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

UNITED STATES COAST GUARD

Complainant

vs.

RANDY JOE GREEN

Respondent

Docket Number 2010-0372
Enforcement Activity No. 3820152

DECISION AND ORDER

Issued: July 02, 2012

By Administrative Law Judge: Honorable Dean C Metry

Appearances:

MR. CLARENCE C. RICE
Marine Safety Unit Paducah

For the Coast Guard

LISA GREEN, Duly Authorized Representative

For the Respondent

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PRELIMINARY STATEMENT

Background

The United States Coast Guard (Coast Guard) instituted this suspension and revocation proceeding seeking revocation of Respondent Randy Joe Green's Merchant Mariner's License Number 1531968. The action was 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 August 10, 2010, 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 alleged that on July 15, 2010, Respondent took a random drug test which yielded a positive result for marijuana metabolites. Respondent filed his Answer on September 2, 2010, admitting all jurisdictional allegations, and denying certain factual allegations.[1] Also on September 2, 2010, the Chief Administrative Law Judge (ALJ) assigned this case to ALJ Bruce T. Smith for hearing and disposition.

On October 25, 2010, Respondent filed a "Motion for Dismissal." In the Motion, Respondent asserted that he had "…been taking random drug tests over the last fifteen years," and that his drug test was not reliable. He suggested that "…[t]here was no

[1] The Complaint consisted of five (5) numbered paragraphs. Respondent indicated that he denied the factual allegations contained in paragraphs 4 and 5, but admitted all others. Paragraphs 1-3 read as follows:

1. On 07/15/2010 Respondent took a random drug test.
2. A urine specimen was collected by Cliff Williamson of West KY Drug Screen.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.

The Coast Guard filed an Amended Complaint on September 24, 2010 modifying the proposed hearing dates and changing the name of the laboratory that analyzed Respondent's urine specimen. Respondent filed an Amended Answer on October 11, 2010, admitting the same numbered jurisdictional and factual allegations.

probable or reasonable cause for the random drug test," and alleged technical violations of the testing process. During an October 28, 2010 pre-hearing conference call, the ALJ determined that Respondent's Motion for Dismissal was not ripe for adjudication, and that the issues discussed therein were better suited for hearing. A hearing on the matter was held on December 9, 2010 in Paducah, Kentucky. 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. Chief Warrant Officer Timothy Smith and Lieutenant Charlotte Keogh represented the Coast Guard; Respondent was assisted by his non-attorney wife, Lisa Green.

Initial Decision

On January 4, 2011, the ALJ issued a Decision and Order. The Decision set forth the law as follows:

> "The law is well settled that in order 'to prove use of a dangerous drug, the Coast Guard must establish a prima facie case of drug use by the mariner.'" (citations omitted).
>
> "…when the Coast Guard's case is based solely upon urinalysis test results, a prima facie case can be made if and only if the Coast Guard initially establishes three required elements by a preponderance of the evidence. See Appeal Decision No. 2662 (VOORHEIS) (2007)."
>
> "If the Coast Guard proves its prima facie case, a presumption then arises that the Respondent used dangerous drugs and the burden of rebuttal then shifts to the Respondent." (citations omitted).
>
> "… to establish a prima facie case based solely on a urinalysis test, the Coast Guard must show that: (1) the Respondent was tested for a dangerous drug, (2) the Respondent tested positive for a dangerous drug, and **(3) the test was conducted in accordance with 49 C.F.R.**

> **Part 40**. Appeal Decisions Nos. 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2598 (CATTON) (1996); 2584 (SHAKESPEARE) (1996); and 2583 (WRIGHT) (1995)." (emphasis added)

The January 4, 2011 Decision and Order found that the Coast Guard had proven all three elements of the *prima facie* case[2] as enumerated above, and that Respondent failed to sufficiently rebut any of the elements. On January 13, 2011, Respondent filed a Notice of Appeal; on March 3, 2011, Respondent filed an Appellate Brief raising multiple issues.

The Commandant's Decision on Appeal (CDOA)

Appeal Decision 2697 (GREEN) (2011) was issued on November 14, 2011. Although Respondent raised many legal issues in his Appellate Brief, the CDOA narrowed the scope of Respondent's appeal to "Whether the Coast Guard established a prima facie case of drug use against Respondent."[3]

At the offset, the decision explained that:

> "[t]o establish a *prima facie* case of drug use based solely on a urinalysis test result, the Coast Guard must prove three elements: (1) that Respondent was tested for a dangerous drug, (2) that Respondent tested positive for a dangerous drug, and **(3) that the test was conducted in accordance with 46 C.F.R. Part 16**. Appeal Decisions 2631 (SENGEL), 2621 (PERIMEN), 2592 (MASON), and 2584 (SHAKESPEARE)." (emphasis added).

Later, the CDOA explained that:

> "When randomness is at issue, if it is not shown that a respondent was selected for testing by a scientifically valid random method, the drug test has not been shown to have

[2] "1. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary (9th ed. 2009).
[3] Appeal Decision 2697 (GREEN) at 3.

