKESPEARE) (1997). This "substantial evidence" standard is the equivalent of the preponderance to the evidence standard. See Appeal Decisions 2603 (HACKSTAFF) (1998) and 2472 (GARDNER) (1987). If the Respondent fails to rebut the presumption by such standard, the undersigned may find the charge proved on the basis of the presumption alone. See Appeal Decisions 2603 (HACKSTAFF) (1998); 2589 (MEYER) (1997); 2584 (SHAKESPEARE) (1997); and 2266 (BRENNER) (1981).

In evaluating the evidence presented at the hearing, the trial judge is in the best position to weigh the testimony of witnesses and assess the credibility of evidence. See Appeal Decisions 2598 (CATTON) (1998), aff'd NTBS Order No. EM-185 (1999); 2589 (MEYER) (1997); 2584 (SHAKESPEARE) (1997); and 2421 (RADER) (1986). Moreover, the trial judge has broad

discretion in making determinations of credibility of witnesses and resolving inconsistencies in evidence. See Appeal Decisions 2560 (CLIFTON) (1995); 2519 (JEPSON) (1991); 2516 (ESTRADA) (1990); and 2492 (RATH) (1989).

The findings need not be consistent with all evidentiary material in the record, so long as sufficient material exists in the record to justify the finding. See Appeal Decisions 2527 (GEORGE) (1991); 2522 (JENKINS) (1991); 2519 (JEPSON) (1991); and 2506 (SYVERSTEN) (1990). But the judge must resolve serious conflicts that exist in the testimony and issue specific credibility findings as necessary. See Appeal Decisions 2614 (WALLENSTEIN) (2000); 2492 (RATH) (1989); and 2489 (JUSTICE) (1989).

E. Drug Testing Requirements under 46 C.F.R. Part 16 and 49 C.F.R. Part 40

The drug testing required by 46 C.F.R. Part 16 must be conducted "as required by [46 C.F.R. Part 16] and in accordance with the procedures detailed in 49 CFR part 40." 46 C.F.R. § 16.201(a). The drug testing in question thus must meet the requirements of both 46 C.F.R. Part 16 and 49 C.F.R. Part 40. "In the interest of justice and the integrity of the entire drug testing system, it is important" that these procedures are followed to maintain the system. Appeal Decision 2631 (SENGEL) (2002).

The drug testing regulations found at 49 C.F.R. Part 40 contain several mandatory provisions regarding the collection process. A number of these provisions are specifically at issue in this case. Respondent raised issues with the collection that are addressed by the following sections of the regulations:

- 49 C.F.R. § 40.49 – provides the requirements for the collection kit, which references the specifications for a specimen collection container at 49 C.F.R. Part 40, Appendix A;
- 49 C.F.R. § 40.61(c) – the collector must require a donor to provide positive identification via a photo id, but positive identification by an employer representative (not a co-worker or other employee being tested) is acceptable;

- 49 C.F.R. § 40.61(f) – the collector must direct the donor to remove any out clothing that could be used to conceal items or substances that could be used to tamper with the specimen;
- 49 C.F.R. § 40.63(b) – the collector must instruct donor to wash and dry his or her hands before providing the urine sample;
- 49 C.F.R. § 43.63(c) – the collector must select or allow the donor to select an individually wrapped or sealed container from the collection kit materials and with both collector and donor present, either the donor or collector must unwrap or beak the seal of the collection container; and
- 49 C.F.R. § 40.65 – the collector must check the specimen's temperature no later than four minutes after the donor has provided the specimen by reading the temperature strip attached to the collection container.

The regulations also provide a number of "fatal flaws" that require a drug test to be cancelled. See 49 C.F.R. § 40.199. A reading of the fatal flaws listed in Section 40.199 reveals that such flaws are directed more toward significant errors that may happen once the donor has provided a sample to be tested and here the Respondent only raised issues with the collection process and subsequent MRO verification call – not any such listed fatal flaws under Section 40.199.

The regulations further provide a non-exclusive list of other procedural deviations from the regulations that do not invalidate the test. See 49 C.F.R. § 40.209 (examples of such listed errors include minor administrative mistakes and the fact that a test was conducted in a facility not meeting the stated requirements in another part of the regulations). Section 40.209 makes it clear that a test may not be cancelled "based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test." Id. The commentary to this section affirms that the proper remedy for such errors is not to cancel the test because "[t]his is a safety rule, and it is not consistent with safety to permit someone with a positive drug test to continue performing safety-sensitive functions because a collector made a minor paperwork error that does not compromise the fairness or accuracy of the test." See 65 FR 79462, 79503 (December 19, 2000).

