

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

UNITED STATES COAST GUARD

Complainant

vs.

TERRY D. WEBER,

Respondent

Docket Number 2011-0187
Enforcement Activity No. 3998076

DECISION AND ORDER

Issued: September 22, 2011

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

For Complainant

LT Jeff A. Fry
U.S. Coast Guard Sector Key West
100 Trumbo Point Rd.
Key West, FL 33040-0005

Mr. James P. Fink
National Technical Advisor
USCG S&R National Center of Expertise
100 Forbes Drive
Martinsburg, WV 25404

For Respondent

Terry D. Weber, Esq., *pro se*



SUMMARY

The United States Coast Guard (Coast Guard) initiated this administrative action under 46 U.S.C. § 7704(c), 33 C.F.R. Part 20, and 46 C.F.R. Part 5 seeking to revoke Respondent Terry D. Weber's Merchant Mariner's Credential for dangerous drug use.¹ This action stems from a random drug test in which Respondent's urine sample tested positive for marijuana metabolites. Under the regulations, if a mariner fails a chemical test for dangerous drugs, the mariner is presumed to be a user of dangerous drugs.

If it is shown that a mariner-credential holder has been a user of dangerous drugs, the law requires the credential to be revoked unless the holder provides satisfactory proof he or she is cured of drug use. Respondent neither rebutted the dangerous drug use presumption nor provided any evidence he was cured of drug use or had any involvement in the cure process. In accordance with the law, Respondent's Merchant Mariner's Credential is therefore Revoked.

STATEMENT OF THE CASE

In its Complaint of April 29, 2011, the Coast Guard charged Respondent with "(Use) Use of or addiction to the use of dangerous drugs" in violation of 46 U.S.C. § 7704(c). The Complaint specifically alleged Respondent's sample from a random drug test given on January 31, 2011 tested positive for marijuana metabolites. In his timely Answer, Respondent admitted to the jurisdictional allegations and to taking a random drug test on January 31, 2011. However, he declared he "is without sufficient knowledge with which to either admit or deny" the remaining allegations. Respondent did not assert Affirmative Defenses and rejected the Coast Guard's settlement agreement.

¹ The term, "Credential" includes Merchant Mariner's Document, Merchant Mariner's License, STCW Endorsement [International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended 1995], and Certificate of Registry. See, 46 C.F.R. § 10.107. In this case, the Coast Guard seeks to revoke Respondent's Merchant Mariner's License No. 1500225, his only Coast Guard issued credential. The terms "Credential" and "License" are used interchangeably in this Decision and Order.

Respondent also filed a Motion for Production of Documents with his Answer requesting that the “Coast Guard produce and deliver any and all documents, letters, communications, memoranda, notes, records, records of telephone conversations, e-mail transmissions or postings, and any and all other items contained within the Respondent’s mariner’s file . . .”

Pre-Hearing Teleconference

The undersigned Administrative Law Judge (ALJ) received this case on May 19, 2011 and on May 25th conducted a pre-hearing teleconference. The teleconference’s purpose was to discuss and decide the following: 1) settlement; 2) Respondent’s Motion for Production of Documents; 3) date and place for hearing; 4) discovery; and, 5) motions.

During the teleconference, Respondent advised that he is also an attorney and will be representing himself. To that end, he once again rejected the Coast Guard’s offer of settlement. Respondent further requested that the hearing be scheduled only after he receives the items requested in his Motion for Production of Documents. Respondent argued he needs the requested documents in his merchant mariner’s file to show that the Coast Guard’s delays in his past license renewals are linked to the current charge.

The undersigned denied Respondent’s Motion for Production of Documents and request to delay scheduling of the hearing. The requested documents are not probative on the issue of whether his sample tested positive for marijuana metabolites and on the issue of the legally mandated sanction. Further, Respondent’s request did not comply with the requirements of 33 C.F.R. § 20.601(c) and (d) because the parties had not yet exchanged witness and exhibit lists. The undersigned advised that once the parties exchanged witness and exhibit lists and Respondent requests further discovery, the request will be addressed in accordance with 33 C.F.R. § 20.601(d). Respondent did not renew this particular motion at any time before or during the hearing.