> been conducted in accordance with 46 C.F.R. Part 16 and one of the elements of a *prima facie* case has not been established.
>
> Whether Respondent intended to contest the randomness of the test is not clear from the statement in his Motion to Dismiss, "There was no probable cause or reasonable cause for the random drug test." Given that Respondent appears *pro se*, he is entitled to an opportunity to clarify the statement."

In so finding, the CDOA noted that, at the December 9, 2010 hearing, the ALJ "…was cognizant of the issue of the randomness of Respondent's drug test," but merely "…accepted that randomness had been conceded by Appellant's Answer." Thus, GREEN "[remanded] the case so that the ALJ [could] obtain clarification of Respondent's statement [that there was no probable cause for a random drug test] and take any further action required."

Although the January 4, 2011 Decision and Order cited 49 C.F.R. Part 40 as the third element of the *prima facie* case, the CDOA, absent acknowledgment of the distinction, cited 46 C.F.R. Part 16 in lieu of 49 C.F.R. Part 40.[4] As discussed in detail herein, the essence of the instant matter is whether the Coast Guard must demonstrate compliance with 46 C.F.R. Part 16, which incorporates 49 C.F.R. Part 40, or merely must show compliance with 49 C.F.R. Part 40.

Recent Procedural History

On January 9, 2012, ALJ Smith recused himself from the matter pursuant to 33 C.F.R. § 20.204(a). On January 11, 2012, the Acting Chief ALJ re-assigned the matter to the undersigned.

[4] 46 C.F.R. Part 16 requires, in part, that chemical testing of personnel be conducted in accordance with the procedures detailed in 49 C.F.R. Part 40. 46 C.F.R. §§ 16.113, 16.201(a). While 46 C.F.R. Part 16 incorporates 49 C.F.R. Part 40, 49 C.F.R. Part 40 does not incorporate 46 C.F.R. Part 16.

The undersigned initially set the matter for hearing on May 2, 2012 in Paducah, Kentucky. On March 30, 2012 and April 12, 2012, the undersigned conducted pre-hearing telephonic conferences on the matter; the April 12, 2012 conference was transcribed and is cited to herein.[5] Attorney Gary Ball represented the Coast Guard; Ms. Lisa Green, Respondent's wife, served as Respondent's Non-Attorney Representative.

During the latter pre-hearing conference, the undersigned noted that "…the gravamen of the Commandant's remand order was to zero in on [the] randomness issue." The Coast Guard agreed, then subsequently explained that it was "…not prepared now nor [would it] be prepared in the future to prove that Mr. Green was selected by a scientifically valid random method." (Pre-hearing Tr. at 28-29, 31-32). The Coast Guard later affirmed that it would not be producing any evidence to show that a scientifically valid criterion selected Respondent for drug testing. (Pre-hearing Tr. at 34-35).

Accordingly, the undersigned determined that it was not necessary to hold a hearing on the matter, and informed the parties that a decision on the record would be issued. (Pre-hearing Tr. at 34-35, 37-38, 55). Neither party objected. On April 19, 2012, the undersigned issued a Notice of Hearing Cancelation.

***Pro Se* Litigant Issue**

As a preliminary matter, the undersigned notes that in the September 2, 2010 Answer, October 11, 2010 Amended Answer, and October 25, 2010 Motion for Dismissal,[6] Respondent acknowledged he took a random drug test.

[5] Citations referencing the April 12, 2012 pre-hearing conference transcript are as follows: Pre-hearing Transcript followed by the page number (Pre-hearing Tr. at __). Citations referencing the transcript of the December 9, 2010 hearing are as follows: Transcript followed by the page number (Tr. at __).

[6] "There was no probable or reasonable cause for the random drug test. I was not on duty or aboard a uninspected vessel 'upon' Western rivers when I took the random drug test. [sic]"

However, in the Appeal Brief, Respondent's Representative alleged that "[t]he Respondent never admitted in his answer that the process used by [Respondent's employer] to select its employees for testing was random, as it states in the Decision and Order. On the contrary, respondent took several 'random' drug tests since May 2009. The forms respondent signed was marked as 'random' however respondent disagrees and believes that [Respondent's employer] abuses the law and violates personal freedom and liberty's [sic]."

The November 14, 2011 CDOA noted that "…the ALJ accepted that randomness had been conceded by the Appellant's Answer," but explained that:

> The federal courts grant wide latitude in construing the pleadings and papers of *pro se* litigants. SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing Maldonado v. Garza, 579 F.2d 338, 340 (5th Cir. 1978)). *See also* Haines v. Kerner, 404 U.S. 519, 520 (1972) (Allegations set forth in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers). More generally, "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

Thus, although Respondent arguably may have conceded the randomness issue in the pleadings, the CDOA specifically found these concessions insufficient as a result of Respondent's *pro se* status. Although the CDOA acknowledged that random testing "…may, by its very nature, be conducted without notice or any suspicion of drug use," (citations omitted), the case was nonetheless remanded so that the undersigned could "…obtain clarification of Respondent's statement [that the random drug test lacked probable cause]."

