

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

UNITED STATES COAST GUARD
Complainant

vs.

GUS WILLIAM TALIAFERRO
Respondent

Docket Number 2009-0442
Enforcement Activity No. 3611490

DECISION AND ORDER
Issued: June 24, 2011

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

**Mr. James D. Fayard
MST2 Meredith Schoen
Sector Lower Mississippi**

For the Coast Guard

Daniel J. Gamino, Esq.

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) instituted this suspension and revocation proceeding seeking revocation of Respondent Gus William Taliaferro's Merchant Mariner's License Number 1510172 and Merchant Mariner's Document Number 191373. This action is brought pursuant to the authority contained in 46 U.S.C. 7704(c) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On October 9, 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 pursuant to 46 C.F.R. §5.35. Specifically, the Coast Guard alleges that on May 13, 2009, Respondent took a urinalysis test which yielded a positive result for marijuana metabolites. Respondent filed his Answer on October 28, 2009, admitting all jurisdictional allegations, denying factual allegations, and requesting a hearing.¹ Respondent attached an exhibit to his Answer offering numerous affirmative defenses. On October 29, 2009, the Chief Administrative Law Judge referred this case to the undersigned for hearing and disposition.

A hearing on this matter was held on October 26-27, 2010 in Oklahoma City, Oklahoma. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Mr. James Fayard and Petty Officer Meredith Schoen represented the Coast Guard. Daniel J. Gamino, Attorney at Law, appeared on behalf of Respondent. The Coast Guard offered eighteen (18) exhibits and presented testimony of five (5) witnesses.² Respondent offered fifty-eight (58) exhibits and presented testimony of six (6) witnesses. The list of witnesses and exhibits is contained in **Attachment A**. Respondent's

¹ Respondent admitted signing the Federal Drug Testing Custody and Control Form and denied all other factual allegations. Additionally, Respondent noted that his Merchant Mariner's License Number was incorrectly listed on the complaint.

counsel elected to make a closing argument on the record at the end of the second day of the hearing. (Tr. at 412-429). Additionally, the Coast Guard and Respondent submitted Proposed Findings of Fact and Conclusions of Law on November 23, 2010 and December 15, 2010, respectively.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, I find the Coast Guard **PROVED** Respondent was a user of dangerous drugs in violation of 46 U.S.C. 7704(c).

FINDINGS OF FACT

1. At all relevant times mentioned herein, Respondent was a holder of Merchant Mariners License Serial No. 1510172 and a Merchant Mariners Document Number 191373. (CG Ex. 1, CG Ex. 2, See Tr. at 16-17).
2. At all relevant times mentioned herein, Respondent was employed by Oceaneering. (See Tr. at 48-49.)
3. Respondent was selected for a random drug screening on May 5, 2009. (CG Ex. 6, Tr. at 28).
4. Respondent's May 5, 2009 drug screen yielded a dilute negative test result. (CG Ex. 12, Tr. at 29).
5. In accordance with Oceaneering's policy, Respondent was ordered to submit to a second drug test. (CG Ex. 21, See Tr. at 24-25).
6. Respondent submitted a subsequent urine sample on May 13, 2009. (CG Ex. 15).
7. The May 13, 2009 urine sample was collected aboard Respondent's vessel, the Ocean Intervention. (Tr. at 78).
8. Max Cheramie, an employee of Complete Occupational Health Services, collected Respondent's May 13, 2009 urine sample. (CG Ex. 13, See Tr. at 77-79).
9. Mr. Cheramie is a qualified urine collector pursuant to 49 C.F.R. Part 40. (See CG Ex. 14, Tr. at 73-74).

² CG Ex. 15 was not offered into evidence, but was later cited to in the Coast Guard's Proposed Findings of Fact and Conclusions of Law. Upon review of the record, I note that CG Ex. 15 is contained at CG Ex. 20 p. 7. Similarly, Resp. Ex. ZZ and Resp. Ex. CCC were not offered into evidence at the hearing.

10. Mr. Cheramie appeared very young, was possibly in his early twenties, and was not wearing a uniform. (Tr. at 353, 355).
11. Respondent never saw identification from the collector. (Tr. at 355).
12. Respondent was not instructed to wash his hands, did not see the collector wash his hands, and the collector was not wearing gloves. (Tr. at 356).
13. On May 13, 2009, the bathroom area had not been secured; the sink was not taped off and no dye had been placed in the toilet. (Tr. at 357).
14. At the time of the urine screening Respondent was taking Ibuprofen, "Pflex" and "Mdraw." (Tr. at 357-359).
15. The collector did not inquire whether Respondent was taking any medications. (Tr. at 359).
16. Respondent was present while the seal was put on his sample. (Tr. at 397).
17. Complete Occupational Health Services sent the May 13, 2009 collected sample to Quest Diagnostics. (Tr. at 86).
18. Quest Diagnostics is a federally certified laboratory. (Tr. at 102).
19. Respondent's May 13, 2009 specimen was tested by an Olympus 5400 automated analyzer at Quest Diagnostics using the technique of immunoassay. (Tr. at 104-105).
20. Immunoassay utilizes an antibody specific for individual drugs. (Tr. at 105).
21. Respondent's immunoassay test was presumptively positive for marijuana. (Tr. at 105).
22. It is Quest policy that if a drug is presumptively positive after the initial test, a second aliquot is taken from the original specimen bottle and sent through confirmation procedures, which encompass solid phase extraction performed by Gas Chromatography/Mass Spectrometry ("GC/MS"). (CG Ex. 20, Tr. at 105-106).
23. When tested using GC/MS, Respondent's specimen had a marijuana metabolite quantitation of 74 nanograms per ML. (CG Ex. 20, p. 5, Tr. at 107).
24. The confirmation cutoff for marijuana metabolite is 15. (Tr. at 107, 49 C.F.R § 40.87).
25. The only other drug that could provide a positive result for marijuana is Marinol. (Tr. at 200).
26. Dr. Barry Sachs, the Medical Review Officer (MRO), requested that Bottle B of Respondent's split sample be sent to Elsohly Laboratories for testing. (Tr. at 133, CG Ex. 17).

27. Elsohly Labs is certified by the National Laboratory Certification Program, the College of American Pathologists, and registered with the DEA as a controlled substances analytical laboratory. (Tr. at 167, 193-194).
28. Elsohly Labs does not receive the name of the person being tested and does not investigate that person. (Tr. at 191-192).
29. Elsohly Labs performed only a GC/MS confirmatory test, which was also positive for marijuana. (Tr. at 175, 197, CG Ex. 18).
30. When Dr. Sachs, the MRO, contacted Respondent regarding his positive urine test, Respondent stated that the collector did not use gloves, denied marijuana use, and stated he would be contacting his attorney. (Tr. at 212, 224).
31. Respondent testified that he had not used marijuana or any illegal substance leading up to May 13, 2009. (Tr. at 317).
32. Respondent testified that he believed the May 13, 2009 test was inaccurate. (Tr. at 317).
33. Respondent was tested for drugs and alcohol numerous times from 1997 to 2009, and the May 13, 2009 sample was the only positive test. (Tr. at 333-334, Resp. Ex. P-SS).
34. Since his discharge from Oceaneering, Respondent has taken four urine tests, all of which he has passed. (Tr. at 370-371).
35. Aubrey Taliaferro, Respondent's wife and a registered nurse, testified that Respondent is not someone who uses controlled dangerous substances, and she is not aware of him showing any effects of having taken dangerous substances. (Tr. at 403-404).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to revoke a mariner's license, certificate or document for violations arising under 46 U.S.C. § 7704. See 46 C.F.R. § 5.19(b). Under 7704(c), a Coast Guard issued license, certificate or document shall be revoked if the holder of that license or certificate has been a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. See also Appeal Decision 2634 (BARETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (rev'd on other grounds); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition or cure established in Appeal Decision 2535 (SWEENEY)).

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize the use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16. Marine employers must establish programs for chemical testing of dangerous drugs on a random basis of crew members who occupy a position required by the vessel's certificate of inspection, perform duties and functions required by Chapter I, Title 46 Code of Federal Regulations, or are specifically assigned duties relating to emergencies. 46 C.F.R. 16.230(a). Additionally, the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 C.F.R. Part 40 and 46 C.F.R. Part 16. If an employee fails a chemical test by testing positive for a dangerous drug, the individual is then presumed to be a user of dangerous drugs. 46 C.F.R. 16.201(b); see also Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for marijuana metabolites in a May 13, 2009 drug test, which served as a follow up to his May 5, 2009 random drug test. The Coast Guard seeks revocation of Respondent's license and document in accordance with 46 C.F.R. § 5.569. For the reasons stated below, I find that the Coast Guard proved Respondent is a user of or addicted to the use of a dangerous drug.

Burden of Proof

The Administrative Procedure Act (APA), Title 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation hearings before Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard

to prove that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of a Dangerous Drug

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 on 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).

