UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

LARRY GRANT JOHNSON

Respondent

Docket Number: CG S&R 2012-0045
CG Enforcement Activity No. 4228348

DECISION AND ORDER

Issued: July 20, 2012

Issued by: Michael J. Devine, Administrative Law Judge

Appearances:

For Complainant
Mark A. Gibbs, Senior Investigating Officer
MSTC Mark Henricksen, Investigating Officer
U.S. Coast Guard Marine Safety Unit
100 W. Oglethorpe Avenue
Suite 1017
Savannah, Georgia 31401

For Respondent
Ronald E. Harrison II, Esq.
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PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Larry Grant Johnson's (Respondent) Merchant Mariner's Document Number 1196731. This action is brought pursuant to the authority contained in 46 U.S.C. 7704(c) and its underlying regulations codified at 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

The Coast Guard issued a Complaint on January 26, 2012, charging Respondent with use of or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges Respondent took a reasonable suspicion drug test on November 15, 2011, and that test yielded a positive result of cocaine metabolites. Respondent filed his Answer on February 14, 2012. In his Answer Respondent neither admitted nor denied jurisdictional allegations and denied all factual allegations contained in the Complaint.

The hearing commenced on April 26, 2012, at 9:34 AM in Savannah, Georgia. 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. The Coast Guard moved for admission of eight (8) exhibits, all were admitted, and presented testimony of three (3) witnesses. Respondent moved for admission of three (3) exhibits, two (2) were admitted and one (1) was withdrawn, and presented the testimony of seven (7) witnesses. The list of witnesses and exhibits is contained in **Attachment A**. At the close of the hearing the parties agreed to hold the record open until May 4, 2012 to allow Respondent to submit an affidavit from Steven Mansfield, M.Ed. LPC.

Respondent filed a notarized Statement of Opinion from Licensed Professional Counselor Steven A. Mansfield, M.Ed., LPC, on May 2, 2012 which has been admitted to the record as Respondent Exhibit B. Both the Coast Guard and Respondent submitted post hearing briefs on June 4, 2012. The record has closed and the case is now ripe for a decision.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, I find the charged violation of use of or addition to dangerous drugs **NOT PROVED.**

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on or about November 15, 2011, Respondent was a holder of Merchant Mariner's Document Number 1196731 issued by the United States Coast Guard. At the hearing Respondent did not dispute the jurisdictional allegations of the Complaint. (Tr. at 13, 16; 148 Complaint)[1].
2. The Georgia Department of Natural Resources (DNR) employed Respondent in November 2011 as a captain. (Tr. at 148).
3. Georgia DNR required employees including Respondent to read and sign a Human Resources SOP which includes DNR drug testing guidelines. (Tr. at 39-40; CG Ex. 10).
4. Respondent hosted a fish fry at his home on Sapelo Island, Georgia on Friday November 11, 2011. (Tr. at 105, 114-15, 128). The fish fry was attended by many friends and neighbors. (Id.)
5. Respondent hosted a fish fry at his home on Sapelo Island, Georgia on Saturday November 12, 2011. (Tr. at 106, 114-15, 128, 132-33). The fish fry was attended by many friends and neighbors. (Id.)

[1] Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the page number (CG Ex. __); Respondent's Exhibits are as follows: Respondent followed by the page number (Resp. Ex. __).