The undersigned then scheduled dates for the parties to exchange witness and exhibit lists and set July 19, 2011 as the date for hearing at the Federal Courthouse in Key West, Florida. The place of hearing was subsequently moved to Miami, Florida because the courtroom in Key West became unavailable. Discussions and rulings during the May 25, 2011 pre-hearing teleconference are detailed in the May 25, 2011 *Memorandum and Order of Pre-Hearing Telephone Conference*.

Pre-Hearing Motions

In addition to the Motion for Production of Documents Respondent filed three other motions as follows: 1) Motion to Dismiss; 2) Second Motion for Production of Documents; and 3) Motion for the ALJ to Disqualify Himself. The undersigned denied all of Respondent's Motions through written Orders. A summary of the motions and orders is as follows:

Motion to Dismiss: Respondent made the following arguments in his Motion to Dismiss: 1) that the Coast Guard charged him with two offenses: use of dangerous drugs and addiction to the use of dangerous drugs. As such, there are no factual allegations contained within the Complaint to support the charge of addiction to the use of dangerous drugs; 2) that the Complaint fails to fulfill the requirements of 46 C.F.R. § 5.53 in that the Complaint contains no allegation setting forth either the approximate time or the place of the alleged offenses; 3) that the language, "Respondent's Instructions" is an "improper usage of the Complaint;" 4) that the Investigating Officer improperly served the four documents on the Respondent because they were duplicate copies and were not signed, verified, or initialed; nor did they contain any legal notice; and, 5) that the Motion for Approval of Settlement Agreement and Entry of Consent Order served on Respondent does not comport with the requirements for motions under the Federal Rules of Civil Procedure (FRCP) because it is not a simple motion. As such, Respondent argued, "the legal injuries to this mariner are within the zone of interest regulated by the provisions and Constitutional guarantees afforded this mariner."

Concerning Respondent's first argument, the Complaint's purpose is to provide the Respondent with notice of the conduct giving rise to the alleged offense so he can prepare a defense. Appeal Decision 2585 (COULON) (1997). Here, the Complaint alleged Respondent took a random drug test on January 31, 2011; that the specimen was collected and analyzed; and, that the specimen tested positive for marijuana metabolites in accordance with DOT regulations. There is no requirement to also prove addiction under 46 U.S.C. § 7704(c) because its language is in the disjunctive; that is, "[i]f it is shown that a holder has been as user of, or addicted to, a dangerous, the license . . . shall be revoked unless the holder provides satisfactory evidence that the holder is cured." [Emphasis added].

Concerning Respondent's second argument, the purpose of the Complaint is to provide notice to the Respondent of the underlying actions giving rise to the alleged offense. The undersigned found the Complaint alleged sufficient facts to support the allegations and is therefore in compliance with 46 C.F.R. § 5.35.

Concerning Respondent's third argument, the undersigned found no indications that the Complaint mandates or attempts to mandate Respondent's actions. It simply restates the law and the possible consequences to Respondent resulting from his action or inaction in accordance 46 C.F.R. § 5.107 and 33 C.F.R. § 20.307.

Concerning Respondent's fourth argument, there is no regulation or statute providing for dismissal on the grounds Respondent cited. There was substantial compliance with 33 C.F.R. § 20.303 and non-substantive, administrative oversights do not warrant dismissal.

Concerning Respondent's fifth and final argument, 33 C.F.R. § 20.103(c) provides, "[a]bsent a specific provision in this part, the Federal Rules of Civil Procedure control." The Coast Guard's regulations contain a specific regulation for motions at 33 C.F.R. § 20.303. The Motion for Approval of Settlement Agreement conforms to 33 C.F.R. § 20.303. Even if

Respondent had not previously rejected the settlement offer making the Motion for Approval of Settlement Agreement moot, the Coast Guard regulation applies, not the FRCP.

None of Respondent's arguments in his Motion to Dismiss required dismissing the Complaint under the procedural regulations at 33 C.F.R. Part 20. Respondent had adequate notice of the allegations and sufficient opportunity to prepare a defense and be heard within the context of Coast Guard law and regulations. To the extent Respondent's claims contest the fairness of the Coast Guard's procedural regulations, the undersigned is without authority to rule on the constitutionality of those claims. See, 33 C.F.R. § 20.202. A detailed discussion and findings on Respondent's five arguments in his Motion to Dismiss is found in the *Order Denying Respondent's Motion to Dismiss* dated June 20, 2011.