F. The Effect of Minor, Technical Violations of the Drug Testing Regulations

Coast Guard case law holds 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. See Appeal Decisions 2668 (MERRILL) (2007); 2575 (WILLIAMS) (1996); 2546 (SWEENEY) (1992); aff'd NTSB Order No. EM-176 (1994); 2541 (RAYMOND) (1992), aff'd NTSB Order No. EM-175 (1994); 2537 (CHATHAM) (1992); 2522 (JENKINS) (1991).[6] As indicated above, the regulations themselves clearly indicate that not all deviations from collection procedures will result in a cancellation of the test. The regulations list specific procedural problems that always result in fatal flaws (see 49 C.F.R. § 40.199), and problems that are correctible (see 49 C.F.R. § 40.203). But just because errors occur during the test that are not "fatal flaws" under 49 C.F.R. § 40.199 does not mean that such errors cannot rise to the level of flaws "fatal" to a resulting test. See Appeal Decision 2653 (ZERINGUE) (2002). The key questions center on whether the collection was conducted in a way that the integrity of the sample (or chain of custody) is potentially compromised and whether the results of the test can be deemed reliable.

ANALYSIS

This case involves a unique set of circumstances. The collection of Respondent's urine sample for drug testing occurred onsite in a remote location with limited facilities. See Tr. 113-114, 166. There was no running water on site, the sample was to be provided in a portable toilet, and the collector had to work without the benefit of a desk or table for the collection. See CG Ex. 13; Resp. Ex. K. Despite the fact that the collection site at issue might not have met the strict

[6] Indeed, specific procedural defects like not requesting identification, not instructing a donor to empty his pockets, and not instructing a donor to wash his hands have been found to be insufficient to establish liability upon a collector for negligence because "[s]uch precautions are in place to prevent employees from subverting the testing procedures or submitting an altered sample . . . ." Balistrieri v. Express Drug Screening, LLC, 2008 WL 906236, *14, n.14 (E.D.Wis. 2008).

criteria for such sites under 49 C.F.R. § 40.41, such deficiencies are not cause to reject the results of the test. See 49 C.F.R. § 40.209(7).

The collector had only performed one or two onsite collections prior to collecting Respondent's urine sample on December 23, 2008. See Tr. 88-89, 154-156.
After the sample was sent to Medtox, it came back positive for methamphetamines. See Tr. 52-57; CG Ex. 15, 18. Respondent does not dispute the chain of custody or the result of the test itself and admitted that Medtox did the testing of the sample he provided correctly. See Tr. 14, 25-26. Respondent's contention is that the test results were compromised by various errors both in the collection process and the MRO's verification call and thus the test should be disregarded. See Tr. 25-26.

A. Respondent Failed to Rebut the First Element of the Coast Guard's Prima Facie Case.

The first element of the Coast Guard's prima facie case is established by 1) proof that Respondent provided the specimen on December 23, 2008 (see CG Ex. 14); 2) proof of a link between Respondent and the Drug Testing Custody and Control Number assigned to his urine sample, which identifies the sample throughout the chain of custody and testing process (id.); and 3) proof of the testing of that sample (see Tr. 52-57; CG Ex. 15, 18, 21). Respondent never disputed the chain of the custody for the urine sample, nor questioned the testing procedures by Medtox. See Tr. 14, 25-26.

B. Respondent Failed to Rebut the Second Element of the Coast Guard's Prima Facie Case.

The second element of the Coast Guard's prima facie case is established by Respondent's failure of the drug test. Respondent's urine sample came back positive for methamphetamines. See Tr. 52-57; CG Ex. 15, 18. The MRO who reviewed the test results was appropriately qualified. See Tr. 277-278. The MRO reviewed the test results with Respondent and confirmed that the results were "positive". See Tr. 287-288; CG Ex. 21. Respondent raised certain errors

in the MRO's verification call that go to this element of the Coast Guard's case, but as discussed below, such errors do not invalidate the test itself.