6. Bobby Grosvenor attended Respondent's fish fry on November 11 and 12, 2011. (Tr. at 152-53).
7. A number of witnesses testified that Respondent has had known disagreements with another family on Sapelo Island. (Tr. at 108, 116-17). J.R. Grosvernor and Bobby Grosvernor specifically have been known to have disagreements with Respondent. (Tr. at 144-145, 151-52).
8. James Lane is the Human Resources Director for Georgia Department of Natural Resources. (Tr. at 24).
9. Mr. Lane has received reasonable suspicion training to handle reports of drug use, and on Georgia DNR policies and procedures. (Tr. at 37-39; CG Ex. 8).
10. Sunday, November 13, 2011, Mr. Lane received a call from Captain Doug Lewis, the regional law enforcement supervisor, stating he had information from a reliable source that a DNR employee had been observed ingesting a substance believed to be cocaine. (Tr. at 25-26).
11. Captain Lewis identified Respondent Larry Johnson as the DNR employee who was reported to have ingested a substance believed to be cocaine. (Tr. at 26).
12. Captain Lewis informed Mr. Lane that this was the second time Captain Lewis had received a report alleging Respondent's involvement with dangerous drugs. (Tr. at 26).
13. Captain Lewis informed Mr. Lane that the information came from a reliable confidential source. (Tr. at 25-26, 44).
14. The Georgia DNR guidelines and SOP outline the factors necessary to allow the DNR to perform a reasonable suspicion drug test. (Tr. at 40-41). Specifically the factor used by Mr. Lane to order Respondent to submit to a reasonable suspicion drug

test is "verifiable information that an employee may be using illegal drugs or is under the influence of drugs." (Tr. at 43).

15. Respondent signed a statement saying he read and understood DNR's drug testing policies. (Tr. at 39-40; CG Ex. 10).
16. Mr. Lane concluded that Captain Lewis' report from an extremely reliable confidential informant was enough to order a reasonable suspicion drug test per the Georgia DNR SOP. (Tr. at 44).
17. Respondent's supervisor, at the direction of Mr. Lane, asked Respondent to submit to a reasonable suspicion drug test on Tuesday, November 15, 2011. (Tr. at 27).
18. Respondent's supervisor escorted Respondent to the Applecare testing facility on November 15, 2011, where Respondent participated in a reasonable suspicion drug test. (Tr. at 27, 62-66).
19. Ieesha Campbell, a specimen collector with approximately eight (8) months experience as a certified collector with Applecare, collected a urine sample from Respondent for the purpose of performing a DOT urinalysis drug test. (Tr. at 62-73).
20. Ms. Campbell followed the collection procedures in accordance with DOT collection standards for a urinalysis drug screen and described it as follows. (Tr. at 63-66).
    a. Ms. Campbell testified the process begins with the donor showing his identification, putting his belongings into a locked box, and washing his hands. (Tr. at 63).
    b. Then Ms. Campbell begins to fill out the Custody and Control Form (CCF) at step one, the donors personal information including, name, address, telephone number and social security number. (Tr. at 63).

c. Once the information in step one (1) of the CCF is filled out and the donor's hands are washed, Ms. Campbell puts on gloves and opens the collection container in front of the donor. (Tr. at 63-64).

d. Ms. Campbell then escorts the donor to the rest room, puts a bluing agent into the toilet, and requests the donor to provide at least forty five (45) milliliters of urine. (Tr. at 64).

e. Once the donor has finished providing the sample they accompany Ms. Campbell back to the lab where she reads the temperature on the urine to make sure it is within the proper range. (Tr. at 64). Urine samples must be between ninety (90) and one hundred (100) degrees Fahrenheit and the temperature must be read within 4 minutes of production. (Tr. at 65).

f. Respondent's temperature was in range. (Tr. at 66, 67; CG Ex. 2).

g. After the temperature was checked, Ms. Campbell filled out step two (2) of the CCF; pours thirty (30) milliliters of urine into vial A and fifteen (15) milliliters into vial B. (Tr. at 64). Then the donor must initial and date that the specimen was not tampered with. (Id.)

h. Finally Step 5 of the CCF is filled out by the donor and the donor must stay in sight of their sample until it is sealed. (Tr. at 64).

i. Ms. Campbell sent the sealed specimens to MEDTOX laboratories via UPS. (Tr. at 76, CG Ex. 6).

j. Respondent mistakenly signed his name in Step 4 of the CCF, then crossed his name out and initialed next to it per Ms. Campbell's instructions. (Tr. at 72-73).