In the instant case, after Respondent was randomly selected for a May 5, 2009 urinalysis which tested dilute negative, a second specimen was collected on May 13, 2009 which tested positive for the presence of marijuana metabolites. (Tr. at 29, 77-79, CG Ex. 11, CG Ex. 12). The specimen was analyzed by an automated analyzer at Quest Diagnostics, a federally certified

laboratory, and tested positive for marijuana. (See Tr. at 102, 104-105, CG Ex. 20). A second aliquot was taken from the original specimen bottle and solid phase gas extraction was performed by GC/MS which verified the presence of marijuana metabolites measuring seventy-four (74) nanograms per milliliter. (CG Ex. 20, p. 5, Tr. at 105-107). The confirmation cutoff for marijuana metabolite is fifteen (15) nanograms per milliliter. (Tr. at 107, 49 C.F.R. § 40.87). Dr. Sachs, the MRO, requested that the split specimen be sent to another laboratory. (CG Ex. 17, Tr. at 133). Elsohly Labs, certified by the National Laboratory Certification Program, the College of American Pathologists, and registered with the DEA as a controlled substances analytical laboratory, performed a GC/MS confirmatory test, which also tested positive for marijuana. (CG Ex. 18, Tr. at 167, 172-174.) Dr. Elsohly testified that the only other drug that could provide a positive result for marijuana is Marinol (Tr. at 200; see also 49 C.F.R. Part 40).

Dr. Sachs received and verified Respondent's positive laboratory results. (CG Ex. 16). He also spoke with Respondent over the phone to determine whether a legitimate medical explanation existed for Respondent's positive drug test (Tr. at 212, 223-225). Respondent testified that while he initially did not tell Dr. Sachs about medications he was taking, he did call Dr. Sachs several days later to inform him of his medications. (Tr. at 362-363). At the hearing, Respondent testified that at the time of the May 13, 2009 urine test he was taking Ibuprofen, Pflex, and Mdraw. (Tr. at 357-359).

Ultimately, two (2) certified laboratories, performing a total of three (3) DOT drug tests and the MRO determined that there were positive findings of marijuana use by Respondent. Given all the above, I find that the Coast Guard did establish and prove a prima facie case of dangerous drug use.

Respondent's Rebuttal

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).

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 a 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 the issue. Id. 33 C.F.R. § 20.703(b).

Respondent has asserted numerous errors with both the collection and testing process. I will address each allegation in turn.³

i. General Collection Errors

Respondent alleges that various aspects of both the collection and laboratory procedure were questionable. (See Tr. at 12). To this end, Respondent elicited testimony tending to show that the collector of the May 13, 2009 did not wear gloves, appeared very young, was not wearing a uniform, and never produced identification (Tr. at 212, 223, 353, 355-356). Further,

³ In his Proposed Findings of Fact and Conclusions of Law, Respondent asserts that the Coast Guard failed to prove that the urine analysis was “lawfully obtained.” To this end, Respondent proffers that the Coast Guard’s witnesses lacked personal knowledge regarding testing procedures and chain of custody. Because I have found that the Coast Guard has made a prima facie case, I need not address the individual witnesses’ inability to verify whether

Respondent was not instructed to wash his hands, the collector did not wash his hands or wear gloves, and the bathroom area had not been properly secured (Tr. at 356-357).⁴

The drug testing regulations found at 49 C.F.R. Part 40 contain several mandatory provisions regarding the collection process, including 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. However, just because errors are not “fatal” flaws 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 test results can be deemed reliable.

The regulations also 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. 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).

guidelines were followed. However, I will address all of Respondent’s specific allegations of error with regards to the collection and testing procedures.

⁴ Respondent also alleged in his Answer that the collector did not certify that the primary specimen bottle seal was intact. However, at the hearing, Respondent testified that he was present while the seal was placed on the sample. (Tr. at 397).

Along these same lines, Coast Guard case law has held 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).

In the instant case, the collector's age and failure to wear a uniform have no bearing on the integrity of the sample or the accuracy of the urine test. Mr. Fullilove testified that the collector, Max Cheramie, was qualified to collect the sample, and the Coast Guard has provided documentation showing Mr. Cheramie's qualifications. (Tr. at 73-74, 83, CG Ex. 14). Mr. Fullilove also testified that he was satisfied with Mr. Cheramie's work performance, and that Mr. Cheramie made no major errors while employed by Complete Occupational Health Services. (Tr. at 73-74, 91).

The collector's failure to show identification similarly has no bearing on the fairness or accuracy of the test. The testimony at the hearing and the sample collection forms clearly indicate that Max Cheramie collected Respondent's May 13, 2009 specimen. (Tr. at 77-79, CG Ex. 13). Further, at the hearing, Respondent acknowledged that anyone boarding the vessel would have been required to show identification, and that Respondent did not believe anyone could have "snuck on" the vessel to perform the collection. (Tr. at 379). Respondent's counsel also acknowledged that Respondent never requested to see the collector's identification. (Tr. at 418-419).

Respondent's allegation that neither he nor the collector washed their hands prior to the collection of the sample is also not a fatal flaw. Respondent failed to introduce evidence tending to show how unwashed hands on part of either party could have resulted in metabolized marijuana in Respondent's urine. Further, Coast Guard case law has specifically addressed this

oversight, holding that this omission amounts to a minor technical violation of drug testing procedures. See Appeal Decision 2522 (JENKINS) (1991) (“[T]he handwashing requirement was promulgated primarily, not to protect the individual, but as an additional precaution to ensure that the urine sample is not surreptitiously adulterated by the individual providing the sample.”)

Thus, Respondent’s allegations that the collector did not wear gloves or properly secure the bathroom area are also not fatal. A collector wears gloves for his/her own safety. Respondent has failed to demonstrate how the absence of gloves could result in a false positive. Further, the failure to secure a bathroom area would not create a false positive; indeed, it is designed to prevent someone from fraudulently producing a negative result. Notably, a collector’s failure to add bluing agent to the toilet bowl is specifically listed in the regulations as an example of a non-fatal error. 49 C.F.R. 40.209(b)(2).⁵

ii. Form Errors

Respondent asserts that the urine collection form fails to indicate the collection time, and that the collector modified the form by to indicate the sample was collected for Oceaneering. (CG Ex. 13, Tr. at 79, 82).

The absence of the collection time is not an enumerated fatal flaw. Indeed, the commentary to 49 C.F.R. § 40.209 specifically notes that minor paperwork errors are insufficient to invalidate a urine test, particularly in light of the safety-sensitive functions in which mariners engage. See 65 FR 79462, 79503 (December 19, 2000). Further, Mr. Fullilove testified that the form was altered only because DISA did not have any blank forms, and Oceaneering was not a regular customer. (Tr. at 82). There is no indication in the record of any nefarious intent on part

⁵ Respondent also alleged in his Answer that the collector did not identify the testing methodology, provide Respondent with the sampling protocol in use, provide certification that specific testing protocol was followed, provided a chain of custody report, or a contemporaneous report of the laboratory analysis of the May 13, 2009 sample. After review of the hearing testimony and the exhibits submitted into evidence, I find that the Coast Guard has provided all of this information.

of the collector in altering the form; on the contrary, it appears Mr. Cheramie altered the form to more readily identify the sample.

iii. Respondent's Medications

While Respondent credibly alleges that the collector did not inquire as to whether Respondent was taking any medications, this is also not a fatal flaw. The regulations do not require the collector to gather this information, and actually caution against having an employee list medications he/she is taking on the CCF. 49 C.F.R. § 40.63(g). Instead, this is a job of the MRO. In this case, Dr. Sachs testified that when he informs people of positive test results, he inquires as to whether there is any medical reason for the results, including certain medications. (Tr. at 211). In response to Dr. Sachs' questions, Respondent stated only that the collector had not worn gloves. (Tr. at 212).

At the hearing, Respondent testified that he was taking only Ibuprofen, Pflex, and Mdraw at the time the sample was provided. (Tr. at 357-359). While Respondent introduced evidence tending to show that Ibuprofen can produce false positives for marijuana (See Tr. at 372-373, Resp. Ex. HHH), Dr. Elshly credibly testified that the GC/MS test is specific enough to avoid any false positives, and that the only drug that could produce a positive test result other than marijuana is Marinol. (Tr. at 199-200). Respondent never indicated that he took Marinol.

iv. Retaliatory Motive

Respondent also alleges that he was singled out for disparate treatment. (See Tr. at 14). Respondent states in his Answer that this disparate treatment was due to Respondent's refusal to "volunteer" to work in a shipyard, Respondent's declining certain overtime assignments, and because Respondent's brother quit in the spring of 2009 and sought unemployment benefits. At the hearing, Respondent testified that he thought certain people in the company were "gunning for [him]" because he had complained about the company's failure to repair and perform maintenance work on an engine. (Tr. at 369). Respondent also introduced evidence that other

Oceanering employees, namely, Artie Scoggins and a galley hand named Gordon, were accused of drug use under dubious circumstances, and that, in December 2005, Respondent was told his urine had tested dilute negative, only to be later told the test was negative. (Tr. at 241-244, 353).