Respondent's Reply: Respondent replied by way of Memorandum to the Coast Guard's Opposition to the Motion to Dismiss and to the undersigned's Order denying same. While Respondent's "Memorandum" was not a Motion and did not ask for any relief such as to reconsider or to re-open the original motion, its contents were thoroughly considered. Fundamentally, Respondent argues he is being improperly charged. He states 46 C.F.R. § 5.35 contains three separate charges and argues that because the Complaint alleges "use of or addiction to the use of dangerous drugs" he is actually being charged with two separate offenses, namely "use of dangerous drugs" and "addiction to the use of dangerous drugs." The undersigned ruled that the title of the charge in this case uses the disjunctive "or" and that the allegations detailing the charge clearly specify he is being charged with "use of dangerous drugs," not "addiction to the use of dangerous drugs." Therefore, Respondent is on notice that he is being charged only with "use of dangerous drugs."

As explained in the *Order Denying Respondent's Motion to Dismiss* dated June 20, 2011, title 46 U.S.C. § 7704 (c) contains the language, "a user of, or addicted to, a dangerous drug" Therefore, charging a respondent with "use of, or addiction to the use of dangerous drugs" is not

contrary to 46 U.S.C. § 7704 (c). Here, the factual underpinnings are further specified in the Complaint to ensure Respondent knows which course of conduct is being alleged in order to prepare a defense.

Title 46 C.F. R. § 5.35 provides, “[w]here the proceeding is based exclusively on the provisions of title 46, U.S.C. 7704, the complaint will allege *conviction for a dangerous drug or use of dangerous drugs or addiction to the use of dangerous drugs*, depending upon the circumstances and will allege jurisdiction by title 46, U.S.C. 7704, and the approximate time and place of the offense.” On the front page of the Complaint, adjacent to “Regulatory Authority” it reads, “46 C.F.R. 5.35 (Use) Use of, or addiction to the use of dangerous drugs.” The second page of the Complaint contains the Factual Allegations and recites as follows:

Use of, or addiction to the use of dangerous drugs. The Coast Guard alleges that:

1. On 01/31/2011 Respondent took a random drug test.
2. A urine specimen was collected by Dean Hubenig of APCA Consortium.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was analyzed by LabOne, Inc. DBA Quest Diagnostics, Lenexa, KS 66219 using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for marijuana metabolites, as determine by the Medical Review Officer, CHRISTOPHER RUBEL.

While it would be more precise to allege only “use of dangerous drugs” the detailed allegations in the Complaint and the parenthetical addition of the term, “(Use)” on the front page of the Complaint provide sufficient notice to enable Respondent to prepare a defense.

Nonetheless, at the beginning of the hearing the undersigned struck the words referring to addiction so that the title of the charge reflects “Use of dangerous drugs.”

Lost Credential: Respondent also claimed he lost his credential. Therefore, his Second Motion for Production of Documents asked the ALJ to order the Coast Guard to produce and provide him with form CG-4363 (lost document affidavit). The undersigned denied that motion because that form no longer exists and the Coast Guard advised it will have a Lost Document Affidavit available at the beginning of the hearing. Further discussion of issues surrounding Respondent's lost credential is found in the *Order* dated June 17, 2011 contained in the administrative record.

Motion for ALJ to Disqualify Himself: Respondent claims the undersigned ALJ has personal bias in favor of the Coast Guard and is predisposed to rule in its favor. He also claims the undersigned is unwilling to render a fair and impartial decision. In support of his claims, Respondents argues that he believes the ALJ "used his authority and position to improperly coerce the Mariner to submit to the Coast Guard's Settlement Agreement;" that the ALJ "summarily overruled" oral motion to delay scheduling the hearing until Respondent obtains records through FOIA; that Respondent believes the ALJ's invitation to the parties to contact him to discuss any question constitutes an invitation to *ex parte* communications; and, that the ALJ denied Respondent's request that the proceedings be conducted under the FRCP.