As discussed *infra*, during the pre-hearing conference, Respondent clarified his statement, explaining that he felt the drug test violated both the Fourth and Fifth Amendments of the United States Constitution. He further argued that he was not "…selected randomly by…a scientific method." (Pre-hearing Tr. at 23). As such, the undersigned will examine the respective arguments of both parties in light of the remand.

DISCUSSION

Scope of the Remand

As discussed, the January 4, 2011 Decision and Order specifically found that the subject urinalysis was conducted in accordance with 49 C.F.R. Part 40; this finding was left undisturbed by the November 14, 2011 CDOA. Accordingly, Respondent's assertions as to technical infractions and non-compliance with 49 C.F.R. Part 40 are outside the scope of the remand.

The CDOA instead focused on compliance with 46 C.F.R. Part 16, subpart B, specifically holding that:

> "…an element in establishing a *prima facie* case of drug use based solely on a urinalysis test result is that the test must have been conducted in accordance with **46 C.F.R. Part 16**. 46 C.F.R. Part 16 requires…that crewmembers selected for random drug testing be selected by a scientifically valid method. 46 C.F.R. § 16.230(c). When randomness is at issue, if it is not shown that a respondent was selected for testing by a scientifically valid random method, the drug test has not been shown to have been conducted in accordance with 46 C.F.R. Part 16 and one of the elements of a *prima facie* case has not been established." (emphasis added).

As discussed, Respondent clarified his position, arguing that the drug test violated the Fourth and Fifth Amendments, and that he was not, in fact, randomly selected by a scientific method. The Coast Guard concedes that it cannot produce any evidence showing that Respondent's test was 46 C.F.R. Part 16 compliant.

Thus, the undersigned must determine whether the Coast Guard proved the charge alleged absent any evidence of compliance with 46 C.F.R. Part 16, specifically 46 C.F.R. § 16.230, "Random testing requirements."

Coast Guard's Arguments

Although the Coast Guard acknowledged that it was unable to put forth any evidence showing that Respondent was selected by a scientifically valid random method, during the pre-hearing conference, the Coast Guard nonetheless proffered that they had "…a scientifically valid[7] positive test for an illegal drug," and that "…[the Coast Guard] has a requirement [to] take action against mariners who are deemed to have been users of a dangerous drug under 46 U.S. Code 7704." (Pre-hearing Tr. at 30-31).

However, the Coast Guard conceded that while it has "reliable evidence of drug use," it also has "the GREEN remand order that says that if…the Coast Guard did not essentially get that evidence via a scientifically valid random test…that's problematic," explaining that "[the Coast Guard] is being pulled in two different directions here." (Pre-hearing Tr. at 31).

Nevertheless, the Coast Guard asserted that "there are two alternatives" for a valid random selection method, explaining that one selection method "[involves] the selection for random testing [of an individual] being made by a scientifically valid method," but that there also exists an alternative selection method wherein "…a [mariner] is selected by vessel." (Pre-hearing Tr. at 43-44).

The Coast Guard acknowledged that the CDOA remanded the case with the language "scientifically valid method," but explained that "…the intent of the employer

[7] The Coast Guard was presumably referring to the validity of the test pursuant to 49 C.F.R. Part 40.

here was more closely related to that alternative selection method." (Pre-hearing Tr. at 44). The Coast Guard explained that "[t]he selection method…was attempted to be more like [the latter method] but they still fell short at achieving that method, according to Part 16," conceding that "the employer basically didn't do either [selection method] correctly…". (Pre-hearing Tr. at 45). Nonetheless, the Coast Guard suggested that "[t]here's less opportunity for an employer to target an individual if the employer is selecting the vessel [as opposed to an individual]." (Pre-hearing Tr. at 45).

The Coast Guard also specifically raised the issue of "…the application of the exclusionary rule to this case," requesting that "…any decision that dismisses this case considers the implications of applying the exclusionary rule to an administrative proceeding." (Pre-hearing Tr. at 35-36). Last, the Coast Guard suggested that because Respondent's test results were certified as positive by an MRO, Respondent's test still met the requirements of "fails a chemical test for dangerous drugs" under Part 16, and Respondent should therefore be required to fulfill certain return-to-work requirements. (Pre-hearing Tr. at 48).

Respondent's Arguments

At the pre-hearing conference, Respondent's Representative asserted that the subject urinalysis violated both the Fourth and Fifth Amendments of the U.S. Constitution.[8] (Pre-hearing Tr. at 19-20). Respondent's Representative also alleged that Respondent was not "…selected randomly by…a scientific method." (Pre-hearing Tr. at

[8] As to Respondent's constitutional concerns, the undersigned notes that CDOAs have held that constitutional issues are beyond the purview of ALJs. Appeal Decision 2632 WHITE (2002) explicitly states that "[s]uspension and revocation proceedings have as the focus of their inquiry issues of compliance with statutes and regulations; Constitutional issues are the province of the Federal Courts. 46 USC §7701 *et seq*." Thus, the undersigned does not have jurisdiction as to Respondent's assertions of Fourth and Fifth

23, 41). Respondent's Representative also generally alleged that the Coast Guard's case was not "bona fide" and alleged specific technical violations of 49 C.F.R. Part 40. (Pre-hearing Tr. at 27, 41-42, 50-51).