Whether other Oceanering employees were treated unfairly is beyond the scope of this hearing. Respondent's urine tests do not appear dubious, and, notably, the regulations specifically list "[c]laims that an employee was improperly selected for testing" as a non-fatal flaw. 49 C.F.R. 40.209(b)(10). Additionally, the evidence shows that Respondent was randomly selected for a urine screening by a third party, not his employer. (See CG Ex. 5, Tr. at 26, 54.) Last, although Respondent testified that he thought certain people were "gunning for [him]," he also testified that he believed the reason behind his firing was his urine test. (Tr. at 367, 369).

v. No Propensity for Drug Use

Respondent further alleges that he has not shown any propensity for drug use. (See Tr. at 13.) Namely, Respondent has a long employment history and has been subject to many random drug tests, all of which have been negative. (See Tr. at 13, 333-334). Many of Respondent's coworkers testified that he is an honest and trustworthy person. (Tr. at 236-238, 254-255, 285-286, 304-305). He is married with two step-daughters, has received many commendations and awards, and has passed a background check to become a licensed armed guard. (Tr. at 322-323, 328, 340-341).

While this evidence shows that Respondent is a skilled mariner, it does not sufficiently rebut any of the elements of the prima facie case, indicate an alternative medical explanation for his positive test result, or indicate that Respondent's use was not wrongful or not knowing. See Appeal Decision 2560 (CLIFTON) (1995). While this evidence is probative as to the fact that Respondent is likely not a habitual drug user or drug addict, the Coast Guard did not need to prove that Respondent was a habitual user, only that Respondent was a user of a dangerous drug.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner License 1510172 and Merchant Mariner Document 191373. (CG Ex. 1, CG Ex. 2, See Tr. at 16-17).
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. 551-59.
3. Respondent provided a dilute negative sample on May 5, 2009.
4. Respondent underwent a subsequent May 13, 2009 urinalysis which followed the guidelines set for drug testing by the Department of Transportation in 49 C.F.R. Part 40 and 46 C.F.R. 5.35.
5. Respondent's May 13, 2009 drug test was positive for marijuana metabolites.
6. The positive drug test creates a presumption that Respondent is a drug user pursuant to 46 C.F.R. 16.21(b).
7. Respondent has failed to rebut the presumption that he is a user of dangerous drugs.
8. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.
9. Respondent's use of drugs violates the provisions of 46 U.S.C. 7704(c) which requires that his merchant mariner's license and document be revoked.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 49 C.F.R. 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174.

When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless cure is proven. See 46 U.S.C. 7704(c); 46 C.F.R. 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of cure or substantial involvement in the cure process, an ALJ must revoke a

respondent's license and document under 46 U.S.C. 7704(c). See also Appeal Decision 2634 (BARRETTA) (2002), Appeal Decision 2583 (WRIGHT) (1997).

In Exhibit A of his Proposed Findings of Fact and Conclusions of Law, Respondent included documentation tending to show he completed a ten hour Alcohol and Drug Abuse Course and was ordered to be tested at random intervals for drugs and alcohol. Notably, these documents were not offered or admitted into the record at the hearing. Furthermore, "Cure" has been defined as a two-step process in which the mariner must: (1) successfully complete a bona fide drug abuse rehabilitation program, and (2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program. See 46 U.S.C. 7704(c); 46 C.F.R. 5.569; Appeal Decision 2535 (SWEENEY) (1992). Coast Guard regulations also require an MRO to verify that a mariner is drug free and that the risk of subsequent drug use of dangerous drugs is sufficiently low to justify the mariner's return to work aboard a vessel. 46 C.F.R. 16.201(f). Furthermore, a mariner is not allowed to work under the authority of a mariner's credentials prior to completion of cure; the Coast Guard retains possession of the document(s) during the cure process. Appeal Decision 2638 (PASQUARELLA) (2003).

In the instant case, the Coast Guard proved and the undersigned found that Respondent used the dangerous drug. Therefore, I am precluded from issuing an order less than **REVOCATION.**

Based on my review of the entire record, including the testimony and exhibits contained herein, I note that Respondent appears to be a highly skilled mariner. Nevertheless, because I am bound by the regulations and case law precedent cited herein I am without discretion in the matter.

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License Number 1510172, Merchant Mariner's Document Number 191373, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Gus William Taliaferro are **REVOKED**.

Respondent is hereby directed to immediately surrender his Merchant Mariner's License and Merchant Mariner's Document to: USCG Sector Lower Mississippi, 2 A.W. Willis Avenue, Memphis, Tennessee 38105.

Pursuant to 33 C.F.R. 20.904(f), three years or less after a suspension and revocation proceeding has resulted in revocation of a license, certificate, or document, Respondent may file a motion to re-open the proceedings and modify the order of revocation. Respondent must state why the basis for the order of revocation is no longer valid. Successful completion of the cure process could illustrate Respondent is no longer a user of drugs or a threat to safety at sea. Therefore, Respondent has up to three years to illustrate he is no longer a user of drugs and move to re-open his case, at which point, the undersigned will consider any new evidence.

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

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date:

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD WITNESSES

1. Pamela Culliver, Human Resources Employee at Oceaneering International, Inc.
2. Joey Fullilove, Owner of Complete Occupational Health Services
3. Barbara Rowland, Director of Laboratory Operation at Quest Diagnostics
4. Mahmoud Elsohly, Ph.D., Laboratory Director and President of Elsohly Labs
5. Barry Sachs, D.O., Medical Review Officer

RESPONDENT'S WITNESSES

1. George Wainwright
2. Jim Cook
3. James Brazier, Jr.
4. William Mansfield
5. Gus Taliaferro
6. Aubrey Faye Taliaferro

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- | | |
|-----------|--|
| CG Ex. 1 | Taliaferro Merchant Mariner License #1510172 |
| CG Ex. 2 | Taliaferro Merchant Mariner Document # 191373 |
| CG Ex. 3 | Oceaneering's Company Policy of Alcohol and Drug Abuse |
| CG Ex. 4 | Acknowledgement of Company Policy |
| CG Ex. 5 | DISA Random Selection Procedure and Probabilities |
| CG Ex. 6 | Personnel Selected for May 5, 2009 Screening |
| CG Ex. 7 | NOT OFFERED AT THE HEARING |
| CG Ex. 8 | NOT OFFERED AT THE HEARING |
| CG Ex. 9 | NOT OFFERED AT THE HEARING |
| CG Ex. 10 | NOT OFFERED AT THE HEARING |
| CG Ex. 11 | E-mail Notification of Dilute Negative |
| CG Ex. 12 | Test Result Certificate |
| CG Ex. 13 | Federal Custody and Control Form |
| CG Ex. 14 | Certifications of Max Cheramie |
| CG Ex. 15 | NOT OFFERED AT THE HEARING |
| CG Ex. 16 | MRO Report |
| CG Ex. 17 | Request to Test Split Specimen |
| CG Ex. 18 | Federal Custody and Control Form |
| CG Ex. 19 | Federal Custody and Control Form |
| CG Ex. 20 | Quest Litigation Package |
| CG Ex. 21 | Oceaneering Policy Update 2007 |
| CG Ex. 22 | MRO Drug Test Results |

RESPONDENT'S EXHIBITS

- Resp. Ex. A Curriculum Vitae
- Resp. Ex. B U.S. Merchant Mariner License
- Resp. Ex. C U.S. Merchant Mariner Document
- Resp. Ex. D Certificate Endorsement
- Resp. Ex. E TWIC Card
- Resp. Ex. F College Transcripts
- Resp. Ex. G Student Record
- Resp. Ex. H 10-Year Service Award
- Resp. Ex. I 6-21-07 Oceaneering Letter
- Resp. Ex. J R/V Fairfield Encounter Letter
- Resp. Ex. K 2-Year Service Award
- Resp. Ex. L 8-4-02 OSV Ocean Intervention II
- Resp. Ex. M 4-28-04 Chief Engineering Letter
- Resp. Ex. N Mansfield Letter
- Resp. Ex. O Armed Security Guard License
- Resp. Ex. P 11-26-09 Federal Custody and Control Form
- Resp. Ex. Q 5-13-09 Federal Custody and Control Form
- Resp. Ex. R 5-5-09 Federal Custody and Control Form
- Resp. Ex. S 9-22-09 Federal Custody and Control Form
- Resp. Ex. T 5-5-09 Alcohol Test Requisition Form
- Resp. Ex. U 1-20-09 Federal Custody and Control Form
- Resp. Ex. V 12-2-08 Federal Custody and Control Form
- Resp. Ex. W 5-21-08 Federal Custody and Control Form
- Resp. Ex. X 12-14-07 Federal Custody and Control Form
- Resp. Ex. Y 9-9-07 Breath Alcohol Testing Form
- Resp. Ex. Z 6-10-07 Breath Alcohol Testing Form
- Resp. Ex. AA 2-15-07 Breath Alcohol Testing Form
- Resp. Ex. BB 4-17-06 Breath Alcohol Testing Form
- Resp. Ex. CC 4-13-06 Breath Alcohol Testing Form
- Resp. Ex. DD 6-3-06 Federal Custody and Control Form
- Resp. Ex. EE 6-1-05 Federal Custody and Control Form
- Resp. Ex. FF 12-14-04 Federal Custody and Control Form
- Resp. Ex. GG 4-19-03 Non-Federal Custody and Control Form
- Resp. Ex. HH 5-1-02 Federal Custody and Control Form
- Resp. Ex. II 12-14-02 Breath Alcohol Testing Form
- Resp. Ex. JJ 12-20-02 Federal Custody and Control Form
- Resp. Ex. KK 10-8-01 Federal Custody and Control Form
- Resp. Ex. LL 5-9-00 Breath Alcohol Testing Form
- Resp. Ex. MM 5-20-99 Federal Custody and Control Form
- Resp. Ex. NN 10-28-99 Federal Custody and Control Form
- Resp. Ex. OO 10-29-98 Non-DOT Chain of Custody Form
- Resp. Ex. PP 10-15-98 Federal Custody and Control Form
- Resp. Ex. QQ 10-29-98 Federal Custody and Control Form
- Resp. Ex. RR 12-31-97 Federal Custody and Control Form