1. Errors in the MRO's Verification Call did not Rise to a Level Sufficient to Invalidate the Positive Drug Test.

Respondent asserts that the MRO's verification call was defective. In examining the evidence and testimony of the witnesses, Respondent established by a preponderance of the evidence that Dr. Wren's verification call on December 30, 2008 was defective. The undersigned cannot see how the MRO in this case adequately followed all the procedures described in 49 C.F.R. § 40.135 for conducting such a verification call. The call lasted approximately two minutes and some required steps were impossible to perform within the allotted time frame. See Tr. 306-307. To be clear, it is not just the length of the verification call that leads the undersigned to question whether the correct procedures were followed – it is also the fact that the MRO was unable to specifically recall whether he went through each of the steps outlined in 49 C.F.R. § 40.135 in their appropriate order or at all. See Tr. 311-324.

There is no evidence in the record that had Dr. Wren fully complied with the regulations, the result would have been any different for Respondent. Respondent did not ask to have his sample retested due to his concerns with the collection process and did not offer any alternative medical reasons (e.g., medications he was taking) for the positive test in his subsequent communications with the MRO. See Tr. 287-288, 477.

The fact that the verification call itself might not have been technically compliant with the regulations does not, however, mandate that the test results be disregarded or that that the Coast Guard's prima facie case be rejected unless such breached the chain of custody or somehow violated the integrity of the specimen provided. See Appeal Decision 2668 (Merrill) (2007) (MRO's defective verification call did not render the positive drug test unreliable because

it was "clearly a technical error that did not breach the chain of custody or violate the integrity of [r]espondent's urine specimen."). The MRO's errors in this case simply do not rise to that level.

C. Respondent Failed to Rebut the Third Element of the Coast Guard's Prima Facie Case

The third element of the Coast Guard's prima facie case is highly contested in this matter. To be entitled to the presumption, the Coast Guard needed to show that the test was conducted in accordance with 46 C.F.R. Part 16, which necessarily involves proof of the collection process, proof of the chain of custody, proof of how the specimen was handled and shipped to the testing facility, and proof of the qualification of the test laboratory. The Coast Guard adequately put on its proof regarding the chain of custody (see CG Ex. 14, 15) and the shipment of the specimen to Medtox (see Tr. 25-26, 48). Respondent never disputed the chain of the custody for the urine sample, nor questioned the adequacy of the testing procedures by Medtox. See Tr. 14, 25-26.[7] Respondent did specifically argue a number of alleged collection errors. Therefore, the collection process itself must be examined in detail to determine the validity of the positive test results.

1. Respondent's Alleged Collection Errors.

Respondent's main contention is that the collection process itself was so flawed that the integrity of the subsequent test is compromised, and the test results indicating use of methamphetamine should be disregarded. To support his case, Respondent claimed a number of errors occurred in the collection process. The errors of potential import include:

- The collector not having Respondent wash his hands before the specimen collection;
- The collector not using a sealed specimen collection cup;
- The collector not using a specimen collection cup with the required temperature strip;

[7] In the absence of any particularized challenge to the qualifications of laboratory personnel or the MRO, the Coast Guard need not show that each of them was competent to perform the responsibilities they were employed or designated to fulfill, and the laboratory report itself, once it was signed by the MRO, constituted proof adequate to shift to appellant the burden of going forward with evidence that the positive finding was not the product of a wrongful use of the drug. See NTSB Order No. EM-176 (1994).

- The collector not using gloves;
- The collector not maintaining constant control of the specimen collection cup containing Respondent's sample by either putting the collection cup on the ground or on a nearby chair;
- The collector not directing Respondent to remove all of his outer clothing before providing the urine sample; and
- The collector failing to indicate the precise location of the collection on the required forms.

Respondent has established by a preponderance of the evidence a number of these errors occurred in the collection process on December 23, 2008. But these errors, by themselves, do not lead to questioning the result of the drug test per se. Some of these errors, e.g., the collector not using gloves (see Tr. 139, 195) or not having Respondent remove his outer clothing (see Tr. 382-384, 413, 421)[8] do not lead one to question the results to any significant degree. The collector's use of gloves is primarily for the collector's own protection in handling the urine sample, and the use of gloves is not a regulatory requirement in any event. The requirement to have a specimen donor remove outer clothing like jackets is aimed toward ensuring that the specimen donor does not have anything in such garments to adulterate the sample.