The undersigned rejected Respondent's claims in the *Order Denying Respondent's Motion to Disqualify the Administrative Law Judge* of June 23, 2011. That Order detailed the law of ALJ disqualification and discussed, in detail, each of Respondent's claims and arguments. In summary, a party moving to disqualify the ALJ must overcome the presumption of honesty and integrity which accompanies administrative adjudicators. Ash Grove Cement Company v. FTC, 577 F.2d 1368 (9th Cir. 1976), *cert denied*, 439 U.S. 982 (1978); Withrow v. Larkin, 421 U.S. 35 (1975). Further, there must be a showing of personal bias, not merely bare claims, to disqualify an ALJ. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1976), *cert. denied*, 434 U.S. 834 (1977); Association of National Advertisers, Inc. v. Federal Trade Commission, 627 F.2d 1151

(D.C. Cir. 1979); Hicks v. U.S. Postal Service, 66 M.S.P.R. 137 142 n.2 (1995). Finally, it is well settled that a party cannot demonstrate bias based solely on the ALJ's ruling's during the proceedings. NLRB v. Donnelly Garment Company, 330 U.S. 219, 236-37 (1947); Adkins v. Dep't of Commerce, 81 M.S.P.R. 246, 252 (1999).

Concerning Respondent's claim that the undersigned used his authority and position to coerce the Respondent to agree to a Settlement Agreement, 33 C.F.R. § 20.501(g) provides, "the ALJ may direct that any of the following be addressed or furnished before, during, or after the conference . . . (9) offers of settlement." The ALJ has the right and the duty to discuss the status of any settlement and to discuss the options available to the Respondent. The bare claim that the undersigned attempted to coerce the Respondent into settlement is unsubstantiated and insufficient to prove personal bias against the Respondent and is therefore rejected.

Respondent's claim that the ALJ demonstrated personal bias by denying motions for production of documents and for withholding setting the date for hearing until Respondent obtained documents pursuant to his request is also rejected. It is well settled that a party cannot demonstrate personal bias based solely on the ALJ's ruling during the proceedings. Donnelly Garment Company, 330 U.S. at 236-7.

The ALJ's invitation to contact him should any questions or problems arise is not an invitation to prohibited *ex parte* communications. The undersigned advised both parties to contact his office should the need arise so that a teleconference could be held with all parties present.

Finally, Respondent argues that the undersigned's denial of his motion that these administrative proceedings should be guided by the FRCP demonstrates bias. It is well settled that a party cannot demonstrate personal bias based solely on the ALJ's ruling during the proceedings. Id. The undersigned thoroughly discussed the FRCP issue in the *Order Denying Respondent's Motion to Dismiss* of June 20, 2011. The undersigned also provided more detailed

reasons for denying his motion to have the FRCP govern these proceedings in the *Order Denying Respondent's Motion to Disqualify the Administrative Law Judge* of June 23, 2011.

Telephonic Testimony: Pursuant to 33 C.F.R. § 20.707, the undersigned granted the Coast Guard's Motion for Telephonic Testimony to allow Ms. Anne Roberts of Quest Diagnostics, Inc. in Lenexa, Kansas and the Medical Review Officer, Dr. Christopher Rubel, M.D. in Greer, South Carolina, to testify telephonically.

In Person Hearing

The hearing was held on July 19, 2011 in Miami, Florida as scheduled and conducted in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 551-559, 46 C.F.R. Part 5, and 33 C.F.R. Part 20. Respondent was unable to produce his credential at the opening of the hearing in accordance with 46 C.F.R. § 5.521. Therefore, he executed a Lost Document Affidavit and submitted it to the Coast Guard Investigating Officer. (ALJ Ex. 1; Tr. at 11 - 15).

The Coast Guard presented the testimony of three (3) witnesses and introduced seven (7) exhibits. Respondent did not call any witnesses or introduce any exhibits; nor did he testify in his own behalf. The ALJ admitted one (1) ALJ exhibit, the Lost Document Affidavit. The witness and exhibit list is shown in **Attachment A**.

Respondent renewed his Motion to Dismiss claiming he was mischarged with both "use of" as well as "addiction to the use of" a dangerous drug. The Coast Guard replied that it was willing to remove the phrase "or addiction to" from the caption but did not agree to amend the factual allegations or withdraw the Complaint. The undersigned amended the caption striking the words "or addiction to" so that the title of the charge reads "Use of dangerous drugs." The undersigned determined that the allegations against the Respondent were not materially altered by striking the phrase referring to addiction. The undersigned further ruled that Respondent was aware of the charge against him and the factual allegations underlying that charge and that it was not necessary reserve the Complaint.