Resp. Ex. SS 1-7-00 Fitness for Duty Form
Resp. Ex. TT 12-30-08 Performance Evaluation
Resp. Ex. UU 6-30-08 Performance Evaluation
Resp. Ex. VV 12-31-07 Performance Evaluation
Resp. Ex. WW 6-30-07 Performance Evaluation
Resp. Ex. XX 12-11-04 Performance Evaluation
Resp. Ex. YY 10-26-04 Performance Evaluation
Resp. Ex. ZZ NOT OFFERED AT THE HEARING
Resp. Ex. AAA Blank Federal Custody and Control Form
Resp. Ex. BBB Carey Letter
Resp. Ex. CCC NOT OFFERED AT THE HEARING
Resp. Ex. DDD Grehan Letter
Resp. Ex. EEE Godfrey Letter
Resp. Ex. FFF Wainwright Letter
Resp. Ex. GGG DOT Drug and Alcohol Policy
Resp. Ex. HHH Internet Articles

ATTACHMENT B

PARTIES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coast Guard's Proposed Findings of Fact

1. On May 13, 2009, Mr. Gus William Taliaferro, hereinafter "Respondent" was the holder of a current U.S. Coast Guard License with a Serial Number of 1510172, issued on June 6, 2008, to expire on June 6, 2013. (CG Exhibit 1). **ACCEPTED, see Decision and Order.**
2. On May 13, 2009, the Respondent was the holder of a current U.S. Coast Guard Merchant Marine Document number 191373 issued on June 6, 2008, to expire on June 6, 2013. (CG Exhibit 2). **ACCEPTED, see Decision and Order.**
3. On October 1, 2002, Oceaneering instituted a "Company Policy on Alcohol and Drug Abuse" which was acknowledged by signature of the Respondent on April 25, 2006. (CG Exhibits 3 & 4). **ACCEPTED AND INCORPORATED.**
4. In 2007, Oceaneering updated their Corporate Policy on Dilute Specimens. (CG Exhibit 21). **ACCEPTED.**
5. On May 12, 2009, Oceaneering sent correspondence to Complete Occupational Health Services requesting they administer a DOT Drug Test in accordance with 49 CFR 40. (Testimonies of Ms. Pam Culliver and Mr. Joey Fullilove) and (CG Exhibit 23). **ACCEPTED AND INCORPORATED.**
6. On November 2, 2007, Mr. Max Cheramie, hereinafter "Collector" was certified and authorized to collect urine specimens for DOT drug testing as per 49 CFR 40.31 and employed by Complete Occupational Health Services. (Testimony of Mr. Joey Fullilove) and (CG Exhibit 14). **ACCEPTED.**
7. May 13, 2009, on board the *M/V Ocean Intervention I*, the Respondent was administered a DOT Drug test and provided a urine sample hereinafter "sample" to the Collector. Both the Respondent and Collector signed the Federal Custody and Control Form, hereinafter "FCCF", with a specimen ID # 5844217, (CG Exhibit 13). **ACCEPTED, see Decision and Order.**
8. The sample in custody by Complete Occupational Health Services was then transferred to Quest Diagnostics for analysis along with the FCCF. Quest Diagnostics received the sample on May 14, 2009. (CG Exhibits 15 & 20). **ACCEPTED AND INCORPORATED.**
9. May 15, 2009, the sample was determined to contain 74 NL/ML of the marijuana metabolites and the results were then sent to Dr. Sachs, the Medical Review Officer, hereinafter MRO along with the FCCF. (CG Exhibit 16). **ACCEPTED see Decision and Order.**

10. During the verification notification, the MRO notified the Respondent that his sample tested POSITIVE for marijuana metabolites, during said notification; the Respondent did not provide any legitimate medical explanation as to the results of his sample. To wit: the MRO determined the Respondent to have used marijuana metabolites. (CG Exhibit 16), (Testimonies of the MRO and the Respondent). **ACCEPTED, see Decision and Order.**
11. May 15, 2009, the MRO informed Oceaneering that the Respondent's sample was POSITIVE for marijuana metabolites. (CG Exhibit 22). **ACCEPTED, see Decision and Order.**
12. On May 26, 2009, a request from the MRO was sent to ElSohly Laboratories requesting a retest for THC (marijuana), and the split specimen was sent to said laboratory for analysis. (CG Exhibit 17) and (Testimony of MRO). **ACCEPTED, see Decision and Order.**
13. On May 29, 2009, the split specimen was reconfirmed for marijuana. (CG Exhibit 18) and (Testimonies of the MRO and Dr. ElSohly) **ACCEPTED, see Decision and Order.**
14. On June 6, 2009, the MRO affirmed the reconfirmation test of the split specimen. (CG Exhibit 19) **ACCEPTED, see Decision and Order.**

Respondent's Proposed Findings of Fact

1. The standard for any UA for Coast Guard purposes was set by the National Institute on Drug Abuse, Research Monograph number 93, "Urine Testing For Drugs of Abuse." The monograph provides in pertinent part:

"The urine test can be useful and reliable for determining drug use patterns only if it is performed and interpreted using appropriate procedures." (Page 24)

"The validity of the results of a urine test is dependent on the integrity of the specimen." (Page 25) (Emphasis added) **ACCEPTED.**
2. Coast Guard witness Dr. El Soholy recognized the preeminence of the NIDA standard in his testimony, to-wit:

"Q. And in my own words, the statement is that a urine test is useful and reliable only if it is performed using appropriate procedures. Would you agree or disagree with that?"

A. Absolutely.

Q. You would agree?

A. I agree, yes, sir.

Q. Okay. One other statement I was to ask you about, that the validity of a urine specimen depends on the integrity of the specimen?

A. I agree whole heartedly." (TR Page 191, Lines 5 to 15) **ACCEPTED.**
3. Coast Guard MRO Dr. Barry Sachs also agreed with the NIDA standard, to-wit:

“Q. Would you agree that a urine test is useful and reliable only if it is performed using appropriate procedures?”

A. Correct.

Q. And would you further agree that the validity of a urine test depends on the integrity of the specimen?

A. That is correct.” (TR. Page 226, Lines 10 to 18). **ACCEPTED.**

4. The Coast Guard offered testimony from Pamela Culliver. Ms. Culliver testified that she was “in charge of the Human Resources Management System, all the data entry for all the personnel, and I’m in charge of random drug screening.” (TR Page 20, Lines 16 to 18). (Emphasis added). Yet despite her title and having Coast Guard Exhibit #3 in front of her at the time of her testimony, the witness could not identify SAMHSA (Substance Abuse and Mental Health Services Administration). Nor could the witness identify SAMHSA (Substance Abuse and Mental Health Services Administration). Nor could the witness identify NIDA (National Institute for Drug Abuse), (TR Page 39, Lines 24-25, Page 40, Lines 1-3). Nor was the witness able to identify how Oceaneering carries out its responsibility to fulfill all requirements under SAMHSA and NIDA, to wit:

“Q. How do you, as the HR Administrator, then carry out Oceaneering’s responsibility to fulfill all the requirements if you don’t know what the SAMHSA requirements are?

A. I don’t know how to answer that. We are required to do random drug screens.

Q. And is there any kind of steps or procedures?

A. I don’t think.

Q. How about under the NIDA guidelines, how do you, as HR Administrator, carry out your responsibility to be sure that all NIDA guidelines are followed?

A. I don’t know.

Q. Do you know and can you tell Judge Metry this morning and swear that those guidelines were followed or not followed in the case with Mr. Taliaferro?

A. No, I can’t.” (TR Page 42, Lines 10-25, Page 43, Lines 1-3).

Under additional questions from Respondent’s counsel and from the Administrative Law Judge the witness’s position was clarified, to-wit:

“Q. Well, I’m confused then. You said a minute ago it is your job that the collectors- you have to be sure the collectors do a good job. Do you remember saying that?

A. Yes, I do.

Q. Okay. I’m just trying to find out what is your process to be sure the collectors are doing a good?

A. I guess I don’t have one.

Q. Okay.

Mr. Gamino: Thank you, Judge.

Administrative Law Judge: Let me just clarify that. What happens is- I think what Mr. Gamino was asking you is not necessarily your personal, you know, part of what your personal responsibility is, but what is the company, is there a company process, a company quality control process in place to ascertain whether or not the collectors are, ‘doing a good job?’

A. The Witness: No.” (TR Page 62, Lines 22-25, Page 63, Lines 1-13). **ACCEPTED AND INCORPORATED.**

5. This was the only Oceaneering witness called by the Coast Guard. And her testimony is clear she cannot prove that the UA was lawfully obtained from the Respondent on May 13, 2009, to-wit:

“Q. Isn’t it true, ma’am, you are assuming that the collection taken by Mr. Taliaferro was handled in a lawful manner?