The fact that the collector might not have maintained complete custody or control of the specimen provided by Respondent throughout the collection process is more troubling. Both Respondent and his son testified that the collector failed to do so as she retrieved plastic bags to be used as gloves for the transfer. See Tr. 386, 425-426.

Even crediting the fact that the collector might have placed the specimen collection cup down while retrieving the plastic bags to use as gloves from her automobile four (4) to six (6) feet away, the impact of such momentary placement is a significant enough concern to render the test unreliable. If anything, such a relinquishing of control over the sample, even for a short

[8] The Coast Guard could have recalled Ms. Illescas to rebut Respondent's assertion that she did not have Respondent remove his outer clothing in conformity with the applicable regulations. The Coast Guard's failure to do so leaves the undersigned in the position of treating Respondent's credible account of such an instance as fact.

period, more likely would allow a donor to adulterate the sample with some substance to defeat the test – not render a positive result.

The fact of Respondent not washing his hands prior to the collection is clearly established in the record. See Tr. 103, 184, 423-424. The necessity of Respondent washing his hands prior to providing the sample and the impact of such non-washing of his hands is the issue and whether the collector instructed him to wash his hands. The regulations are clear on this point. See 49 C.F.R. § 40.63(b) (before the employee provides the sample, the collector must "[i]nstruct the employee to wash and dry his or her hands at this time."). The mandatory aspect of Section 40.63(b) is that the collector must provide the instruction to the employee to wash and dry his or her hands, not that the collector must make the employee wash his or her hands. While it is clear that the collector must instruct the employee to wash his or her hands, the effect, if any, of not being able to (rather than refusing to) wash one's hands prior to providing a sample is not clear in the regulations.

Here, given the apparent unavailability of a water source on the site (see Tr. 103), the collector in this case more likely than not failed to give such an instruction. Respondent's failure to wash his hands prior to providing the sample (and the collector's lack of instruction on this point) should not be taken to invalidate the results of the drug test as not having an employee wash his hands has been specifically rejected as a basis for invalidating a test. See, e.g., Appeal Decision 2522 (JENKINS) (1991). A technical violation of the regulations on this level is, by itself, a form of harmless error since the integrity of the specimen and the chain of custody were not adversely affected.

2. Respondent Alleged the Collector Used an Unsealed, Non-Standard Specimen Collection Cup.

The most significant and troubling alleged error concerns the specimen collection cup that was used on December 23, 2008. This alleged error has the potential to compromise the

integrity of the sample and must be examined in detail to determine whether Respondent has rebutted the Coast Guard's prima facie case. The use of an unsealed collection cup could cast significant doubt on the integrity of the sample collected. Cf. Appeal Decision 2598 (CATTON) (1998), aff'd NTBS Order No. EM-185 (1999) (finding that not providing a respondent with a sealed container fails to cast sufficient doubt on the test results when specimen container was unwrapped in view of respondent). Both the Coast Guard's and Respondent's expert agreed that the use of an unsealed, non-standard specimen collection cup would lead to a serious questioning of the test's results. See Tr. 69, 75-76, 194, 210.

The collector stated that she selected a Medtox collection kit and unsealed it in front of Respondent. See Tr. 136-137, 149. Respondent and his son claimed that the collector pulled an unsealed cup from her car. See 376, 418-419, 482. One cannot reconcile these divergent accounts on which specimen collection cup was used. The actual collection cup used is not available for review. It is critical to resolve the question of what collection cup was used (and in what condition, i.e., either sealed or not) to reach an appropriate decision in this case, and it is the undersigned's duty to make such a determination. See, e.g., NTSB Order EA-4968 (2002) (refusing to overturn the trial judge's findings where the evidence as to the collection process was a standoff and the judge found credible a claim that the collection cup was not unsealed in the donor's presence).

a. The Collector's Version of Events.

The collector's version of events appears credible on its face.[9] The collector testified that she used a sealed, Medtox, DOT-approved collection cup (see Tr. 136-137, 149). There are reasons to believe that the collector did so. For example, the vials used to transmit the split sample to the laboratory were the standard vials that are contained in the Medtox specimen

[9] Her employer, the MRO, found her to be a reliable employee and doubted that she would lie about the collection process. See Tr. 295.

collection kits. See Tr. 49. Such kits consist of the sealed collection cup, the transmittal bag for the split specimen, the two vials, and the absorbent chemical. See CG Ex. 11.