21. The CCF shows MEDTOX received Respondent's sample on November 16, 2011, and the specimen bottles were received intact. (CG Ex. 6).

22. The CCF from MEDTOX shows a positive test result for the Cocaine metabolite Benzoylecgonine in the amount of 1217 ng/ml for specimen ID number Y8886427. (Tr. at 91; CG Ex. 6).
23. Specimen ID number Y8886427 on the MEDTOX test result form corresponds with Respondent's ID number on his CCF. (CG Ex. 2, 6).
24. The CCF indicates that Jelaine Simcox, certifying scientist for the primary testing laboratory, signed the CCF certifying that the "specimen identified on this form was examined upon receipt, handled using the chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements." (CG Ex. 6).
25. Neither Ms. Simcox nor any other employee from MEDTOX testified in this case.
26. Dr. Donald M. Wilson, Jr., Medical Review Officer (MRO), is employed with I3SCREEN. (Tr. at 83).
27. Dr. Wilson's duties as a MRO are to review results from a DOT certified laboratory and interpret the laboratory findings while providing an individual the opportunity to discuss the positive test results and provide an acceptable medical reason for the positive finding. (Tr. at 85-86).
28. Dr. Wilson contacted Respondent after receiving the results from the laboratory. (Tr. at 86).
29. Respondent did not provide Dr. Wilson with an acceptable medical reason for a positive test result for cocaine. (Tr. at 86-87).
30. Respondent's split sample was sent to a second laboratory to be tested. (Tr. at 96; CG Ex. 6).
31. The secondary laboratory reconfirmed MEDTOX's positive test results for Respondent's sample. (Tr. at 96; CG Ex. 6).

32. The CCF indicates that L. Burdyugova, certifying scientist for the secondary testing laboratory, signed the CCF certifying that the "split specimen identified on this form was examine upon receipt , handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements." (CG Ex. 6).

33. Neither L. Burdyugova nor any other employee from the secondary testing lab testified in this case.

34. The MRO, Dr. Wilson verified the test results as positive for cocaine metabolite from the urine specimen provided by Respondent on November 15, 2011 based on receipt of the positive results from both labs and Respondent's failure to provide Dr. Wilson with an acceptable medical reason for a positive drug test for cocaine metabolite. (Tr. at 86-87; CG 6).

35. Respondent denied using cocaine. (Tr. at 154).

DISCUSSION

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 Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. 7704. Under 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. See also Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause

drug testing to minimize use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16. Here the type of drug test was a reasonable cause drug test. If an employee fails a chemical test by testing positive for a dangerous drug and the test is demonstrated to be in compliance with the requirements of 46 C.F.R. Part 16, the individual is then presumed to be a user of dangerous drugs. See 46 C.F.R. §16.201(b); see also Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for cocaine metabolite in a reasonable suspicion drug test taken on November 15, 2011. The Coast Guard seeks revocation of Respondent's license in accordance with 46 C.F.R. 5.569. For the reasons stated below, I find the Coast Guard has **NOT PROVED** the charged violation that Respondent is a user of or addicted to the use of a dangerous drug based on the evidence in the record.

Burden of Proof

The Administrative Procedure Act (APA), Title 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. Securities and Exchange Commission , 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for

Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer (IO) must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of Use of a Dangerous Drug

As stated above, the Coast Guard bears the burden of proof. Where the sole basis of proof for the charged violation is a positive urinalysis test, the Coast Guard must establish a *prima facie* case in order to prove that a merchant mariner is a user of or addicted to dangerous drugs. Appeal Decision 2603 (HACKSTAFF) (1998)[2]; 46 C.F.R. 16.201.

A *prima facie* case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs; (2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2584 (SHAKESPEARE) (1997).

Once the Coast Guard establishes a prima facie case that Respondent is a user of or addicted to dangerous drugs, the Respondent may then present evidence to rebut the presumption of the positive drug test result. Id. If Respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997).

i. Respondent was the Person Tested for Dangerous Drugs

There is no dispute that Respondent submitted to a drug test. Respondent's supervisor took him on Tuesday, November 15, 2011 to Applecare testing facility to submit a urine sample. (Tr.