A. Yes.

Q. And it was taken in a lawful manner?

A. Yes.

Q. You cannot assure this Judge that the collector on May 13 wore his uniform, can you?

A. No, I can’t.

Q. You don’t know if he carried any ID or not, do you?

A. No.

Q. You don’t know if he wore any gloves?

A. No.

Q. You don’t know if he washed his hands before he undertook the testing process?

A. No, I don’t.” (TR Page 35, Lines 5-21).

“Q. You don’t know, ma’am, even though you have been the head of HR for 16 years, in this particular case if the collector allowed Mr. Taliaferro to wash his hands before a collection was made, do you?

A. No, I don’t. (TR Page 37, Lines 3-7).

Q. Can you tell the Judge, is there any requirement that a collection site have a source of water for washing hands, or do you know?

A. I’m sorry, say that again?

Q. Do you know if there is a requirement that a collection site have a source of water for washing hands?

A. No, I don’t.

Q. Do you know if there is a requirement that the collector should wear gloves?

A. Do I know? No, I don’t know, but I do see the collectors wearing the gloves upon collection when they are at this facility, I do see that.

Q. Are you able to swear to the Judge that the collector was wearing gloves on May 13, 2009 when he took a sample from Mr. Taliaferro?

A. No, I’m not.

Q. You mentioned in direct testimony that the collected must fill out certain paperwork, did you not?

A. Yes.

Q. Do you know in this case that the paperwork was lawfully prepared by the collector or not?

A. No.

Q. Do you know in this case if the collector provided identification of Mr. Taliaferro?

A. No, I don’t.

Q. Is that a requirement or not, or do you know?

A. No, I don’t.

Q. Do you know if there is any requirement that the collector must inquire about medication taken by the employee?

A. No, I don’t.” (TR Page 43, Lines 4-25, Page 44, Lines 1-9).

“Q. Do you know, ma’am, moving on here, whether the collector allowed Mr. Taliaferro to wash and dry his hands before providing a sample?

A. I do not know.” (TR Page 45, Lines 13-16). **ACCEPTED IN PART, see Decision and Order.**

6. The Coast Guard next offered testimony of Joey Fullilove, owner of Complete Occupational Health Services, the company that provided the collector to obtain the sample from the Respondent on May 13, 2009. Yet this witness could not prove that the UA was lawfully obtained, to-wit:

“Q. Can you tell the Judge any of the actual acts that Max Cheramie did on May 13, 2009 in taking, collecting the sample?

A. Meaning do I know exactly what he did?

Q. Yes, sir.

A. No.

Q. All you have- all you have is the form in front of you, do you not?

A. Right, I have the form in front of me.

Q. And whether Mr. Cheramie wore a uniform or carried an ID or showed an ID or anything else, you don’t have any knowledge, do you?

A. If Mr. Cheramie had an ID on him? I would hope he did.

Q. I know.

A. He’s supposed to follow that.

Q. I know what he’s supposed to do, Mr. Fullilove. My only question is-

A. I can’t say 100% one way or the other if he did or didn’t, no, I can’t.” (TR Page 83, Lines 20-25, Page 84, Lines 1-14).

Further Mr. Fullilove testified that the collector made modification to the form, to-wit:

“Q. He modified that form?

A. Modified? Yes.

Q. One of the modifications was he left off the time, didn’t he?

A. I see that.

Q. Did you authorize him to leave off the time?

B. A. He probably just forgot to do it. No, I didn’t authorize that. He probably just forgot to put it in.” (TR Page 81, Lines 11-20). **ACCEPTED IN PART, see Decision and Order.**

7. Mr. Fullilove also testified that this May 13, 2009 collection from Mr. Taliaferro was for a follow-up test but then he acknowledged there was nothing on the paperwork that identified it as a re-test or a confirmation, to-wit:

“Q. Mr. Fullilove, did you testify just a second ago that if you were doing a follow up test it must be observed?

A. Yes.

Q. Did anything in that email from Deborah Stevenson tell you that this was a follow up test to a dilute negative?

A. I don’t have that anywhere. A follow up is not- I don’t have that anywhere. I have it marked as random, and I don’t remember if she told me that or not.

Q. Is there any of your paperwork that shows this gentleman was tested previously on or around May 5th?

A. No. I wouldn't have done it, but somebody else might. But I don't think we did it.

Q. And is there anything in your paperwork that says this is a re-test or confirmation?

A. Let me look. I don't see any of that, no. No, sir. (TR Page 94, Lines 4-20).

ACCEPTED, see Decision and Order.

8. The Coast Guard presented testimony from Barbara Rowland, Director of Laboratory Operation, Quest Diagnostics in Lenexa, Kansas. Ms. Rowland was candid in that she could not prove the UA was lawfully obtained, to-wit:

“Q. In this particular case, Ms. Rowland, you don't have any knowledge of how this sample was collected on May 13, 2009, do you?”

A. I could not testify or have knowledge of how the specimen was collected, that's correct.

Q. And to save time, if I asked if the collector had a uniform or he wore gloves or he washed his hands or a whole number of things there, you wouldn't have any knowledge on any of those, would you?

A. No, sir, I would not.” (TR Page 113, Lines 12-21).

“Q. Ma'am, in preparing for this case, have you have a chance to ever interview the person who actually took the collection on May 13, 2009? His name is Max Cheramie.

A. No, I would not have done that.

Q. I know you wouldn't do it originally when the material came in. Have you done it since then?

A. No, I have not.

Q. And do you have anything to offer as to his acts of taking that sample?

C. A. I cannot testify to anything about the collection.” (TR Page 125, Line 25, Page 126, Lines 1-10). **ACCEPTED IN PART, see Decision and Order.**

9. Dr. El Sohly was equally candid as the other Coast Guard witnesses that he had absolutely no knowledge of the sample collection techniques on May 13, 2009 from this Respondent, to-wit:

“Q. Do you have any knowledge of the acts undertaken by the specimen collector on May 13, 2009, when he took this sample?”

A. No, I don't.

Q. Can you say the sample taken on May 13th was lawfully obtained in conformance with 49 CFR Part 40?

A. No, I cannot-

Q. Okay.

A. Testify to anything regarding the collection of the specimen.

Q. Okay. And that will eliminate a lot of my other questions if you cannot speak to the collection. And that is correct, is it not?

A. Yes, I can't speak for the collection.” (TR Page 185, Lines 6-20). **ACCEPTED IN PART, see Decision and Order.**

10. Coast Guard MRO Dr. Barry Sachs also readily acknowledged he had no evidence about the actual collection procedures of May 13, 2009 used with the Respondent, to-wit:

“Q. Mr. Taliaferro, according to your notes, denied any use of marijuana or anything else, didn’t he?”

A. Correct.” (TR Page 223, Lines 4-7).

“Q. Okay, Mr. Taliaferro- you testified earlier Mr. Taliaferro did say the collector did not wear gloves. Do you remember saying that?”

A. That is correct. It’s in my notes.

Q. And Mr. Taliaferro brought that to your attention in that phone call did he not?

A. Yes, he did.

Q. When you received that information from Mr. Taliaferro, how did you follow that up?

A. It’s not the MRO’s purview to follow up on any problems that occur at the collection site.

Q. Whose purview is it?

A. It’s up to the collection site to find out if there’s any problems there.

Q. It’s up to the individual?

A. Yes, sir.

Q. Okay. But it’s not your task?

A. No, sir.

Q. Okay. You said that, according to your notes, Mr. Taliaferro said the collector did not wear gloves and Mr. Taliaferro denied use of marijuana?

A. Correct.” (TR Page 223, Lines 17-25, Page 224, Lines 1-9).

“Q. Did you ascertain in this case if the collector followed all of those steps?”