If the collector used the standard split sample vials to transmit the specimen to the laboratory, why would she also not use the standard specimen collection cup containing such vials? The collector also stated she used the plastic transmittal bag from two other specimen collection kits as gloves to perform the transfer of the specimen. See Tr. 139, 195. If she had extra specimen collection kit transmittal bags, it stands to reason that she also had extra specimen collection cups. There would be no reason for the collector not to have used a standard, sealed specimen collection cup in the first instance if she had extra collection kits, which she would have opened to make use of the specimen transmittal bags as improvised gloves.

Significant reasons exist to discredit the collector's version of events. The collector portrayed herself as very thorough and always following procedures. See Tr. 91-99, 189-190. And yet, this was not a typical collection for her. This was only her second or possibly third onsite collection. See Tr. 88-89, 154-156. She was surprised at the lack of facilities on site. See Tr. 113-114, 166. She got lost on her way to the collection site and had to contact the DFA numerous times to get directions as to how she was to proceed. See Tr. 109-110, 163. She did not know prior to getting on the ferry to Webb Tract Island that she would have to board her car onto the ferry, and admitted to being scared at this time. See Tr. 112, 118, 164-165. Furthermore, after the collection was finished, she left a couple of items used for the collection (i.e., the bluing agent and the evidence tampering tape) onsite despite her initial testimony that she brought everything back with her. See Tr. 146, 182-183, 389-390, 432-434, Resp. Ex. H and I.

As for the collection itself, she admitted to not bringing gloves to the onsite collection, which she characterized as an oversight. See Tr. 197. The collector's claim of opening up two extra specimen collection kits to use the transmittal bags contained therein as improvised gloves

surely does not sound like a standard operating procedure for conducting a collection. See Tr. 139, 195.

The collector also did not direct Respondent to remove his outer clothing prior to providing the sample, which is a clear violation of the regulations. See Tr. 382-384, 413, 421. The collector's failure to specify the exact location of the collection on the required form also constitutes a technical violation as well.[10] See Tr. 159-160, CG Ex. 14.

Additionally, the collector would likely want to paint a picture that the collection was compliant with the regulations. She admitted that if she had used an unsealed, non-standard specimen collection cup, her job would be in jeopardy. See Tr. 190, 201-203. But she did discuss her problems with the collection with CCIMC staff after returning from the collection, and there is no evidence that such problems discussed included the use of a non-standard, unsealed collection cup. See Tr. 146-147, 186-187. Yet the collector admitted that such errors were "minor" and would not put her job in jeopardy. See Tr. 202-203.

Finally, there was the unrebutted testimony[11] that on another occasion, the collector allowed a CCIMC employee to provide a sample without adequately confirming his identity, despite the collector's testimony that she always checked identification. See Tr. 93-94, 406-407. But the only evidence of this incident was Respondent's own testimony, and Respondent did not provide corroboration from the DFA employee who was allegedly allowed to take a drug test under such circumstances.

Such collection errors go primarily to procedural requirements that are designed to make sure that a donor does not cheat the test. Even if these errors by themselves or in combination do

[10] Respondent also alleged certain other minor technical deficiencies with the custody and control form (e.g., not having the complete employer information, employer representative information, etc.) None of these alleged errors call into question the integrity of the sample provided or the chain of custody. Even Respondent's expert witness admitted that while technically not compliant, all of these errors were non-fatal. See Tr. 522-528.

[11] Again, the Coast Guard certainly could have recalled Ms. Illescas to rebut Respondent's assertion but failed to do so.

not necessarily call into question the results of the test, they lend some credence to Respondent's other claimed error about the specimen collection cup (which is of paramount significance). However, for the reasons stated below, the undersigned simply cannot make the key credibility determination in Respondent's favor.

b. Respondent's Version of Events.

Respondent's version of events also appears credible on the surface. His version that the collector used an unsealed collection cup was supported by the testimony of his son, Bobby. Both Respondent and his son testified that the collector pulled an unsealed specimen collection cup from under her front car seat. See Tr. 373-375, 377, 379, 417-418. Both testified that the collector failed to maintain constant control of the specimen collection cup containing Respondent's sample while the collector went to get some plastic bags to use as gloves. See Tr. 381, 425.