As to the Fourth Amendment violations, Respondent's Representative explained that the test was unconstitutional "[b]ecause it was unreasonable, and there was no probable cause." (Pre-hearing Tr. at 21). As to the Fifth Amendment, Respondent's Representative asserted that the Constitution provides that that "no person shall be a witness against himself." (Pre-hearing Tr. at 19-20).

When asked to clarify what bearing the Fifth Amendment has on the instant matter, Respondent's Representative asserted that "[t]hat's the whole thing about randomness. They go around getting random people and they force them to be witness against theirselves and that's not right. [sic]" (Pre-hearing Tr. at 24). Respondent's Representative explained that she believed that both requiring someone to submit fluids and requiring them to testify violates the Fifth Amendment. (Pre-hearing Tr. at 24).

Last, Respondent explained that he had undergone multiple tests within a three-month period, and "[was not] randomly selected." (Pre-hearing Tr. at 21, 23).

46 C.F.R. Part 16 and 49 C.F.R. Part 40

As discussed herein, the three elements of a *prima facie* case have been inconsistently cited at both the ALJ and CDOA level. As to this specific case, at the December 9, 2010 hearing, the Coast Guard explained that it "[would] prove three elements…", and enumerated the elements as follows: (1) that Respondent was the person tested for dangerous drugs, (2) the test was conducted in accordance with 49

Amendment violations. See also Appeal Decisions 2646 (MCDONALD), 2612 (DEGOUGH), 2611

C.F.R. Part 40, and (3) that the specimen tested positive for marijuana metabolites.[9] (Tr. at 13). The January 4, 2011 Decision and Order also listed 49 C.F.R. Part 40 compliance as one of the three elements;[10] the CDOA lists 46 C.F.R. Part 16.

Title 49 C.F.R. Part 40 "Procedures for Transportation Workplace Drug and Alcohol Testing Programs", *inter alia*, sets technical testing standards for urine drug tests. Title 46 C.F.R. Part 16, in part, requires that chemical testing of personnel be conducted in accordance with the specific procedures outlined in 49 C.F.R. Part 40. [11] While 46 C.F.R. Part 16 incorporates 49 C.F.R. Part 40, 49 C.F.R. Part 40 does not incorporate 46 C.F.R. Part 16.

Beyond merely incorporating 49 C.F.R. Part 40, 46 C.F.R. Part 16 also specifies five circumstances under which a mariner is subject to drug testing by marine employers, and the required procedures for each of the following types of tests: (1) Pre-employment testing; (2) Periodic testing; (3) Random testing; (4) Testing following a serious marine accident; and (5) Testing following reasonable cause. 46 C.F.R. §§ 16.210, 16.220, 16.230, 16.240, and 16.250.

Random drug testing falls under the purview of 46 C.F.R. § 16.230, "Random testing requirements." The section explains that:

> "The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social

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(CIBULKA), 2599 (GUEST), 2594 (GOLDEN).

[9] However, during closing arguments, the Coast Guard cited generally to 46 C.F.R. Part 16. (Tr. at 165).

[10] The January 4, 2011 Decision and Order cites "Appeal Decisions Nos. 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2598 (CATTON) (1996); 2584 (SHAKESPEARE) (1996); and 2583 (WRIGHT) (1995)" as authority for the three elements of the *prima facie* case. With the exception of VOORHEIS, all of the cited cases list 46 C.F.R. Part 16 as the third element.

[11] "Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR Part 40." 46 C.F.R. § 16.201(a).

> Security numbers, payroll identification numbers or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection."

Because 46 C.F.R. Part 16 incorporates 49 C.F.R. Part 40, both provisions mandate an examination of 49 C.F.R. Part 40 compliance. Thus, the citation to one provision over the other only becomes an issue if a challenge is raised as to a provision contained solely in 46 C.F.R. Part 16, as in the instant case.[12] Here, the focus of the remand is 46 C.F.R. § 16.230.

The History of 46 C.F.R. Part 16

Appeal Decision 2603 (HACKSTAFF) (1998) explained that, since 1988, the Coast Guard has brought cases based solely on the results of drug testing by urinalysis, noting that "…to establish the 46 C.F.R. § 16.201(b) presumption, the Coast Guard must prove (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 16**. Proof of those three elements establishes a *prima facie* case of the 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." (emphasis added).

[12] Indeed, the majority of contested issues at ALJ hearings and issues raised on appeal relate to the integrity of the testing process, not the method of selection for testing. Perhaps for this reason, among other reasons discussed herein, ALJ decisions and CDOAs have frequently transposed the two provisions absent explanation.

A review of CDOAs issued post-HACKSTAFF reveals inconsistencies as to the third element of the *prima facie* case. HACKSTAFF was issued in 1998. From HACKSTAFF up to and including Appeal Decision 2631 SENGEL (2002), CDOAs generally listed the third element of the *prima facie* case as compliance with 46 C.F.R. Part 16.