A. I did not follow the collection steps. So I don’t know that.” (TR Page 226, Lines 6-9). **ACCEPTED IN PART, see Decision and Order.**

11. No Coast Guard witness could testify as to how the UA was lawfully obtained from Mr. Taliaferro. None of the above witnesses were present on May 13, 2009. Indeed, none of the above witnesses had investigated any actions of Max Cheramie in collecting the sample from Mr. Taliaferro. The above witnesses all were unable to provide the Court with any testimony to prove that the UA was lawfully obtained from Mr. Taliaferro. **DENIED.**
12. The two physicians produced by the Coast Guard, Dr. El Sohly and Dr. Sachs, specifically agreed with the findings of the National Institute on Drug Abuse set forth above concerning specimen collection and handling. They agreed that it was utterly essential that any UA specimen be collected using appropriate procedures and that the validity of the results of the UA depends entirely on the integrity of the specimen. Yet the Coast Guard failed to provide any proof in regard to actions that occurred with Mr. Taliaferro. The Coast Guard failed to meet its burden of proof that the UA was lawfully obtained. **ACCEPTED IN PART, REJECTED IN PART.** Dr. Elsohly and Dr. Sachs agreed with the findings of NIDA; however, the Coast Guard met its burden of proof in showing both the integrity of the sample, and that the sample was lawfully obtained.
13. The burden of proof in this case is on the Coast Guard. The Coast Guard has the burden to prove their allegation that Mr. Taliaferro either used or is addicted to the use of dangerous drugs. They must prove every element of that proposition by a preponderance of the evidence. **ACCEPTED.**

14. Yet the Coast Guard failed to prove the key, threshold step. The Coast Guard offered no evidence from any source or any witness to prove the UA was lawfully obtained. Clearly, a tainted UA will not yield a reliable result. And a tainted UA will not show up on any laboratory analysis to show how it was tainted, unless seals are visibly broken or bottles are broken when they arrive at the designated laboratory. **DENIED.**
15. Because the Coast Guard did not meet its burden of proof that the UA was lawfully obtained, any downstream evidence from laboratories cannot stand if that critical threshold step is not met. Thus, the Coast Guard's glaring lack of proof is fatal. **DENIED.**
16. The lack of evidence set forth above was the basis of Respondent legal counsel entering Motion for Directed Verdict at the close of the Coast Guard evidence (TR Page 230). The Court denied the motion because at the conclusion of the Coast Guard evidence the Court properly viewed the evidence in the list most favorable to the Coast Guard. Now, at the conclusion of the trial, the Court can rule based on the Coast Guard burden of proof. **REJECTED, this is not a Finding of Fact.**
17. Uncontroverted testimony from the Respondent was specific as to the collection procedure used on May 13, 2010. Mr. Taliaferro's testimony was specific on several points, to-wit:
- “Q. So anyway, you were rousted out. What happened next?
A. I- the collector, he was- he looked, I mean, real young, no uniform. He was telling me about an incident that the company had where they had an employee that was on camera smoking crack out in the parking lot before she was going in to take samples. And that particular company I guess, Quest, was never allowed back on their premises again.
Q. That was offered up by the collector?
A. Yeah.” (TR Page 353, Lines 24-25, Page 354, Lines 1-7).
- “Q. Had you ever seen him before in giving samples that you've talked about?
A. No.
Q. So anybody- and he had a uniform?
A. No.
Q. No uniform?
A. No uniform.
Q. Insignia on a T-shirt?
A. No.
Q. Hat?
A. He was in civilian clothes.
Q. Did he have his ID in his pocket or around his neck?
A. No.
Q. ...with a clip? Did you ask him about it?
A. No.
Q. Did you ever see an ID?
A. No I didn't.
Q. There wasn't one visible to you.

A. No.” (TR Page 355, Lines 7-25, Page 356, Line 1).

“Q. Did he say wash your hands before we begin the process?

A. No.

Q. Did you have any opportunity to wash your hands before you began?

A. No.

Q. Did you see the collector wash his hands?

A. No.

Q. Did the collector wear any gloves?

A. No.

Q. You have been sampled before, have you not? And the records are in here.

A. Yes.

Q. Is there a bathroom in the area where you were there by the chart table?

A. Yes.

Q. Could you tell, had the bathroom premises been secured?

A. No.

Q. What normally do they do to secure the bathroom?

A. They- they tape off the sink, and they put some kind of dye in the toilet.

Q. Had any of that been done in this instance?

A. No.

Q. And in light of his request, did you go ahead and provide a sample?

A. Yes.

Q. Did he make any inquiry about any medications that you were on at the time?

A. No.

Q. Were you taking any medications prescribed or over the counter?

A. I was taking Ibuprofen. I usually take that. And I was taking-

Q. For the record let me stop you there. What kind of drug is that?

A. It's just over the counter.

Q. Okay. For what purpose?

A. For muscle aches.

Q. Okay. Pain medication?

A. Yeah.

Q. Okay.

A. Headache.

Q. Okay. So you had taken some of that?

A. Yes. I take it all the time.

Q. And were you ready to tell him that if somebody asked?

A. Yes.

Q. Besides Ibuprofen, did you have anything else that you had taken?

A. I was taking a couple of muscle supplements. Muscle supplements I've never taken before called Bflex and Mdraw. (TR Page 356, Lines 11-25, Page 357, Lines 1-25, Page 358, Lines 1-14).

“Q. Did he ever ask you if were taking any medication?

A. No.

Q. Do you ever write down on the back of the form anything about medication?

A. No.

Q. Now, were you cooperative with him?

A. Yes.

Q. Did you follow all his directions?

A. Yes.” (TR Page 359, Lines 10-19). **ACCEPTED, see Decision and Order.**

18. All of Mr. Taliaferro’s testimony of actual occurrences on May 13, 2009 was uncontroverted. It is the only testimony in the record in that regard from either party. The Coast Guard did not challenge or controvert any of Mr. Taliaferro’s evidence which shows the UA was not lawfully obtained. **DENIED.**

19. Additional evidence in the record from Mr. Taliaferro was his direct and emphatic denial of drug use. His denial was specific. It was not controverted by the Coast Guard, to-wit:

“Q. I’m just going to ask you straight off, the start with, May 13, 2009 were you using or had you used marijuana or any illegal substance?

A. No sir.

Q. Anytime leading up to that had you used that while you were out on the voyage?

A. No sir.

Q. Are you a drug user?

A. No.

Q. Are you a regular user of marijuana?

A. No.

Q. Do you socialize with those kinds of people?

A. No.

Q. Is that a part of your lifestyle?

A. No.

Q. And in your- do you have an opinion whether the test, May 13th, was accurate or not?

A. Not accurate.

Q. Okay. Because you know what you did?

A. Yes.

Q. And you know you didn’t use drugs?

A. Yes.

Q. You didn’t use marijuana?

A. Yes.” (TR, Page 317, Lines 3-25, Page 318, Line 1). **DENIED.**

20. Mr. Taliaferro’s utter denial of use or abuse of controlled drugs stands uncontroverted in the record. **DENIED.**

21. Respondent proffered several exhibits that were admitted into evidence to support a drug free lifestyle and work performance. Exhibits A, B, C, D, E, F, and G were all admitted into evidence without objection. All are utterly inconsistent with a person using or addicted to DCS as charged herein. **DENIED IN PART, see Decision and Order.**

22. In addition, his work performance was formally evaluated by a series of different supervisors. All of those positive evaluations were introduced into the record and admitted, Exhibits TT, UU, VV, WW, XX, and YY. **ACCEPTED AND INCORPORATED.**

23. In addition, Mr. Taliaferro had submitted to numerous UA’s before the test of May 13, 2009. Evidence was introduced of those UA’s along with Mr. Taliaferro’s testimony that

they all ended up negative. See Exhibits P-SS inclusive covering years 1997 to 2009, as admitted by the Court. **ACCEPTED.**

24. In addition, Mr. Taliaferro introduced letters from previous supervisors that were all complimentary of his work performance, his punctuality and his attendance and performance (Exhibits J, L, M, N, BBB, DDD, EEE, FFF). The transactions and incidents and recommendations contained in those exhibits are totally contrary to anybody who was using or addicted to controlled dangerous substances. **DENIED IN PART, see Decision and Order.**
25. Further evidence of Mr. Taliaferro's sobriety and drug free work performance was his emergency actions in 2007 to contain a fire in the immediate area of the engine and the intake turbo. Because of his response to that emergency Mr. Taliaferro presented Exhibit I signed by the president and chief executive officer of Oceaneering International, Inc. and by five other high ranking executives (Exhibit I). The original letter was framed by Oceaneering and publically presented to Mr. Taliaferro in front of everybody on board the vessel at that time and was demonstrated in Court. (TR Page 346-348). **DENIED IN PART, see Decision and Order.**
26. Clearly, Mr. Taliaferro could not maintain a strong work record with high personal evaluations, pass a number of UA's from 1997 to 2009, obtain numerous letters of reference and accommodations, and obtain a certificate for his bravery at sea in fighting the engine room emergency is he were using or addicted to habit forming drugs as alleged. **DENIED IN PART, see Decision and Order.**
27. Mr. Taliaferro produced four different witnesses who were prior supervisors and shipmates who could testify as to Mr. Taliaferro's day-to-day work performance. They were all very complimentary. Nothing was offered by the Coast Guard to attack any of the conclusions offered by Mr. Taliaferro's supporting workplace witnesses. The witnesses' sworn testimony is summarized below. **ACCEPTED IN PART, see Decision and Order.**
28. George Wainwright is the present Operations Manager at Gulf Mark America and had a long-time professional acquaintanceship with Mr. Taliaferro. Mr. Wainwright was specific about Mr. Taliaferro's positive and highly professional work performance.
"Q. And over what period of time did he go from a young engineer to the chief engineer position?
A. Probably about a three-year slot, I think. Maybe about 3 or 4 years. But he moved right along quickly. Gus is a good, hard-working, sharp, young man.
Q. And in your professional duties on that vessel did you from time to time professionally interact with Mr. Taliaferro?
A. Yes, sir, everyday.
Q. Okay. Can you advise the Court, from your everyday interaction with him, what was his general work performance?
A. Gus has always been very professional. He's a very meticulous, hard-working young gentleman.
Q. Is he dependable?
A. Absolutely.
Q. Is he punctual?