Respondent's prior drug testing history and involvement with DFA's drug policy implementation support his denial of being a user of dangerous drugs. Respondent had been subject to numerous random drug tests over his period of employment with the DFA and none of these tests had returned positive. See Tr. 216-217, 238-239. Respondent was heavily involved with the DFA's drug testing policy and program changes that occurred in November 2008 (see Tr. 220, 250) and was aware that a random, onsite drug collection would be conducted for one more DFA by the end of that year (see Tr. 408, Finding of Facts No. 10 and No. 11). Given this background, Respondent would have to take an unreasonable risk by using methamphetamines within an approximately one-month period during which he knew that a random, onsite drug test would be given to one of possibly four DFA employees, a set of employees to which he belonged. Respondent's past history of clean random drug tests and involvement with the DFA's drug policy implementation caution against finding that he was so reckless.

Respondent also made contemporaneous complaints to a CCIMC employee about the collection process once he received the positive test results. See Tr. 434, 477-478, 493-498. Such complaints centered in part on the collector's use of a non-sealed specimen collection cup. Id. While the details about such complaints are somewhat vague, the fact that the collector used an unsealed kit for the collection remained constant in Respondent's versions of events over time. Moreover, Respondent has consistently made the allegation concerning the use of an unsealed specimen collection cup to a number of people, including CCIMC's office manager, the MRO, Ensign Looney, his wife, and his boss. See Tr. 234, 272, 347, 427-428, 444-445, 475; Resp. Ex. D. While certain elements of Respondent's story have shifted over time (e.g., location from which the collector pulled the specimen collection cup as stated in Resp. Ex. D versus his testimony), the use of an unsealed collection cup was always present.

Also weighing in favor of Respondent is the fact that his employer was shocked by the test results, has no concerns that Respondent is in fact a drug user, and is holding Respondent's position as a ferry boat captain open for him pending resolution in this matter. See Tr. 223, 238, 252.

Significant reasons to discredit Respondent's version of events are present as well. Respondent and his son obviously have a motivation to make the collection process appear as non-compliant with the regulations as possible to preserve Respondent's right to work as a licensed mariner.

Most troubling, Respondent's written statement of events (see Resp. Ex. D) contradicts elements of Respondent's testimony and established fact (see Tr. 467 (explaining contradiction between cup allegedly coming from under front or back seat of Ms. Illescas' automobile); Tr. 480-481 (explaining contradiction between split specimen vial lids allegedly being unattached to vials)).

The key discrepancy is that Respondent's February 12, 2009 written statement claims that the lids for the split specimen vials were not attached to the vials and the collector placed the lids on a chair beside the portable toilet. See Resp. Ex. D. Specifically, Respondent stated:

> The tubes also were not in any kind of packaging and had no lids. I remember wondering how she was going to travel with my specimen and not spill it with no lids, when I noticed two small lids sitting on an old boat seat next to the port-a-potty. Ruth picked up the cup from the ground containing my specimen and with the bags from her back seat I watched her pour the specimen into the two vials. Ruth then picked up the small lids I had seen on the old seat and placed them on the vials.

Id. (emphasis added). This account of the separated specimen vial lids is very specific and detailed, and yet cannot be correct given the fact that the lids were attached to the vials upon receipt at Medtox. See Tr. 49.

Bobby Lawrence's February 18, 2009 statement contains much the same allegation. See Resp. Ex. E. Specifically, Bobby stated the following:

> Then she pulls out two vials from a pocket on her shirt. She takes the lids off and lays them and one of the tubes on the chair by the other two boxes. Ruth bends down to the ground where the specimen cup has been sitting, uncovered, picks it up and pours it into the vial she is holding. Ruth fills one vile [sic], places a lid on it, lays it down, picks up the other vial and pours the remainder of the specimen into it and replaced its lid as well.

Id. (emphasis added). Bobby's statement offers a similarly detailed account of the two lids of the specimen vials being unattached. But, again, both the collector and Dr. Collins testified that the split sample vials had their lids attached. See Tr. 49, 142.

Respondent provided an explanation for these discrepancies (see Tr. 480-481, 485-487), but the undersigned must still take into account such discrepancies when evaluating Respondent's version of events. Given the seriousness of the allegations against Respondent, one would think that he would have ensured that his written statement of events concerning the collection were accurate and would have proofread his statement for any errors. The fact that Respondent's wife typed his statement and the fact that he did not proofread it before it was sent

(see Tr. 485-487) also does not explain why such inconsistencies are present in his son's statement as well. See Resp. Ex. E.