However, in Appeal Decision 2632 WHITE (2002) the third element inexplicably changed, albeit inconsistently, to compliance with 49 C.F.R. Part 40 in lieu of compliance with 46 C.F.R. Part 16.[13] WHITE, which cited 49 C.F.R. Part 40, was issued a mere two days after SENGEL, which cited 46 C.F.R. Part 16.[14] The rationale behind the sudden change in the *prima facie* case was not explained in WHITE; in fact, WHITE failed to acknowledge the change.

The undersigned notes for the record that a regulatory change impacting 46 C.F.R. Part 16 occurred in 2001. See 66 Fed. Reg. 42964 (2001). Pursuant to this change, 46 C.F.R. Part 16, subpart C was removed and reserved. Portions of subpart C were already covered in detail in 49 C.F.R. Part 40; accordingly, these portions were removed from 46 C.F.R. Part 16 altogether. However, other portions of subpart C were relocated to subparts A and B of 46 C.F.R. Part 16. See 66 Fed. Reg. 42966 (2001). Notably, this regulatory change took effect on August 16, 2001, almost one year prior to the Commandant's decision in WHITE.[15] Thus, the sudden change in CDOAs appears unrelated to the legislative history of the relevant provisions. Further, as discussed,

[13] WHITE cited the following cases as authority for establishing the elements of a *prima facie* case: Appeal Decisions 2584 (SHAKESPEARE), 2589 (MEYER), 2592 (MASON), 2603 (HACKSTAFF), 2598 (CATTON), and 2583 (WRIGHT). All of these cases cite 46 C.F.R. Part 16 rather than 49 C.F.R. Part 40 as the third element.
[14] SENGEL was issued on August 7, 2002; WHITE was issued on August 9, 2002.
[15] The underlying hearings for both cases were held well before the regulatory change.

WHITE was issued a mere two days after SENGEL, and made no mention of the regulatory change.

Absent explanation, post-WHITE CDOAs generally cited to 49 C.F.R. Part 40 as the third requisite element. But see Appeal Decision 2637 (TURBEVILLE) (2003), Appeal Decision 2653 (ZERINGUE) (2005), Appeal Decision 2679 (DRESSER) (2008). Appeal Decision 2688 (HENSLEY) (2010) did not explicitly list the elements, but noted that the ALJ had determined the Coast Guard had not proved its case "in accordance with 46 CFR Part 16 and 49 CFR Part 40."

However, it is important to note that multiple CDOAs which listed 49 C.F.R. Part 40 as the third element nevertheless continued to consider whether a given drug test complied with 46 C.F.R. Part 16. Although the provision was unmentioned, CDOAs continued to treat 46 C.F.R. Part 16 compliance as important, if not dispositive. One decision to do so was Appeal Decision 2633 (MERRILL) (2002).

In MERRILL, a respondent mariner injured his hand immediately prior to reporting to work. After the respondent's employer informed him it would pay his medical expenses if he submitted to a drug test, the respondent provided a urine sample that subsequently tested positive for cocaine metabolites. As the respondent's employer classified the test as a "post injury chemical test," it was outside the scope of 46 C.F.R. Part 16.

Although MERRILL listed solely 49 C.F.R. Part 40 as the third element of the *prima facie* case, the CDOA nevertheless remanded the case back to the ALJ for a determination of voluntariness, explaining that "[a determination of voluntariness] could dramatically alter the outcome of this case." (emphasis added). In so remanding, the

CDOA relied on Appeal Decision 2545 (JARDIN) (1992) wherein it was held that, if voluntary, a urine sample may nonetheless be used even if collected for a purpose other than those delineated in 46 C.F.R. Part 16. Thus, although MERRILL altogether omitted 46 C.F.R. Part 16 for purposes of the *prima facie* case, the CDOA nonetheless crafted the scope of the remand around 46 C.F.R. Part 16 compliance, demonstrating its import in drug use cases.

MERRILL is not alone. Other CDOAs nonetheless continued to analyze whether mariner urine screenings met the requirements of 46 C.F.R. Part 16 or an established exception thereto. See Appeal Decision 2635 (SINCLAIR) (2002) (reasoning that Respondent's "post-accident" urine test did not comport with 46 C.F.R. § 16.240, but, based on JARDIN, was nonetheless sufficient for the suspension and revocation proceeding because Respondent voluntarily took the test as a "precautionary measure.").[16] The undersigned notes that if 46 C.F.R. Part 16 compliance were neither important nor dispositive, all of this analysis would be gratuitous.

Along these same lines, regardless of whether 46 C.F.R. Part 16 or 49 C.F.R. Part 40 is cited as the third element, it has been, and remains, common practice both in the pleadings and at hearings to allege the type of drug test taken, substantiate why such a test was ordered, and prove compliance with the 46 C.F.R. Part 16. See Appeal Decision 2583 (WRIGHT) (1995) ("…Appellant [provided] a periodic urine sample, as required by Coast Guard regulations, to receive a drug free certificate permitting him to sail."). See also Appeal Decision 2688 (HENSLEY) (2010) ("As a condition of employment with Florida Marine, Respondent was required to submit to a pre-employment drug test.") The undersigned also notes that it is common practice for the Coast Guard to adduce the

employer's drug testing policies at the hearing. Again, if 46 C.F.R. Part 16 compliance is not required for the Coast Guard to prove its case, all of this information and analysis is superfluous.