A. Absolutely.

Q. Did you find him to be honest?

A. Yes.

Q. Was there any time where you found him to be the contrary, or dishonest?

A. No, sir, not at any time.

Q. Do you have any recollection of his added aptitude or ability to showing leadership on the ship?

A. Gus has always taken charge. He's always, like I say, taking charge. He's always stepped right up and taken whatever task was assigned and looked for things to-to better the ship's operation.

And since he has come to work with Gulf Mark, Gus has really done an outstanding job. He's been a real asset to train. He runs a very professional engine room. I've have nothing but great reports on him." (TR Page 236, Lines 10-25, Page 237, Lines 1-18).

"Q. And have you ever had any doubt to any question about his word or his truthfulness?

A. Not at all, absolutely none." (TR Page 238, Lines 23-25). **ACCEPTED.**

29. Mr. Cook testified he was retired from the US Coast Guard in 2005 and had been a merchant mariner since September, 2007 with Oceaneering. (TR, Page 253). Mr. Cook was specific about Mr. Taliaferro's positive work performance, to-wit:

"Q. During that time did you have regular interaction with Mr. Taliaferro?

A. Every day we worked- I was on a 28-14 rotation. And during that time, I would say, for at least three quarters of it Mr. Taliaferro and I were both on the same rotation.

And I see him every single day, report to him and give him status updates of my work. And he would also direct me for anything he needed electrical wise or engineering wise. So I saw Mr. Taliaferro on a daily basis while we were on the boat.

Q. During that time, could you advise the Judge, did you find him to be punctual?

A. Gus is an extremely conscientious supervisor and chief engineer. I will gladly work with him again. Very thorough and straight forward. He's very fair. He has a good head on his shoulders. I felt very comfortable in any crisis, whether it be fires or any mechanical problems we may have, in the interim and on the boat. A wonderful supervisor. Good people person also.

People are different. He would joke around with you. But when it was time to get the job done, he made you feel comfortable to get the job done. And I will gladly work with Gus again.

Q. Did you find him to be honest and truthful?

A. Extremely. Extremely. Very loyal and truthful.

Q. And did you find him to be professional in his duties?

A. Extremely. Whether he was speaking to the captains or whether he was speaking to the master or a brand new oiler, he would give each and all their due respect. And I respected him for that. I had no issues whatsoever with Gus as the chief engineer at all." (TR Page 254, Lines 22-25, Page 255, Lines 1-25, Page 256, Lines 1-5). **ACCEPTED.**

30. Mr. Brazier testified that he was on the sixth issue of his Coast Guard license and had worked on many different vessels and in different work stations (TR Page 284). Mr. Brazier's testimony about Mr. Taliaferro was specific and entirely positive, to-wit:

"Q. And during those- the approximately year and a half to two year period, what was your amount of contact with Mr. Taliaferro?

A. Well, my contact with him was- of course, being on the vessel during those either 14 days or 28 day-periods as running opposite his shift, Gus would change watches with me in the morning. And then in the afternoon we would pass watch over, any problems I assisted him during repairs. And I worked with Gus in that capacity. So our shifts were 12 hours. Of course, we met during our lunch breaks or suppers.

Q. How would you characterize his work performance, Mr. Brazier?

A. I would say excellent as chief engineer. He was conscientious of his job, conscientious of other responsibilities, and he carried it out quite well. As a chief engineer, he was doing quite well, in my opinion.

Q. Did you find him to be punctual?

A. Yes, sir, he was punctual. In fact, I was never relieved late on watch. And he did quite- that's usually a big item. After spending 12 hours you're waiting for relief to show up. So, yes, he was punctual.

Q. Did you find him generally dependable?

A. Yes, sire, I did.

Q. And what did you find was his reputation for truth and veracity?

A. An honest man of good character is what I found him to be. That goes without saying. He's never lied to me. I didn't- none of us- well, I personally don't get involved in the semantics of different people on the crew or this and that, you know, but how the talk goes aboard some of those vessels, but Gus handled it as a professional and handled the crew or his oiler or a QMed that was on his shift, one with me and one on his shift. He handled them all in a professional manner. So I'd say his character would be great. (TR Page 286, Lines 23-25, Page 287, Lines 1-25, Page 288, Lines 1-10). **ACCEPTED.**

31. Mr. Mansfield testified that he was a chief engineer employed by Oceaneering during the time in question. Mr. Mansfield testified as to his personal interaction with Mr.

Taliaferro, to-wit:

“Q. Do you have occasion during that time to watch his work performance?”

A. Yes sir.

Q. Can you advise the Judge what is your estimation of his work performance in the chief engineer position?

A. Very professional. I mean, very professional. Gus was the type of chief you were glad to work with because he treated you fair, but he wanted to get the job done right.

Q. Okay.

A. There wasn't no cutting corners.

Q. Okay. Did you find him to be punctual?

A. Yes, sir.

Q. Dependable?

A. Say it again?

Q. Dependable?

A. Yes sir.

Q. Did you find him to be honest or dishonest?

A. Oh, no, Gus was honest. He didn't pull no punches. He didn't hide nothing. And he didn't lie to you.

Q. Okay. And would you be willing to serve with him again?

A. Oh, yes, sir. It would be an honor to serve with him again.

Q. Did he previously ask you to write a letter on his behalf?

A. I had heard about the incident with the Coast Guard and wrote the letter, yes, sir. I volunteered to do it and told him if he needed, I would do it.” (TR Page 305, Lines 2-25, Page 306, Lines 1-7).

“Q. And in your estimation he was an honest and good person, and so you volunteered to write this letter?

A. Yes, sir. Gus is an excellent person. He’s knowledgeable. He does the job. He’s safety oriented. He’s for his crew and for the boat, but he always wants to make sure he sets a good example for everybody to follow.

Q. And your letter speaks to that, does it not?

A. I believe so, yes sir.” (TR Page 307, Lines 12-21). **ACCEPTED.**

32. Several of Respondent’s witnesses also identified improprieties in prior substance abuse collection and testing procedures. That testimony included the following, to-wit:
ACCEPTED.

32. Mr. Wainwright testified that two Oceaneering employees were tested and discharged, “under dubious circumstances,”

“Q. You used the phrase that it was under dubious circumstances. Did I hear you correct?

A. That is correct.

Q. What do you mean by that?

A. I’m trying to remember the whole story on Art Scoggins, on Artie, but I remember he- I believe he was- had some illness and was- had been prescribed medicines. And he notified them and told them. And they- when he failed the drug test, they neglected to take that into context and pretty much told him that that was- it wasn’t their problem.

Q. Did he make clear to them what medications he had taken?

A. Yes, he did. He filled out the paperwork on the drug form before he took the test and all. I remember a lot of that now.

Q. Okay.

A. But, as I say, that was- I think that was about the second time I saw that happen over there, that somebody was falsely claimed or accused of having an illegal substance.

Q. But right or wrong, he was put down as failing the drug test, was he not?

A. That’s correct. Yes, he was.

Q. And you were telling us about a galley hand. You remember that a minute ago?

A. Yes, sir.

Q. Do you remember his name?

A. Gordon- I’m trying to remember Gordon’s last name. But he was a nice fellow. He- Gordon was also terminated for the same reasons. And I wish I could think of Gordon’s last name, but I remember Gordon though.

Q. Were both of these done under the auspices of the company Oceaneering?

A. That’s correct.” (TR Page 242, Lines 7-25, Page 243, Lines 1-17). **ACCEPTED.**

34. William Mansfield also testified as to substance testing irregularities. His testimony concerned chief officer Captain Pat Walsh, to-wit:

“Q. Moving on, are you acquainted at that time with a chief officer Captain Pat Walsh?

A. Yes, sir, I am

Q. Do you know if a breathalyzer test was administered to him and/or around January 20, 2009?

A. Yes, sir, I do. He took it, what, four times, and couldn't pass it. They had to make a phone call to someone to get him and let him go on.

Q. Okay. Now, let me ask you first, were you there present to see any of this?

A. The first or second time I was present. I was in the wheel house trying to do my analysis and then blow for the breathalyzer.

Q. Okay.

A. And then, when I was in the wheel house, I saw what was going on up there.

Q. But what did you see in regards to Captain Walsh?

A. Pat was- he couldn't pass the breathalyzer test. He kept blaming it on the mouthwash, and said he'd washed his mouth out. But, you know, after an hour they did it again, and he still couldn't pass it. And finally, the captain on board had to make a phone call to somebody and- so they could get on with this. And they said let Pat go, just leave him alone, he's okay.

Q. Wait a minute, even though he did not pass the test?

A. That's Oceaneering policy. If they like you, if you're in the clique, you get away with it." (TR Page 308, Lines 1-25, Page 309, Lines 1-4). **ACCEPTED.**

35. Jim Cook also testified as to the collection irregularities on the test of May 5, 2009, to-wit:

"Q. And- and on that May 5th test, you testified earlier that you had concerns that the collector was not wearing gloves; is that correct?

A. That's correct.

Q. And if you had concerns, why would you continue on with the test?

A. Well, I didn't want to rock the boat, I guess. I didn't think anything was going to happen, but I was more vigilant on my sample at the time. I held my sample until it was sealed.

Q. Okay, sir. If the individuals- do you recall all the individuals that took the test on May 5th of 2009 on the Ocean Intervention?