There is no evidence in the record that Mrs. Lawrence also typed Bobby's statement, and one must question why the same error of fact appears in both statements. Furthermore, one would anticipate that accounts delivered closer to the time in question (i.e., Respondent's and Bobby's written statements in February 2009 about events occurring late in December 2008) would be more, not less, accurate depictions of fact than testimonial accounts given months later.

The replication of this error in Bobby's statement casts doubt about the overall veracity and independence of his statement (which was written after Respondent's statement) and his testimony generally. Either Bobby erroneously recalled the same event as Respondent (i.e., removal of the split sample vials' lids) or was unduly influenced by Respondent's earlier written statement. Serious questions about both Respondent's and his son's credibility thus exist.

c. Respondent Failed to Establish that the Collector Used an Unsealed, Non-Standard Collection Cup.

This case is replete with a lot of he-said-she-said with radically different and incompatible versions of events. One cannot objectively state that Ms. Illescas' version of events is absolutely correct or Respondent's version is absolutely correct in the abstract. Ultimately, the undersigned is left with the difficult task of determining whether to order the revocation of Respondent's license in light of the conflicting testimony concerning the collection procedures.

The undersigned has taken into account the entire record and the fact that the collection was not done in conformity with the drug testing regulations in making an overall credibility finding as to this key fact – i.e., whether an appropriate, sealed specimen collection cup was used. For the reasons discussed above, it is more likely than not that the collector had multiple Medtox standard collection kits onsite and used such a kit for the drug collection. It is also more

likely than not that the collector failed to unseal such a kit in Respondent's presence but nevertheless used such a standard, Medtox collection cup for the collection of the sample.

The fact that the collector failed to unseal the collection cup in Respondent's presence is a close call in terms of determining whether the integrity of the sample was compromised. The case law holds that a collection error must rise to a level that compromises the integrity of the sample or raises an issue with the chain of custody to invalidate an otherwise positive test. The collector's actions in this instance do not rise to such a level. The sample collection cup used was not some random, drinking cup of questionable origin but rather the facts and evidence as a whole point to the use of an appropriate Medtox collection cup into which Respondent provided his sample. There is absolutely no evidence to suggest that Respondent's sample was somehow adulterated with metabolized methamphetamine by errors that occurred during the collection. Unless one were to hold as a matter of law that the failure to unseal an appropriate sample collection cup in the donor's presence, by itself, rises to a level sufficient to disregard a positive test result, the test must stand. See, e.g., NTSB Order EA-4968 (2002). While the undersigned believes that the NTSB may throw such a case out, the current state of Coast Guard precedent does not allow for such a finding.

At its core, the undersigned finds the collector's version of events with respect to which collection cup was used more credible than Respondent's depiction on this point, especially in light of the objective indicia of Respondent's (and his son's) either outright falsehood or significant failure to accurately recall a detail of the collection (i.e., the flip top lids of the specimen vials being detached from the vials). The collector's version of events concerning key aspects of the collection simply holds together better with the facts and makes more logical sense for the reasons given above.

To be sure, there are problems with the collector's version of events concerning the collection and her credibility. But overall, the weight of the evidence simply does not tip in

favor of Respondent's rebuttal attempts, and the Coast Guard, which bears the ultimate burden of proof, adequately established that the collector used an appropriate, specimen collection cup by substantial, reliable and credible evidence. Enough evidence is thus in the record to find as a fact that the collector provided Respondent with a collection cup in which to provide his sample in fundamental accordance with 49 C.F.R. § 43.63(c) and 49 C.F.R. Part 40, Appendix A and that the collection, as a whole, was done in sufficient accordance with the regulations to accept the results of the test.

Respondent failed to establish any error in the collection (or the subsequent MRO verification call) that would lead to a finding that the positive test results should be disregarded because of either a problem with the chain of custody or the integrity of Respondent's sample. The Coast Guard adequately met its ultimate burden of proof with respect to all three elements of its prima facie case and revocation of Respondent's Coast Guard issued credentials is warranted.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7704(c), 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of United States Coast Guard Merchant Mariner's License, Serial Number 1503397 and Merchant Mariner Document number xxx-xx-***[REDACTED]***.
3. On December 23, 2008, Respondent participated in a random drug test and tested positive for methamphetamine metabolite.
4. The Coast Guard established it prima facie case that Respondent is a user of a dangerous drug by showing that 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16.