Following the in-person hearing, Respondent and the Coast Guard filed post-hearing briefs in accordance with 33 C.F.R. § 20.710. This matter is now ripe for decision.

ISSUES

The Coast Guard contends that Respondent is presumed to be a user of dangerous drugs because he failed a random drug test. In support of its contention, the Coast Guard called three witnesses and submitted seven exhibits. Respondent argues that the drug testing procedure was flawed and not conducted in accordance with 49 C.F.R. Part 40. Therefore the issues are: 1) Whether the Coast Guard proved a prima facie case thus creating the presumption that Respondent was a user of dangerous drugs; and, 2) Whether Respondent rebutted the presumption that he is a user of dangerous drugs.

FINDINGS OF FACT

The following Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire administrative record. The Coast Guard's proposed findings of fact and the undersigned's rulings thereon are attached as **Attachment B**. Respondent filed "post-hearing recommendations" which contained further argument but did not contain enumerated, proposed findings of fact.

1. At all relevant times Respondent was a holder of a Merchant Mariner's Credential (License Number 1500225) issued by the United States Coast Guard. (See Respondent's Answer at 1; Tr. at 17 -18).²
2. On January 31, 2011, Respondent provided a urine specimen for a random drug test. (CG Ex. 02; Tr. at 21, 38 -40; See also Respondent's Answer at 1).

² Citations referencing the transcript are as follows: (Tr. at ____). Citations referring to Coast Guard Exhibits are as follows: (CG Ex. ____). Citations referring to ALJ Exhibits are as follows: (ALJ Ex. ____). Respondent did not submit any Exhibits at the hearing.

3. On January 31, 2011, Respondent signed the Federal Drug Testing Custody and Control Form (CCF) for specimen ID number 1625142. CG Ex. 02, Tr. at 39.
4. Mr. Dean Hubenig, a certified specimen collector, collected a split urine sample, ID number 1625142, from Respondent on January 31, 2011 for the purposes of performing a five (5) panel DOT urinalysis drug test by a certified laboratory.³ (CG Ex. 1, CG Ex. 02, Tr. at 17, 21, 32, 35, 38 – 39).
5. Mr. Hubenig substantially followed collection procedures in accordance with DOT collection standards for urinalysis drug screen. (Tr. at 36 – 44).
6. Lab One, d/b/a Quest Diagnostics, received Respondent’s specimen, ID number 1625142, with all seals intact. (CG Ex. 08; Tr. at 59 - 62).
7. Quest Diagnostics is a Substance Abuse and Mental Health Services Administration (“SAMHSA”) certified laboratory. (CG Ex. 07; Tr. at 53 – 57).
8. The chain of custody for Respondent’s specimen, ID number 1625142, was intact and without flaws. (Tr. at 67 – 8, 84, 91; CG Ex. 02, 04, and 08).
9. Quest Diagnostics used procedures approved by the Department of Transportation, listed in Title 49 Code of Federal Regulations (CFR) Part 40. CG 04 at 3, CG 08 at 70, TR at 61-62 & 67-68.
10. Quest Diagnostics analyzed specimen ID number 1625142 using immunoassay as the initial screening test and Gas Chromatography / Mass Spectrometry (GC/MS) as a confirmation test resulting in specimen ID number 1625142 testing positive for marijuana metabolites. CG 08, TR at 60-61, 63 & 66.
11. Quest Diagnostics found Respondent’s specimen, ID number 1625142, tested positive for marijuana metabolites. (CG Ex 04 at 3, 08 at 70; Tr. at 63, 66 – 7).

³ A five (5) panel DOT drug test tests for the following drugs: (1) marijuana metabolites, (2) cocaine metabolites, (3) amphetamines, (4) opiate metabolites, and (5) phencyclidine (PCP). 49 C.F.R. § 40.85.

12. The Medical Review Officer, Dr. Christopher Rubel, M.D., contacted Respondent on February 15, 2011 regarding the results of the drug test. (CG Ex. 04, 06; Tr. at 87 – 9, 95 – 6).

13. Dr. Rubel verified Respondent’s positive drug test on February 15, 2011. (CG Ex. 04; Tr. at 90 – 92, 94).

BURDEN OF PROOF

The Administrative Procedure Act, 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States 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. SEC, 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, 371-2 (1970) (Harlan J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by reliable, credible, probative, and credible evidence that Respondent more likely than not committed the violation charged.