A. Yes, myself, Gus Taliaferro, Jeff Wolfe, a cook by the name of Derek Belhumeur, and then whatever captains were on board. I don't recall who that was at the time that was actually physically taking the test at that time." (TR Page 271, Lines 21-25, Page 272, Lines 1-13). **ACCEPTED.**

36. Aubrey Taliaferro testified on her own behalf. She is licensed in Oklahoma as a Registered Nurse in good standing (TR 400). Therefore she has professional and personal acquaintanceship with controlled dangerous substances (CDS). In responding to questions about persons who use CDS Ms. Taliaferro testified as follows, to-wit:

"Q. And do you have an opinion, whether you want any of those around you?

A. I do not.

Q. Do you want any of those around your children?

A. No sir.

Q. Do you, therefore, personally use any CDS that's not prescribed by a physician?

A. No sir.

Q. Do you allow anybody around you to recreationally use any CDS?

A. No, sir.

Q. Would you put up with Mr. Taliaferro or anybody else in your home using CDS?

A. No, sir.

Q. Or exposing your children to any of those dangers?

A. No, sir.

Q. You sound like a no tolerance person for CDS. Is that a fair statement?

A. Yes, sir.

Q. And you don't socialize with people who use that, do you?

A. No, sir.

Q. My grandchild on Sunday asked me to sit down an "chill" with him. Do you even sit down a chill with anybody who uses CDS?

A. No, sir.

Q. Do you allow it in your home?

A. No, sir.

Q. Around your children?

A. No, sir.

Q. Any vehicles?

A. No, sir." (TR Page 402, Lines 9-25, Page 403, Lines 1-16). **ACCEPTED.**

37. Ms. Taliaferro's testimony was equally certain in regard to the conduct of her husband, to-wit:

"Q. You've been married to Mr. Taliaferro since August of 2007, and you've known him before then probably?

A. Yes, sir.

Q. Can you tell the Judge is Mr. Taliaferro a person who uses CDS?

A. No, sir.

Q. We are- have you seen him use that during the time you have known him?

A. No, sir.

Q. Even if you didn't see him use it, are you aware as a nurse what some of the effects of somebody who has used it and us under the influence?

A. No, sir.

Q. Okay. You're not aware of what the effects are?

A. No, I'm not aware of him showing any effects.

Q. Okay. That's my question. Did he ever exhibit any of those traits of anybody who has been using?

A. No, sir.

Q. He is here because he's charged with the use of dangerous drugs, in part. Have you ever seen any evidence that he has ever used dangerous drugs?

A. No.

Q. He is here in part because he is charged in the alternative with addiction to the use of dangerous drugs.

A. Yes.

Q. Have you ever seen him exhibit any of those traits of anybody who is addicted to the use of CDS?

A. No, sir." (TR Page 403, Lines 17-25, Page 404, Lines 1-23). **ACCEPTED.**

38. After the evidence was taken by the Judge on October 26 and 27, 2010, and without any adverse findings by the ALJ, Mr. Taliaferro's employer, Gulfmark America would not allow him to return for duty until Mr. Taliaferro was formally evaluated for any alcohol or substance abuse. **ACCEPTED.**

39. Mr. Taliaferro immediately arranged for an evaluation to be performed at Chuska Consulting, 401 Chickasaw Avenue, Chickasaw, Oklahoma by a Licensed Professional Counselor and a Licensed Alcohol and Other Drug Counselor, Substance Abuse Professional, Ruth Ann Helton. After testing it was Ms. Helton's evaluation that Mr. Taliaferro had a "low probability of have a substance dependence disorder." (See Exhibit A). Ms. Helton signed off on a Return to Duty Agreement on November 15, 2010 for Mr. Taliaferro after Mr. Taliaferro completed a 10-hour educational counseling class. Copies of those materials are attached hereto and marked Exhibit A. **ACCEPTED.**

Respondent's Proposed Conclusions of Law

1. The Coast Guard failed to fulfill its burden of proof. **DENIED.**
2. 49 CFR 40.40 controls the collection and analysis of samples for substance abuse under Coast Guard regulations and is named in the Oceaneering Company Policy on alcohol and drug abuse. (Coast Guard Exhibit 3). **ACCEPTED IN PART, see Decision and Order.**
3. Under 49 CFR 40.11(a) the employer must meet all the collection requirements. In this case the only witness from the employer, Oceaneering, was not aware that the employer had that duty, and admitted neither she nor Oceaneering followed any procedure to evaluate the sample Collection process in this case, or in any other case. **DENIED IN PART, see Decision and Order.**
4. 49 CFR 40.43(a) requires the collection site to be secured. Uncontroverted testimony from Mr. Taliaferro proves that on May 13, 2009 the collection site was not secured by the employer or the collector. **DENIED IN PART, see Decision and Order.**
5. 49 CFR 40.41(e)(2) requires the source of water for washing hands. This record has no testimony that a source of water was provided for washings hands or that there was any opportunity for that purpose. The testimony from Mr. Taliaferro shows violation of this provision. **DENIED IN PART, see Decision and Order.**
6. 49 CFR 40.61(d) requires the collector to provide an ID to an employee if it is requested. But evidence from Mr. Taliaferro proved the collector wore no uniform, had no T-shirt, there was no insignia, there was no hat and there was no ID that was readily apparent. That same testimony was provided by Mr. Cook. **DENIED IN PART, see Decision and Order.** Further, as discussed above, Respondent admitted he never requested to see an ID from the collector.
7. 49 CFR 40.61(g) required the collector to ask Mr. Taliaferro is he was presently taking any medications so they could be listed in the record. Testimony from Mr. Taliaferro showed that the collector failed in that regard. **DENIED.** 49 C.F.R. § 40.61(g) does not require this. Rather, 49 C.F.R. § 40.61(g) states in relevant part, "You must instruct the employee not to list medications that he or she is currently taking on the CCF."
8. 49 CFR 40.63(b) gives the collector an affirmative duty to instruct an employee to wash his hands at the beginning of the testing process. Uncontroverted testimony from Mr.

Taliaferro was that the collector did not advise him to wash his hands or give Mr. Taliaferro any opportunity to wash his hands. **DENIED IN PART, see Decision and Order.**

9. 40 CFR 40.65(a)(1) sets forth the condition known as “shy bladder.” Curative procedures are set forth at 49 CFR 40.193(b)(2). The Coast Guard does not have evidence about Mr. Taliaferro’s inability to immediately provide a sample after he was roused out and the Coast Guard has no evidence that the sample collected complied with those requirements on time and amount of fluid that may be consumed by a person providing a bodily-fluid sample. **DENIED IN PART, see Decision and Order.**
10. 49 CFR 40.191(a)(8) provides that the employee cannot refuse to wash his hands when directed. There is nothing in the record that Mr. Taliaferro was ever offered the opportunity to wash his hands at the beginning of the testing process. **DENIED.** 49 C.F.R. § 40.191(a)(8) states that an employee has refused to take a drug test if he or she “[f]ail[s] to cooperate with any part of the testing process.” The record contains no allegation that Respondent refused to take the drug test.
11. 49 CFR 40.45(c) prohibits the collector from modifying the collection form. There is uncontroverted evidence in this case that the collector modified the collection form by omitting the time the collection was taken and made further modification by scratching out and modifying the form on the headline for Oceaneering. Such modifications are not authorized by §40.45(c). **DENIED.** 49 C.F.R. § 40.45(c)(2) explains that modifications and revisions are permitted to indicate “...the names, addresses, telephone numbers and fax numbers of the employer...”. In the instant case, the form was modified to indicate the correct employer name. Further, 49 C.F.R. § 40.45(c) addresses modifications and revisions to the CCF, not omissions.
12. Collection guidelines from the United States Department of Transportation, Revised August 31, 2009 show that single use, disposable gloves are recommended for use by collectors when handling specimens. Testimony is clear from Mr. Taliaferro and Mr. Cook that the collector on May 13, 2009 did not wear gloves. **DENIED IN PART, see Decision and Order.**
13. The aforesaid violations of 49 CFR Part 40 totally undercut the integrity of the original sample given by Mr. Taliaferro on May 13, 2009. **DENIED.**
14. As noted by the National Institute on Drug Abuse and Research Monograph No. 73, a urine test can be used when reliable only if it is performed using appropriate procedures and further the validity of the results of a urine test “are dependent on the integrity of the specimen.” When the integrity of the original specimen is not established, subsequent test results are rendered irrelevant and cannot be used to attack a professional license. **ACCEPTED.**
15. Additional testimony offered by Mr. Taliaferro, Aubrey Taliaferro, George Wainwright, Jim Cook, James William Brazier, and William Mansfield also contained weigh and established that Mr. Taliaferro was not a user of controlled dangerous substances and is not addicted thereto despite the bald allegations made by the Coast Guard. **DENIED.**

16. In light of the evidence received in this case it is clear the Coast Guard has failed in its burden of proof to prove that the UA collected from Mr. Taliaferro on May 13, 2009 was lawfully obtained and that evidence along with the Respondent's evidence and admissions of other Coast Guard witnesses set forth above the Coast Guard has failed in its burden of proof. **DENIED.**

ATTACHMENT C

33 CFR 20.1001 General.

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

33 CFR 20.1002 Records on appeal.

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

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If

the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.