[2]"However, where the Coast Guard seeks to rely upon the regulatory presumption, all the terms which form the predicates for the presumption must be established according to the same standard of proof. That is to say, the elements of the case must be shown by substantial evidence of a reliable and probative nature." Appeal Decision 2603 (HACKSTAFF)(1998)

at 27, 62-66). Respondent complied with his supervisors request and submitted a urine sample. Id. The CCF also verifies that Respondent submitted to a drug test. CG Ex. 2 and 6.

ii. The Laboratory Found that Specimen Y8886427 Yielded a Positive Drug Test Result

MEDTOX laboratories tested Respondent's specimen for dangerous drugs and returned a positive result for cocaine metabolite (Benzoylecgonine) at a level of 1217 ng/ml. See CG Ex. 2, 6. A second laboratory reconfirmed MEDTOX's positive test result. See CG Ex. 6. The MRO, Dr. Wilson, received the results from the laboratories and ultimately verified the test as positive for cocaine metabolite. (Tr. at 96).

iii. Drug Test must be Conducted in Accordance with 46 C.F.R. Part 16

The final element specifically requires drug tests ordered pursuant to 46 C.F.R. Part 16 be conducted in accordance with the procedures detailed in 49 C.F.R. Part 40. 46 C.F.R. § 16.201(a). The drug testing in question thus must meet the requirements of both 46 C.F.R. Part 16 and 49 C.F.R. Part 40. "In the interest of justice and the integrity of the entire drug testing system, it is important" that these procedures are followed to maintain the system. Appeal Decision 2631 (SENGEL) (2002). This element of a *prima facie* case is disputed. Respondent's post hearing brief specifically argued that there was insufficient evidence to show that the laboratories followed the requirements of 49 C.F.R. Part 40.

Reasonable Cause Drug Test

A marine employer may test an employee, who is required to hold a Coast Guard issued credential, for dangerous drugs if the employee is reasonably suspected of using a dangerous drug. See 46 C.F.R. § 16.250(a). The employer's decision to test the employee must be based on a reasonable and articulable belief that the individual has used a dangerous drug. See 46 C.F.R. § 16.205(b). This reasonable and articulable belief may be based on direct observation, physical, behavioral or performance indicators of probably use. Id.

Mr. James Lane, Director for the Georgia Department of Natural Resources (DNR), Respondent's employer, received a call from Captain Doug Lewis, another DNR employee. (Tr. at 25). Captain Lewis reported to Mr. Lane that he received an anonymous report that DNR employee, Larry Johnson (Respondent), was using cocaine over the weekend. (Tr. at 25-26). Captain Lewis also informed Mr. Lane that this was the second report the Captain had received concerning Respondent's possible drug use. (Tr. at 26). The previous report had apparently not been received in sufficient time for a test to be conducted. Captain Lewis assured Mr. Lane the information came from a reliable informant and that the informant could be trusted. (Tr. 25, 44).

The Georgia DNR guidelines and SOP outline the factors necessary to allow the DNR to perform a reasonable suspicion drug test. (Tr. at 40-41). Specifically the factor used by Mr. Lane to order Respondent to submit to a reasonable suspicion drug test is "verifiable information that an employee may be using illegal drugs or is under the influence of drugs." (Tr. at 43). Respondent signed a statement saying he read and understood DNR's drug testing policies. (Tr. at 39-40; CG Ex. 10).