Last, the undersigned notes that ALJs are obliged to follow legal precedent as set forth. GREEN, the most recent CDOA relating to use of a dangerous drug, lists 46 C.F.R. Part 16 as the third element of the *prima facie* case. The undersigned is obliged to follow this legal precedent.

The *Prima Facie* Case Generally

A discussion is also warranted as to the relationship between the *prima facie* case and the rebuttable presumption in drug use cases. Historically, CDOAs linked the three enumerated elements of a *prima facie* case of drug use with entitlement to a rebuttable presumption of drug use.[17] Appeal Decision 2560 (CLIFTON) (1995) explained:

> "The presumption is established by 46 C.F.R. 16.201 (b), which states "If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." **In order to establish this presumption, the Coast Guard must prove (1) that the respondent was the individual 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 16. This proof establishes a prima facie case** of use of a dangerous drug (i.e. a presumption of use of a dangerous drug), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption." (emphasis added).

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[16] Voluntariness is not at issue in the instant matter. (See Pre-hearing Tr. at 24).

[17] See Appeal Decision 2603 (HACKSTAFF) (1998) ("…to establish the 46 C.F.R. § 16.201(b) presumption, the Coast Guard must prove (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 16. Proof of those three elements establishes a *prima facie* case of the 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.").

However, in CDOAs subsequent to CLIFTON, the language transmuted, and the relationship between the *prima facie* case and the presumption of drug use became less clear. Frequently, any discussion of the rebuttable presumption was altogether omitted.[18] Nevertheless, the presumption remains codified at 46 C.F.R. § 16.201(b), and states: "If an individual fails a chemical test for dangerous drugs **under this part**, the individual will be presumed to be a user of dangerous drugs." (emphasis added).

Appeal Decision 2662 (VOORHEIS) (2007), sets forth the law as follows:

> "Pursuant to Coast Guard regulation, if a mariner fails a drug test, he is presumed to be a user of dangerous drugs. **46 C.F.R. § 16.201(b)**…[t]o prove use of a dangerous drug, the Coast Guard must establish a *prima facie* case of drug use by the mariner….In a drug case based solely on urinalysis test results, a *prima facie* case of use of a dangerous drug is shown when three elements are proved: (1) that a party is tested for use of a dangerous drug; (2) that test results show that the party tested positive for the presence of a dangerous drug; and (3) that the drug test is conducted in accordance with the procedures set forth in **49 C.F.R. Part 40**."
> (emphasis added).
> (some citations omitted).

Thus, a careful reading of both VOORHEIS and 46 C.F.R. § 16.201(b) suggests that if a test is 46 C.F.R. Part 16 compliant, the Coast Guard is entitled to a presumption of drug use, but if the test is merely 49 C.F.R. Part 40 compliant, the Coast Guard arguably could still be able to prove a *prima facie* case. Whether this possible interpretation was intentional, or merely an inadvertent byproduct of 49 C.F.R. Part 40 being substituted for 46 C.F.R. Part 16 (whether intentionally or not), is unknown.

[18] See Appeal Decision 2631 (SENGEL) ("The Coast Guard may establish a *prima facie* case for *use of a dangerous drug* by showing: (1) that the respondent was tested for a dangerous drug; (2) that the respondent tested positive for a dangerous drug; and, (3) that the test was conducted in accordance with 46 C.F.R. Part 16.").

Nevertheless, GREEN, the most recent CDOA, omitted any discussion of the rebuttable presumption, merely listing the three elements needed "[t]o establish a *prima facie* case based solely on a urinalysis test result…"[19], and specifically listed 46 C.F.R. Part 16 as the third requisite element. The CDOA did not disturb the ALJ's holding that the test was 49 C.F.R. Part 40 compliant, nor did the CDOA dispute the ALJ's assertion that the Coast Guard could prove use of a dangerous drug "if and only if" the Coast Guard established the three elements comprising the *prima facie* case. Thus, GREEN forecloses the possibility that 49 C.F.R. Part 40 alone is sufficient for the Coast Guard to prove the charge alleged.

The Selection Method

At the pre-hearing conference, Respondent argued that he was not selected by a scientifically valid method, and thus that the urinalysis was not in compliance with 46 C.F.R. § 16.230. The Coast Guard explained that Respondent's employer's selection method "attempted" to follow the latter method discussed in 46 C.F.R. §16.230 [conducting random selection by vessel as opposed to by individual mariner] but fell short. The Coast Guard conceded that the employer "…didn't do either [selection method] correctly…". (Pre-hearing Tr. at 45). Nevertheless, the Coast Guard asserted that "[t]here's less opportunity for an employer to target an individual if the employer is selecting the vessel [as opposed to an individual]." (Pre-hearing Tr. at 45).