PRINCIPLES OF LAW

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 C.F.R. § 5.19 gives ALJs authority to suspend or revoke a

license or certificate in a hearing for violations arising under 46 U.S.C. § 7704. Pursuant to 46 U.S.C. § 7704(c), a Coast Guard issued license or certificate shall be revoked if the holder of that license or certificate has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. Pursuant to Coast Guard regulation, if a mariner fails a drug test, he is presumed to be a user of dangerous drugs. See 46 C.F.R. § 16.201(b); see also, Appeal Decision 2584 (SHAKESPEARE) (1997). To prove use of dangerous drugs, the Coast Guard must establish a *prima facie* case of drug use by the mariner. Appeal Decision 2603 (HACKSTAFF) (1998); Appeal Decision 2584 (SHAKESPEARE) (1997).

To establish a *prima facie* case of drug use, the Coast Guard must show 1) that the Respondent was the person who was tested for dangerous drugs; 2) that the Respondent failed the test; and 3) that the test was conducted in accordance with 46 C.F.R. Part 40. Proof of those three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the Respondent to rebut this presumption. If the Respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Id.; Appeal Decision 2592 (MASON) (1997).

ANALYSIS

Respondent admits he provided a urine sample on January 31, 2011 and signed the Custody Control Form. However, he disagrees that Mr. Hubenig was in the restroom when Respondent provided the sample, thereby claiming that the test was not performed in accordance with 49 C.F.R. Part 40. (Tr. at 43 – 45, 47, and 48). Mr. Hubenig testified that he checked the “observed” box on the Federal Drug Custody and Control Form because “standard procedure was to observe all of the sampling simply because the restroom is a public restroom and cannot be secured.” (Tr. at 43). Pursuant to 49 C.F.R. § 40.209(b)(6), “[m]atters that do not result in

the cancellation of a test include, but are not limited to...[t]he failure to directly observe or monitor a collection that the rule requires or permits to be directly observed or monitored, or the unauthorized use of direct observation or monitoring for a collection.”

In his reply to the Coast Guard’s post hearing brief, Respondent “suggests the ALJ forthwith enter an Order in which the parties shall establish by credible evidence whether there exists a fatal flaw in the evidence produced by the Coast Guard.” See, Respondent’s Response to Complainant’s Brief and Recommendations to the ALJ at 2. To this end, Respondent suggests that he and Mr. Hubenig submit to polygraph examination “regarding the attendance of the tester in the presence of the respondent while the respondent urinated for the tester.” The undersigned rejects Respondent’s suggestion because the collector’s presence during urination is not dispositive on the validity of the test according to 49 C.F.R. § 40.209(b)(6).

The chain of custody and the integrity of the specimen were found to be intact. Mr. Hubenig properly secured and labeled Respondent’s urine specimen and properly filled out the Federal Drug Custody and Control Form which Respondent also signed. Respondent presented no evidence showing Mr. Hubenig performed the collection procedures other than in accordance with 49 C.F.R. Part 40. (Tr. at 8, 12, 15, 18, and 21; CG Exhibits 01, 02, 04, 06 and 08). In any event, it is well settled that minor, technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen’s integrity. Appeal Decision 2688 (HENSLEY) (2010); see also, Appeal Decision 2575 (WILLIAMS) (1996); Appeal Decision 2541 (RAYMOND) (1992).

LabOne d/b/a Quest Diagnostics [Quest] received Respondent’s urine sample. (CG Ex. 03). Quest performed two tests on Respondent’s sample: an initial test and a confirmatory test. Ms. Anne Roberts, the laboratory manager at Quest, testified that the chain of custody was intact; that the sample from Respondent was tested according to DOT drug testing procedures; and, that the result was a positive drug test for marijuana metabolites. Respondent provided no evidence

or testimony to show that the chain of custody or the integrity of his sample was violated in any way during the testing process.

Quest forwarded the positive drug test result to Dr. Christopher Rubel, M.D., a Certified Medical Review Officer. Dr. Rubel contacted Respondent on February 15, 2011 and verified the positive drug test on that same day. Respondent raised arguments regarding what was said during this telephone conversation but submitted no evidence showing that Dr. Rubel's verification was incorrect or flawed. Specifically, Respondent's MRO cross examination focused mainly on whether he admitted to using marijuana. It is not necessary that one who has submitted a sample for drug testing to admit to dangerous drug use in order for the MRO to verify the drug test as positive. See 49 C.F.R. Part 40, Subpart G.