The Georgia DNR based their decision to test Respondent on a reasonable and articulable belief that he had used a dangerous drug. Accordingly, the undersigned finds DNR properly requested Respondent to submit to a reasonable cause drug test. Furthermore, there is also enough evidence in the record to show DNR properly ordered Respondent to submit to a drug test in accordance with DNR's company policy. Even if DNR had not followed all of its procedures in requiring a reasonable suspicion drug test, the actions of the DNR were in good faith and the exclusionary rule does not apply to these administrative proceedings. See Appeal Decision 2625 (ROBERTSON) (2002)

Respondent's Specimen Collection

The drug testing regulations found at 49 C.F.R. Part 40 contain several mandatory provisions regarding the collection process. Here, Ms. Campbell, the collector, followed all

applicable Part 40 rules. Specifically Ms. Campbell filled Respondent's personal information in step one (1) of the Custody and Control form (CCF); required Respondent to wash his hands; Ms. Campbell put on gloves before opening the collection container; escorted Respondent into the restroom; and asked him to supply a sample of at least forty-five (45) milliliters of urine. (Tr. at 63-64). Ms. Campbell also checked that the urine sample was the within the proper temperature range; poured 30 ml of urine into vial A and 15 ml into vial B; sealed the vials; and had Respondent initial and date that the specimen was not tampered with. (Tr. at 64-65). The sealed specimens were then sent to MEDTOX laboratories via UPS. (Tr at 76). All of Ms. Campbell's actions were consistent with the regulations. According, the undersigned finds the collection was done in accordance with the Part 40 requirements and element one is satisfied.

Laboratory Analysis

Title 49 C.F.R. § 40.81, requires that the testing laboratory follow Health and Human Services (HHS) guidelines in order to perform a DOT 5-Panal test. A DOT 5-Panal test is the required urinalysis for 46 C.F.R. Part 16 drug testing. The record is devoid of evidence that either laboratory that tested Respondent's urine specimen was a properly HHS certified laboratory.

Although the CCF contains a statement from the certifying scientists from both the primary and secondary labs stating the "specimen identified on this form was examined upon receipt, handled using the chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements," the Coast Guard did not present any additional evidence as to either laboratories practices and procedures. See CG Ex. 6. There is no evidence in the record as to what initial and confirmatory cut off levels were used by MEDTOX or the secondary laboratory. The required cut off levels are found in 49 C.F.R. § 40.87. There was no evidence from an employee of the lab to provide factual information on how the lab maintains and calibrates its equipment, maintains the documentation for identifying the specific specimens

tested and observes all DOT lab testing requirements. Absent further documentation or testimony by a person with knowledge regarding the testing of Respondent's specimen by the lab, there is insufficient evidence in the record to prove the test was conducted in accordance with 49 C.F.R. Part 40, a required element for the presumption contained in 46 C.F.R. Part 16 to apply.

The CCF does indicate Respondent's specimen tested positive for cocaine metabolite (Benzoylecgonine) at a level of 1217 ng/ml. See CG Ex 2, 6. This information alone without further documentation and evidence from the lab illustrating the labs internal chain of custody or testimony from the laboratory director or certifying scientist is not enough to prove by a preponderance of the evidence that Respondent's sample tested positive for cocaine metabolite. In contested cases based solely on urinalysis the Coast Guard is required to present evidence sufficient to prove each elemement of a prima facie case as required by Appeals Decision 2603 (HACKSTAFF)(1998). Where the only evidence regarding process and procedures at the lab presented by the Coast Guard is a CCF without any additional evidence from the laboratories there is not substantial evidence in the record to demonstrate that the regulations found in 49 C.F.R. Part 40 were followed. Without sufficient evidence of compliance with Part 40 the undersigned cannot apply the presumption allowed under 46 C.F.R. Part 16.

Medical Review Officer's Confirmed Positive

The Medical Review Officer (MRO), Dr. Donald Wilson, received Medtox's report that Respondent's urine specimen yielded a positive result for cocaine metabolite. (Tr. at 86). After receiving the results Dr. Wilson contacted Respondent to inquire whether there was an acceptable medical reason for Respondent's specimen to test positive for cocaine metabolites. Id. Upon Respondent's request his split specimen was sent to a second laboratory to be tested. (Tr. at 96). The second laboratory reconfirmed Medtox's positive test result. (Tr. at 96; CG Ex. 6). Dr. Wilson verified Respondent's specimen as positive for cocaine metabolite using the test

results from both labs and Respondent's failure to provide an acceptable medical reason for the positive result. (Tr. at 86-87, CG Ex. 6). The undersigned finds the MRO followed all applicable regulations found in 49 C.F.R. Part 40.

