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

UNITED STATES COAST GUARD
Complainant

vs.

JAMES ARTHUR WINN

Respondent

Docket Number 2011-0331
Enforcement Activity No. 4086336

DECISION AND ORDER
Issued: September 19, 2012

By Administrative Law Judge:
Honorable George J. Jordan

Appearances:

CWO Gary S. Medina
Sector Puget Sound
For the Coast Guard

JAMES ARTHUR WINN, Pro se
For the Respondent

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I. PRELIMINARY STATEMENT

This proceeding concerns the suspension or revocation of the Merchant Mariner Credential ("MMC" or "Credential") issued to James Arthur Winn ("Respondent") pursuant to 46 U.S.C. § 7701 *et seq.* and United States Coast Guard ("Coast Guard") regulations found at 46 C.F.R. Part 5. This proceeding is conducted under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard found at 33 C.F.R. Part 20.

II. PROCEDURAL HISTORY

The Coast Guard initiated this proceeding on July 18, 2011 by filing a Complaint seeking revocation of Respondent's MMC for use of, or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges that Respondent took a drug test on June 21, 2011, which tested positive for marijuana metabolites. The Complaint set forth the following factual allegations:

1. On 06/21/2011 Respondent took a pre-employment drug test.
2. A urine specimen was collected by Sandy Curlay [sic] of FRANCISCAN PORT CLINIC.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was analyzed by PATHOLOGY ASSOCIATES MEDICAL LABORATORIES, Spokane WA 99204 using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for marijuana metabolites, as determined by the Medical Review Officer, PAUL DARBY.

Respondent filed an Answer on August 8, 2011 in which he admitted all jurisdictional allegations but denied the factual allegations contained in paragraph 5 of the Complaint. He asserted as affirmative defenses "testing error, 2nd hand exposure." Respondent requested a hearing before an Administrative Law Judge.

On August 22, 2011, the Chief Administrative Law Judge assigned this case to me for adjudication. I issued an order on December 5, 2011, scheduling a telephonic prehearing conference in this matter. The conference took place on January 18, 2012. The Coast Guard participated but Respondent did not. Afterward, I issued a Scheduling Order – Prehearing Conference Memorandum dated January 30, 2012 in which I set forth the tentative hearing date and location and the schedule for prehearing submissions

The Coast Guard submitted its prehearing list of expected witnesses and exhibits on February 9, 2012, along with a motion for telephonic testimony. On February 28, the Coast Guard moved to amend the factual allegation in paragraph 1 of the Complaint to read "drug test" instead of "pre-employment drug test." The Respondent did not reply to this motion. On March 20, 2012 the Coast Guard submitted a motion requesting that another witness be permitted to testify telephonically. I issued an Order on Motion to Amend Complaint on March 27, 2012, granting the Coast Guard's motion to amend. On March 27, 2012, I also issued the Scheduling Order – Notice of Hearing setting the date, time, and place of the hearing. I granted the Coast Guard's motions for telephonic testimony on April 3, 2012.

The hearing took place in the Jackson Federal Building, Seattle, Washington on April 4, 2012. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. § 551-59, and Coast Guard procedural regulations located at 33 C.F.R. Part 20. CWO2 Gary S. Medina and LT Jon Lane represented the Coast Guard. Respondent appeared *pro se*.

At the hearing, three witnesses testified on behalf of the Coast Guard. Respondent testified on his own behalf. The Coast Guard submitted nine exhibits, all of which were received into evidence. Respondent submitted one exhibit, which was also received into evidence. A list of witnesses and exhibits is attached to this decision as Appendix II.

At the conclusion of the hearing, I issued a ruling holding the record open until May 18, 2012, to allow the Respondent to obtain an evaluation by a Substance Abuse Professional ("SAP"). Respondent called my office on that date and requested a brief extension. On May 22, 2012, I issued an order granting him two additional weeks to submit his SAP report. Respondent did not submit this evidence by the deadline, and the record was accordingly closed. I issued an order to this effect on June 11, 2012.

III. FINDINGS OF FACT

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

The issue before me is whether the Coast Guard has proved by a preponderance of the evidence that Respondent was a user of dangerous drugs. If I find the allegation proved, I must then decide an appropriate sanction under the circumstances. 46 C.F.R. §§ 5.567-5.569.

My findings of fact are as follows:

1. At all relevant times herein, Respondent was the holder of Merchant Mariner's Credential 000035783. (Complaint; Tr. 12.)
2. The Coast Guard is currently in possession of Respondent's credential, as Respondent made a good faith deposit in August 2011. (Tr. 12.)
3. The Respondent received his credential on October 30, 2009 with an Officer Endorsement that authorizes him to serve as Master of 100-ton vessels and uninspected passenger vessels. (Tr. 16; EX CG-3)
4. Respondent received his credential for personal enrichment and has not served under his credential or been employed by a marine employer. (Tr. 16.)
5. Respondent gave periodic urine samples for drug testing because he believed it was required to maintain his license. He was under the impression that he had to take these tests every 165 days and keep them on file. (Tr. 17 and 110.)
6. Respondent is not employed as a mariner and was not seeking a license upgrade or renewal at the time he submitted the urine sample in question. (Tr. 39.)