In view of the foregoing and in accordance with 46 C.F.R. § 16.201(b), I find the Coast Guard established a *prima facie* case that Respondent is a user of dangerous drug use.

Respondent's Rebuttal

To rebut the presumption that he is a user of dangerous drugs Respondent must present persuasive evidence. Respondent did not offer any evidence, only arguments. For example, Respondent argues that Mr. Hubenig and Dr. Rubel lied under oath. Respondent again argued that Mr. Hubenig did not comply with the procedures in Part 40. Respondent submitted his recollections, beliefs, and arguments in his post-hearing brief which are not evidence.

Also in his post-hearing brief, Respondent argues that he "has not been permitted to explore the real possibility that he may have taken a prescription medication which could affect the results of the urine test." See, *Respondent's Recommendations to the ALJ* at 7. He claims that information on his prescription medication is contained in his medical records which he asked the Coast Guard to produce in his initial Motion for Production of Documents, but the undersigned denied that motion. In that Motion, Respondent requested "any and all documents, letters, communications, memoranda, notes, records of telephone conversations, e-mail

transmissions, or postings, and any and all other items contained within the Respondent's mariner's file. ..." See, Respondent's May 11, 2011 Motion-Order for Production of Documents at 2.

Respondent's Motion for Production of Documents does not specifically mention his medical records. At no time during the pre-hearing teleconference or the in-person hearing did Respondent raise the Affirmative Defense of prescription medication affecting the positive drug test. Respondent submitted no evidence to show he was taking any prescription medication at the time of the drug test. Respondent submitted no testimony to show he was taking medication at the time of the drug test. To that extent, it is not unreasonable to infer that if Respondent intended to present evidence he was taking prescription medication, such evidence, if any, routinely exists in places other his merchant mariner's file. In view of the foregoing, I find Respondent did not rebut the presumption that he is a user of dangerous drugs.

CREDIBILITY DETERMINATIONS

I find that all witnesses testified truthfully. Respondent did not testify under oath. Therefore, I make no credibility findings on Respondent.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Terry D. Weber and the subject matter of this hearing are properly within the jurisdiction of the U.S. Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7704; 46 C.F.R. Part 5; and 33 C.F.R. Part 20.
2. Respondent's positive drug test was in compliance with 49 C.F.R. Part 40.
3. Respondent's positive drug test raised the presumption that he is a user of dangerous drugs. 46 C.F.R. § 16.201(b).
4. Respondent failed to rebut that presumption.
5. Respondent is a user of dangerous drugs.

6. Respondent presented no evidence of cure or substantial involvement in the cure process.
7. Respondent's Merchant Mariner's Credential must be Revoked in accordance with Title 46 U.S.C. § 7704(c).

DECISION

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** by reliable, probative, and substantial evidence that Respondent was a user of dangerous drugs in violation of 46 U.S.C. § 7704(c).

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 C.F.R. §§ 5.567 and 5.569; Appeal Decision 2362 (ARNOLD) (1984). When the Coast Guard proves a mariner used dangerous drugs, any Coast Guard issued licenses, documents or other credentials must be revoked absent evidence of cure or substantial involvement in the cure process, 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992); Appeal Decision 2583 (WRIGHT) (1997); Appeal Decision 2634 (BARRETTA) (2002).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's License and all other valid documents and endorsements that the Coast Guard issued, if any, to Terry D. Weber, are **REVOKED**.

IT IS FURTHER ORDERED that immediately after finding it, Respondent, Terry D. Weber, shall surrender his license, as well as all other valid documents and endorsements issued by the Coast Guard, if any, to the Investigating Officer at Coast Guard Sector Key West.

PLEASE TAKE NOTICE that service of this Decision and Order 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, attached hereto as **Attachment C**.

Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: September 22, 2011

ATTACHMENT A

WITNESSES AND EXHIBITS:

Coast Guard Witnesses:

1. Mr. Dean Hubenig – certified collection site technician
2. Ms. Anne Roberts – laboratory manager at Quest Diagnostics
3. Dr. Christopher Rubel, M.D. – certified Medical Review Officer

Respondent Witnesses:

Respondent did not call any witnesses. Respondent did not testify.