Respondent's Rebuttal

If the Coast Guard establishes a *prima facie* case by a preponderance of the evidence, a presumption of dangerous drug use arises, and the burden then shifts to the respondent to produce persuasive evidence to rebut the presumption. See 33 C.F.R. § 20.703(a); Appeal Decisions 2603 (HACKSTAFF) (1998). To be clear, the presumption established by the failure of a urine test for dangerous drugs is rebuttable. A respondent faced with overcoming the presumption of use of a dangerous drug "may rebut the presumption by producing evidence (1) that calls into question any of the elements of the prima facie case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or not knowing." Appeal Decision 2560 (CLIFTON) (1995). If a respondent's evidence sufficiently rebuts the presumption, then the burden of presenting evidence of a respondent's drug use returns to the Coast Guard, which always bears the ultimate burden of proof on this issue. Id.; 33 C.F.R. § 20.703(b). Evidence presented by either the Coast Guard or the Respondent may be considered in the record in reaching a decision on whether a charge has been proven.

At all times during this proceeding Respondent has expressly denied using cocaine. (Tr. at 153-154; 159-162). Respondent asserts in his Post Hearing Brief that the Coast Guard has not met the requirements for a prima facie case in several respects, including, insufficient direct evidence from the labs on the tests and internal controls at the lab; that the drug test was not conducted under the requirements of 46 C.F.R. Part 16 and the evidence failed to meet the requirements as stated in Appeal Decision 2603 (HACKSTAFF) (1998) and Appeal Decision 2697 (GREEN) (2011). Respondent's argument includes the implied speculation that the only

way he could have tested positive for cocaine was if someone placed it in his drink during a fish fry he hosted at his home on Sapelo Island, Georgia. (Tr. at 114-15, 128). A number of friends and family testified at the hearing that Respondent had an ongoing feud with another family that lived on Sapelo Island, the Grosvernors. (Tr. at 108, 116-17, 144-145, 151-52). Respondent implies that since members of Grosvernor family attended his fish fry on both Friday and Saturday nights before his employer received an anonymous tip Respondent was observed using cocaine, one of the persons at the fish fry could have put cocaine in his food or drink. There is insufficient evidence to support Respondent's speculation. I do not find Respondent's argument credible. However, Respondent expressly denied using dangerous drugs and there is no evidence of use of drugs other than the positive drug test. Where the Coast Guard does not meet all of the elements of a prima facie case it is not entitled to the presumption in 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998); Appeal Decision 2653 (ZERINGUE) (2005); Appeal Decision 2662 (VOORHEIS) (2007).

Without having sufficient proof of the required element concerning laboratory procedures and testing practices that meet DOT requirements for establishing a *prima facia* case of dangerous drug use, the Coastt Guard has not met the required burden of proof. The Coast Guard's case is based solely on urinalysis results but they have failed to present evidence sufficient to meet the requirements for the regulatory presumption contained in 46 C.F.R. Part 16. In Coast Guard Suspension and Revocation proceedings the Coast Guard bears the burden of proof in keeping with 33 C.F.R. 20.702. The Court is constrained by the limits of the evidence in the record and the requirements of the regulations for the Coast Guard to bear the burden of proof of a violation. Additionally, Appeal Decision 2603 (HACKSTAFF) (1998) and Appeal Decision 2653 (ZERINGUE) (2005) are also applicable as authority that requires dismissal where the elements of a *prima facie* case are not proven. See 46 C.F.R. 5.65. This decision is limited to the unique facts and limited circumstances of this case. I do not find Respondent's

denial to constitute proof that he did not use dangerous drugs. Although I find that the Coast Guard did not present sufficient evidence to prove their case in this matter, that does not mean that sufficient evidence did not exist. This decision is limited to a finding that the burden of proof was not met.