5. Respondent failed to rebut the Coast Guard's prima facie case and the presumption that he is a user of a dangerous drug.
6. The record as a whole, the testimony, and facts established at the hearing concerning the December 23, 2008 collection and subsequent testing of Respondent's specimen do not compromise the results of the positive drug test so that such results must be disregarded.
7. The factual allegation of "Use of or Addiction to the Use of Dangerous Drugs" against Respondent is found **PROVED** by a preponderance of the evidence.

ORDER

IT IS HEREBY ORDERED that the charge against Respondent of Use of or Addiction to the Use of Dangerous Drugs is hereby found **PROVED**.

IT IS HEREBY FURTHER ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001. See 33 C.F.R. §§ 20.1001-20.1004 (Attachment B).

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

Date: December 14, 2009

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

COAST GUARD WITNESSES

1) Dr. Jennifer Collins (telephonically)
2) Ms. Ruth Illescas
3) Mr. David Forkel
4) Ensign Samud Looney – USCG
5) Dr. David Wren, Jr.

RESPONDENT WITNESSES

1) Mrs. Carrie Lawrence
2) Mr. Bobby Lawrence
3) Mr. Ronald A. Lawrence
4) Ms. Vicki Owens (telephonically)
5) Ms. Halle Weingarten

COAST GUARD EXHIBITS

Coast Guard Exhibit 1	Letter from Mr. Dan Forkel, Delta Ferry Authority, to United States Coast Guard, dated January 7, 2009
Coast Guard Exhibit 2	Complaint
Coast Guard Exhibit 3	Answer
Coast Guard Exhibit 4	Copy of Respondent's Merchant Mariner's License
Coast Guard Exhibit 5	Report of drug testing
Coast Guard Exhibit 6	Patient consent for use and disclosure of protected health information
Coast Guard Exhibit 7	Letter from Mr. Dan Forkel, Delta Ferry Authority, to Contra Costa Industrial Medical Center, dated February 16, 2009
Coast Guard Exhibit 8	Photograph of collection kit and red box
Coast Guard Exhibit 9	Photograph of red box
Coast Guard Exhibit 10	Photograph of split specimen collection kit
Coast Guard Exhibit 11	Photograph of split specimen collection kit contents
Coast Guard Exhibit 12	Example of Medtox chain of custody form
Coast Guard Exhibit 13	Ten (10) photographs of collection site on Webb Tract Island
Coast Guard Exhibit 14	Copy of Custody and Control Form
Coast Guard Exhibit 15	Medtox Laboratory report of positive drug test
Coast Guard Exhibit 16	Certificate of Inspection for M/V VICTORY II
Coast Guard Exhibit 17	NOT USED
Coast Guard Exhibit 18	Medtox Laboratory Litigation Package
Coast Guard Exhibit 19	Contra Costa Industrial Medical Clinic New Patient Registration and consent form
Coast Guard Exhibit 20	DOT Drug Testing Guidelines binder

Coast Guard Exhibit 21	Contra Costa Industrial Medical Clinic Report of Drug Test Results

RESPONDENT EXHIBITS

Respondent's Exhibit A	Curriculum vitae – Halle Landesman Weingarten
Respondent's Exhibit B	Chain of Custody and Consent Form
Respondent's Exhibit C	CCIMC Roster
Respondent's Exhibit D	Letter from Respondent to Dr. Wren, dated February 12, 2009
Respondent's Exhibit E	Statement from Mr. Bobby Lawrence, dated February 18, 2009
Respondent's Exhibit F	Letter from Mr. Ken Moyal, Esq. to Dr. Wren, dated February 25, 2009
Respondent's Exhibit G	Email from Ensign Looney to Respondent, dated February 12, 2009 – offered and admitted but stricken from the record per footnote 3 above
Respondent's Exhibit H	Box of Tamper-Evident Tape
Respondent's Exhibit I	Box Toilet Bowl Bluing Agent
Respondent's Exhibit J	Letter from Dr. Wren re Respondent dated January 9, 2009
Respondent's Exhibit K	Photograph of Respondent standing between portable toilet and truck on Webb Tract Island