Whether Respondent's employer attempted to randomly select mariners individually or by vessel is irrelevant. The Coast Guard has not demonstrated by a preponderance of the evidence that the selection method was conducted in accordance

[19] The January 4, 2011 Decision and Order specifically held that "[t]he instant case is based solely upon the

with either selection method discussed in 46 C.F.R. § 16.230; in fact, the Coast Guard conceded that it was not. The law as set forth requires compliance with 46 C.F.R. Part 16.

Accordingly, the Coast Guard failed to prove that Respondent's drug test was conducted in accordance with 46 C.F.R. Part 16, the third element of the *prima facie* case. Based on the remand and the case law discussed *supra*, failure to prove this element is fatal.

The Coast Guard also asserted that it was required to take action against mariners deemed users of dangerous drugs pursuant to 46 U.S.C. § 7704. Title 46 U.S.C. § 7704 states, in relevant part: "If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." 46 U.S.C. § 7704(c). In the instant case, based on the requirements of proof set forth by the applicable CDOAs, the Coast Guard has not satisfactorily shown that Respondent is a user of dangerous drugs.

Exclusionary Rule

During the pre-hearing conference, the Coast Guard requested that the undersigned "…[consider] the implications of applying the exclusionary rule to an administrative proceeding." (Pre-hearing Tr. at 35-36).

As a general principle of law, the exclusionary rule mandates the suppression of evidence obtained in violation of an individual's constitutional rights. See Mapp v. Ohio, 367 U.S. 643 (1961). However, use of the exclusionary rule has been narrowly construed

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results of a random urinalysis test."

in the context of administrative proceedings. See INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). Appeal Decision 2625 (ROBERTSON) (2002).

The most recent CDOA to explicitly discuss application of the exclusionary rule was ROBERTSON, supra, a 2002 case. ROBERTSON affirmed the ALJ's holding that a respondent committed Misconduct by submitting an adulterated sample during a reasonable cause chemical test. On appeal, the respondent argued that, since his employer lacked "particularized reasonable suspicion" that he was using drugs, the ALJ should not have considered his action of providing the adulterated sample. In holding that the exclusionary rule should not apply, the Commandant stated: "I have held in other cases that the Exclusionary Rule should not apply to Coast Guard Suspension and Revocation proceedings. Appeal Decisions 2297 (FOEDISCH), 2135 (FOSSANI). I believe that reasoning is still sound." However, the decision also specifically acknowledged, *inter alia*, that in ROBERTSON "…the decision to drug test Respondent was made…in a good faith effort to comply with the company's drug and alcohol policy."

At the offset, it is important to note that in ROBERTSON the underlying charge was Misconduct. In the instant case, the underlying charge is Use of, or Addiction to the Use of Dangerous Drugs pursuant to 46 C.F.R. § 5.35. Thus, the required elements of proof are different. As discussed, GREEN held that proof of 46 C.F.R. Part 16 compliance is required to prove Use of, or Addiction to the Use of Dangerous Drugs. Thus, the undersigned is not applying the exclusionary rule, but merely applying the law as set forth.

The remand was specific and required the undersigned to explore Respondent's allegations of non-compliance with 46 C.F.R. Part 16; the undersigned has done so. To further analyze whether the elements of proof invoke the exclusionary rule would both transcend the scope of the remand and require the undersigned to explore the constitutional implications of the *prima facie* case.

While 46 C.F.R. Part 16 may have Fourth Amendment implications, any further analysis of this issue is beyond the undersigned's purview. As discussed, "[s]uspension and revocation proceedings have as the focus of their inquiry issues of compliance with statutes and regulations; Constitutional issues are the province of the Federal Courts. 46 USC §7701 *et seq.*" See WHITE, supra.

Last, the undersigned notes that ROBERTSON specifically reasoned that "…the decision to drug test Respondent was made by the marine employer in a good faith effort to comply with the company's drug and alcohol policy—a policy Respondent knew he was subject to as a condition of his employment." In the instant case, there is insufficient evidence from which the undersigned could render such a finding; it is unclear as to whether company policy was followed, or whether Respondent was selected in good faith. Thus, even if the undersigned had jurisdiction to entertain arguments regarding the exclusionary rule, there may be insufficient information in the record from which to render such a determination.

Required Chemical Tests

At the hearing, the Coast Guard also asserted that Respondent's test nonetheless met the requirements for "fails a test for dangerous drugs" under Part 16, and Respondent should therefore be required to fulfill certain "return to work" requirements. (Pre-hearing

Tr. at 48). The Coast Guard presumably refers to the requirements set forth in 46 C.F.R. § 16.201. Title 46 C.F.R. § 16.201 states, in relevant part: [20]

> "(c) If an individual holding a credential fails a chemical test for dangerous drugs, the individual's employer, prospective employer, or sponsoring organization must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation proceedings against his or her credential under 46 CFR part 5.
>
> (e) An individual who has failed a **required** chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f) of this section and 46 CFR Part 5, if applicable, have been satisfied.
>
> (f) Before an individual who has failed a **required** chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual must agree to be subject to increased unannounced testing--
>
> > (1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40; and
> >
> > (2) For any additional period as determined by the MRO up to a total of 60 months."
> > (emphasis added).