The Coast Guard's case seeking revocation can only be proven if the record is supported by a legally sufficient basis. See Appeal Decision DESIMONE (2683) (2009). I find the evidence presented shows that there was clear evidence that a specimen was properly obtained from Respondent and forwarded for testing. The MRO testified there was no valid basis presented for excusing a positive result from the test. However, there was insufficient evidence presented to show that either of the laboratories complied with DOT testing requirements and this case is based solely on a urinalysis test. Therefore, the Coast Guard did not meet the burden of proof, by providing sufficient reliable and persuasive evidence, that Respondent is a user of dangerous drugs based on the November 2011 drug test.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner's License 1196731.
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. On November 15, 2011, Respondent participated in a reasonable suspicion drug test.
4. Respondent's Custody and Control Form shows Respondent's urine sample yielded a positive result for B (cocaine metabolite).
5. The Coast Guard failed to provide sufficient evidence that Respondent's positive drug test met all of the elements of a prima facie case in order to apply the regulatory presumption that he is a user of dangerous drugs. 46 C.F.R. 16.201(b).
6. Absent sufficient substantial evidence in the record, the Coast Guard cannot prove Respondent is a user of or addicted to dangerous drugs without the presumption.
7. Accordingly, the Coast Guard has **NOT PROVED** by a preponderance of reliable, probative, and credible evidence that on or about November 15, 2011 Respondent is a user of or addicted to dangerous drugs.

ORDER

IT IS HEREBY ORDERED that the Charges against Respondent Larry Grant Johnsons' Merchant Mariner's Document Number 1196731 are **DISMISSED**.

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

Done and dated July 20, 2012
Baltimore, Maryland

_____

Michael J. Devine
US Coast Guard Administrative Law Judge

Date: July 20, 2012

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LIST

Coast Guard Witnesses

Witness 1	James Lane
Witness 2	Iesha Campbel
Witness 3	Donald Wilson, M.D.

Respondent Witnesses

Witness 1	Lewis Jackson
Witness 2	Ernest Walker
Witness 3	Ernest Dunn
Witness 4	Stanley Walker
Witness 5	Lila Hillary
Witness 6	Michelle Johnson
Witness 7	Larry Johnson

EXHIBIT LIST

Coast Guard Exhibits

CG Ex. 1	Not offered, Withdrawn by Coast Guard
CG Ex. 2	Federal Drug Testing and Control Forms, page 1 Fax Copy from Apple Care (collector company) (Tr 66-69)
CG Ex. 3	Federal Drug Testing and Control Form, Employer copy and page 2, i3screen test results form (reasonable suspicion test) from MRO
CG Ex. 4	Georgia DNR letter to CG Investigating Officer dated December 8, 2011
CG Ex. 5	Georgia DNR Letter to Larry Johnson terminatinf employement dated

	November 18, 2011 indicating Mr. Johnson declined to sign.
CG Ex. 6	i3screen test results information from MRO
CG Ex. 7	Georgia DNR Drug and Alcohol Free Workplace Program documents
CG Ex. 8	Reasonable Suspicion Testing Program completion certificate for James Laine dated June 24, 2010

Respondent Exhibits

Resp Ex. A	Summary of Employee Larry John son drug testing records from 2009 through 2011 from the Georgia Dept of natural resources.
Resp Ex. B	Statement of Opinion (Notarized) from Steven A. Mansfield, M.Ed.; Licensed Professional Counselor (with CV attached).
Resp Ex. G	Opens Records Act request – Discussed on the record at 52 but was not offered into evidence and Withdrawn.

ATTACHMENT B - PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COAST GUARD – PROPOSED FINDINGS OF FACT

1. At all relevant times, Respondent was a holder of a Coast Guard issued Merchant Mariner License No. 1196731. TR at 13; Complaint.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 47 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.