ALJ Exhibits:

ALJ Ex. 1 – Copy of Lost Credential Affidavit completed by Mr. Weber at the time of the hearing (1 page – front and back).

Coast Guard Exhibits:

CG 01 – Maritime Drug Testing Collection Site Technician Certification Documents (2 pages).

CG 02 – Federal Drug Testing Custody and Control Form (1 page).

CG 03 – American Association of Medical Review Officers Verification of Certification (1 page).

CG 04 – Agency documentation to Terry Weber regarding positive drug test including copy of executed copy of the Custody and Control Form as well as a copy of the laboratory report from Quest Diagnostics. (3 pages).

CG 05 – Not offered into evidence.

CG 06 – Dr. Rubel’s MRO action report form (1 page).

CG 07 – Federal Register excerpt regarding the certification of LabOne d/b/a Quest Diagnostics located at 10101 Renner Boulevard, Lenexa, Kansas (2 pages).

CG 08 – Documentation Package provided by Quest Diagnostics Inc., 10101 Renner Blvd, Lenexa, KS 66219 (106 pages).

Respondent Exhibits:

Respondent did not offer any exhibits into evidence.

ATTACHMENT B

As previously stated, Respondent did not submit proposed findings of fact. Respondent provided further argument in his post-hearing brief.

Coast Guard's Proposed Findings of Fact

1. Respondent's current license NO. 1500225 was issued on March 18, 2008 and expires on March 18, 2013. At all times relevant to this proceeding, Respondent was the holder of a Coast Guard-issued license. Hearing Transcript (TR) at 17.

ACCEPTED AND INCORPORATED to the extent of "at all times relevant to these proceedings, Respondent was the holder of a Coast Guard issued license." In his Answer, Respondent admitted that he is the holder of license # 1500225. However, he could not present the license at the beginning of the hearing because he claimed it was lost.

2. On January 31, 2011, Respondent took a random drug test. CG 02, CG 03, CG-04 at 1 & 2, TR at 17.

ACCEPTED AND INCORPORATED.

3. On January 31, 2011, Respondent submitted urine specimen (bearing a specimen ID number 1625142) for chemical analysis. This specimen was collected by Dean Hubenig, a certified collector for APCA consortium. CG 01, CG 02, CG 03, CG 04 at 1 & 2, TR at 33, 35, 39 & 40.

ACCEPTED AND INCORPORATED.

4. On January 31, 2011, Respondent signed the Federal Drug Testing Custody and Control Form (CCF) for specimen ID number 1625142. CG 02, TR at 39.

ACCEPTED AND INCORPORATED.

5. This specimen, specimen ID number 1625142, was analyzed by LabOne, Inc, doing business as Quest Diagnostics Laboratory located in Lenexa, KS 66219 (LabOne, Inc), using procedures approved by the Department of Transportation, listed in Title 49 Code of Federal Regulations (CFR) Part 40. CG 04 at 3, CG 08 at 70, TR at 61-62 & 67-68.

ACCEPTED AND INCORPORATED.

6. LabOne, Inc, was a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory at all times relevant while analyzing specimen ID number 1625142. CG 07 at 1, TR at 54, 55, 56 & 58.

ACCEPTED AND INCORPORATED.

7. LabOne, Inc. analyzed specimen ID number 1625142 using immunoassay as the initial screening test and Gas Chromatography / Mass Spectrometry (GC/MS) as a confirmation test. Specimen ID number 1625142 tested positive for marijuana metabolites during both of these tests. CG 08, TR at 60-61, 63 & 66.

ACCEPTED AND INCORPORATED.

8. LabOne, Inc. reported specimen ID number 1625142 as positive for marijuana metabolites to Dr. Christopher Rubel, a certified MRO for APCA. CG 03, CG 04 at 3, TR at 63-64.

ACCEPTED AND INCORPORATED.

9. On February 15, 2011, the MRO for APCA, Dr. Christopher Rubel, determined that Respondent's specimen, specimen ID number 1625142, tested positive for marijuana metabolites. CG 04 at 2, CG 06, TR at 83-91.

ACCEPTED AND INCORPORATED.

ATTACHMENT C

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

§ 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.

§ 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.

§ 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.

§ 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.