Notably, 46 C.F.R. § 16.105 defines "Fails a chemical test for dangerous drugs" as:

> "…the result of a chemical test conducted in accordance with **49 CFR 40** was reported as 'positive' by a Medical Review Officer because the chemical test indicated the

[20] As discussed, 46 C.F.R. § 16.201(b) explains that an individual who fails a chemical test for dangerous drugs will be presumed to be a user of dangerous drugs; however, the provision explains that the presumption applies only to individuals who have failed a test "under this part." (emphasis added).

> presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40."

The January 4, 2011 Decision and Order held that Respondent's drug test was conducted in accordance with 49 C.F.R. Part 40, and specifically found that the MRO, Dr. Daniel Drew, reported the test as positive. These findings were left undisturbed by the CDOA. Thus, for purposes of 46 C.F.R. § 16.201, Respondent did fail a chemical test for dangerous drugs.

However, while Respondent "failed a chemical test for dangerous drugs", he did not fail a required chemical test. [21] See 46 C.F.R. § 16.113. Title 46 C.F.R. Part 16 sets forth the minimum standards that marine employers are required to employ to test mariners for the use of dangerous drugs. 46 C.F.R. § 16.101. As explained in GREEN, "[u]nder 46 C.F.R. Part 16, employers are required to conduct five specific types of drug testing: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Serious marine incident testing; and 5) Reasonable cause testing. 46 C.F.R. §§ 16.210-16.150; Appeal Decision 2641 (JONES)."

Here, the Coast Guard was unable to show that Respondent's test fell into one of these categories. There is nothing in the record to suggest that Respondent's test was required by 46 C.F.R. Part 16, any other applicable regulation, or even by Respondent's employer's own drug testing policy. In fact, it is altogether unclear how or why Respondent was selected for testing. Accordingly, Respondent is not subject to the provisions of 46 C.F.R. § 16.201(e) and (f), which are only applicable to mariners who have failed required chemical tests.

[21] Title 46 C.F.R. Part 16, subpart B is entitled "Required Chemical Testing."

However, 46 C.F.R. § 16.201(c) does not explicitly state that the chemical test need be "required", but simply mandates that an individual with a license who fails a chemical drug test, "…be removed from duties which directly affect the safe operation of the vessel as soon as practicable and [subjected] to suspension and revocation proceedings against his or her credential under 46 CFR part 5." Arguably, this provision could apply to Respondent.

However, the undersigned notes that, based on the law as set forth, the undersigned is required to find that the Coast Guard has failed to prove Use of, or Addiction to the Use of Dangerous Drugs. It is unclear as to what "return to work" requirements the Coast Guard suggests that Respondent should be required to fulfill pursuant to 46 C.F.R. § 16.201(c), especially in light of the fact that the undersigned must find the charge not proved. (Pre-hearing Tr. at 48).

Conclusion

As discussed, the January 4, 2011 Decision and Order cited 49 C.F.R. Part 40 as the third requisite element of the *prima facie* case, however, GREEN, absent explicit acknowledgement of the distinction, cited 46 C.F.R. Part 16. A review of applicable case law reveals that ALJs and CDOAs have, frequently, and without explanation, transposed the two provisions. However, GREEN, the most recent CDOA, specifically mandates 46 C.F.R. Part 16 compliance, and the undersigned is obliged to follow the law as set forth. Further, a review of relevant CDOAs indicates that GREEN is not an aberration; 46 C.F.R. Part 16 compliance has historically been treated as important, if not dispositive, even absent explicit mention. Thus, the Coast Guard's failure to prove compliance with

46 C.F.R. § 16.230 is fatal, and the undersigned must find the charge of Use of, or Addiction to the Use of Dangerous Drugs **NOT PROVED.**

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner License 1531968.

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 submitted to an involuntary urinalysis drug test on July 15, 2010.

4. The July 15, 2010 test, which yielded a positive result for marijuana metabolites, followed the guidelines set for drug testing by the Department of Transportation in 49 C.F.R. Part 40, but did not follow the guidelines set forth in 46 C.F.R. Part 16.

5. The Coast Guard failed to prove that the test was conducted in accordance with 46 C.F.R. § 16.230.

6. Because of the Coast Guard's failure to prove the test was conducted in accordance with 46 C.F.R. Part 16, the Coast Guard did **NOT PROVE** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.

ORDER

The matter is hereby **DISMISSED WITH PREJUDICE**.

PLEASE TAKE NOTICE that service of this Decision and Order on Remand 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. A copy of 33 C.F.R. §§ 20.1001 – 20.1004 is provided below.

_____

Dean C. Metry
US Coast Guard Administrative Law Judge

Date: July 02, 2012

Notice of Appeal Rights

33 C.F.R. § 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

33 C.F.R. § 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 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 C.F.R. § 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

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

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

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

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

33 C.F.R. § 20.1004 Decisions on appeal.

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

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