   ACCEPTED AND INCORPORATED IN PART, as provided in the Decision and Order jurisdiction is established. The APA and other cites do not provide jurisdiction.

3. Respondent underwent a November 15, 2011 urinalysis which followed the guidelines set for drug testing by the Department of Transportation in 49 C.F.R. Part 40 and 46 C.F.R. 5.35.

   REJECTED, as provided in the Decision and Order.

4. Respondent's November 15, 2011 drug test was positive for cocaine metabolites and was confirmed by the November 18, 2011 split specimen drug test.

   ACCEPTED IN PART AND REJECTED IN PART, as provided in the Decision and Order there was documentation of a positive test but a prima facie case was not proven.

5. The Coast Guard proved the test was conducted in accordance with 46 C.F.R. Part 16.

   REJECTED, as provided in the Decision and Order.

RESPONDENT – PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent holds a current Merchant Mariner License Number 1196731 (Stipulated).

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. On November 15, 2011, Respondent was an employee of the Georgia Department of Natural Resources. (DNR) (Tr. at 26)

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

3. On November 15, 2011, Respondent was required to take a reasonable suspicion drug test. (Tr. 27)

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order

4. Ieesha Campbell, an employee of Applecare, was the urine collector in the present case. (Tr.62)

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

5. Ms. Campbell had only eight months experience with DOT collection prior to this collection. (TR. 63)

   NEITHER ACCEPTED NOR REJECTED AND INCORPORATED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

6. There was no evidence that Ms. Campbell required the Respondent to produce identification pursuant to DOT regulations.

   NEITHER ACCEPTED NOR REJECTED AND INCORPORATED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

7. Ms. Campbell used out of date CCF forms that did not contain required DOT information. (Tr. 89)

   NEITHER ACCEPTED NOR REJECTED AND INCORPORATED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

8. The CCF was signed in the wrong place and crossed thru by Ms. Campbell. (Tr. 73)

   ACCEPTED AND IN PART, as provided in the Decision and Order.

9. The urine sample was tested by Medtox on November 18, 2011. (Tr. 86)

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

10. The urine sample was interpreted by Dr. Donald Wilson on November 18, 2011. (Tr. 86)

    ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

11. The results were positive for cocaine metabolites. (Tr. 86; CG-6)

    ACCEPTED IN PART AND INCORPORATED, as provided in the Decision and Order.

12. On November 18, 2011, the Respondent was notified of the positive drug test and offered no acceptable medical explanation for the results. (Tr. 86)

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

13. A split specimen was tested by Clinical Reference Laboratory on November 23, 2011 and tested positive for cocaine metabolites.

ACCEPTED IN PART AND INCORPORATED, as provided in the Decision and Order.

14. The Respondent worked for the Georgia Department of Natural Resources (DNR) for 16 years.

ACCEPTED IN PART, as provided in the Decision and Order.

15. The Respondent had no prior record of positive drug screens with the Georgia Department of Natural Resources. (Tr. 150)

ACCEPTED IN PART, as provided in the Decision and Order.

16. The Respondent had no complaints or disciplinary actions during his tenure at DNR. (Tr. 154)

ACCEPTED IN PART, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

17. The Respondent was evaluated for drug addiction by a certified addiction counselor, Steven Mansfield, and was shown not to have an addiction to cocaine. (R-B)

ACCEPTED IN PART, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. The Respondent has a reputation for truthfulness in his local community. (Tr. 116, 121, 123, 129, 133)

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Credibility determinations are a matter reserved to the court.

19. The Respondent was involved in a dispute with Bobby Grovener who had threatened he would get the Respondent due to his perceived power to get Mr. Grovener hired with DNR and failing to do so. (Tr. 152, 175)

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

20. The Respondent lost his job as a result of the positive drug screen. Tr. 53, CG-5)

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Any employment issue or dispute between Respondent and his former employer is a private matter not relevant to this proceeding.