7. Respondent is involved with blues music. Approximately 72 hours before Respondent took the drug test at issue in this case, he was at a blues event. Several times throughout the night, he stood on a balcony with a group of people who were consuming marijuana. (Tr. 101.)
8. On June 21, 2011, Respondent voluntarily provided a urine sample at Franciscan Occupational Health. (Tr. 99; EX CG-1.)
9. On June 21, 2011, Respondent's sample was collected, documented, and labeled using DOT testing procedures. (Tr. 23-32.)
10. The urine sample was collected by Sandy Curley, who is an employer service coordinator and medical assistant at Franciscan Occupational Health. Ms. Curley has been trained in DOT collection procedures and is familiar with the requirements of 49 C.F.R. Part 40. (Tr. 21.) She has been certified as a collector. (Tr. 22.)
11. Ms. Curley marked the Federal Drug Testing Custody and Control Form (DTCCF) accompanying the urine sample as a "pre-employment" test because that was what Respondent told her. "Periodic" is not an available option on the form. (Tr. 37-38, 42.)
12. Respondent also signed and submitted a DOT/USCG Periodic Drug Testing Form (CG-719P) with the sample. (EX CG-2.) The urine sample was transmitted by PAML Courier to the PAML laboratory in Spokane, Washington. (Tr. 31.)
13. The testing laboratory, Providence Health and Services Catholic Health Initiatives, also known as Pathology Associates Medical Laboratories (PAML), is a SAMHSA-inspected and certified facility. (Tr. 46, 48-49; EX CG-8.) The laboratory is currently in compliance and has never been out of compliance with SAMHSA standards. (Tr. 64).
14. The Certifying Scientist is an individual with at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent who reviews all pertinent data and quality control results. The individual shall have training and experience in the theory

and practice of all methods and procedures used in the laboratory, including a thorough understanding of chain of custody procedures, quality control practices, and analytical procedures relevant to the results that the individual certifies. (Section 11.5, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Substance Abuse and Mental Health Services Administration, see also 10 C.F.R. § 26.155)

15. The certifying scientist at PAML was Tammy Dixson. She has been employed by PAML since 2006 and has held the certifying scientist position since June 2009. Ms. Dixson previously held other positions such as GCMS technician and initial analysis technician prior to being promoted as a certifying scientist at PAML. (Tr. 46-47.)
16. The primary job duties and responsibilities of a certifying scientist included reviewing the results of any testing in particular whether a result is negative or positive and to review chains of custody and instrument data, and to make the final determination for acceptability of reportable results. The Certifying scientist must be familiar with the regulations at 49 C.F.R. Part 40. (Tr. 46-48.)
17. Ms Dixson has a bachelor's degree in Biology and she meets the requirements for a certifying scientist in Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs. (Tr. 47.)
18. Ms. Dixson completed the custody and control form accompanying Respondent's urine sample. She recognized the litigation package (EX CG-6) and had reviewed all the information in the package prior to reporting the specimen. (Tr. 54-56.).
19. When Respondent's June 21, 2011 urine sample was screened under an initial test using the enzyme multiplied immunoassay technique ("EMIT") test, the result was presumptively positive. (Tr. 52, 56.)
20. After the presumptive positive result, the specimen was analyzed by gas chromatography mass spectrometry ("GCMS"), a confirmatory technique that separates the analyte from

other substances and specifically tests for the analyte of interest. (Tr. 52, 57.) This allows the laboratory to confirm the presence of marijuana metabolite and quantitate the amount. (Tr. 57.)

21. The GCMS revealed a concentration of marijuana metabolites of 25 nanograms per milliliter. (Tr. 57.)

22. The laboratory normalizes its cutoff values to equal 100, and reports readings in percentages of the cutoff. The cutoff for marijuana metabolites is 15 nanograms per milliliter, which is set as 100%. Respondent's sample was reported as 108% of the cutoff. (Tr. 58.)

23. Ms. Dixson did not see any abnormalities in the drug testing procedures or security protocols from the time the specimen reached PAML to the time the report was generated. (Tr. 59-60.)

24. Under D.O.T. rules, a Medical Review Officer (MRO) is a person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results. To qualify, a physician must be knowledgeable about and have clinical experience in controlled substances abuse disorders, including detailed knowledge of alternative medical explanations for laboratory confirmed drug test results and also as to issues relating to adulterated and substituted specimens as well as the possible medical causes of specimens having an invalid result. Additionally, an MRO must receive qualification training and complete an exam by a nationally-recognized MRO certification board. (49 C.F.R. § 40.121)

25. Paul S. Darby, M.D. was the MRO who reported the results of Respondent's drug test. Dr. Darby is a licensed medical doctor, and has received specialized training and passed a certification examination in order to become an MRO. (Tr. 66-68.)

26. Dr. Darby marked the result of the test as positive for THC on the custody and control form accompanying Respondent's results. (Tr. 68, 72-73.)

27. Dr. Darby notified Respondent that he had tested positive for marijuana metabolites on June 23, 2011. Respondent called Dr. Darby's office back at 9:30 am the same day to deny use of marijuana, but stated he had passive exposure to the drug. (Tr. 74.) Dr. Darby returned the call at 11:30 am to advise Respondent that he had 72 hours in which to notify Dr. Darby of his decision regarding a split sample retest. (Tr. 74.) Respondent did not request a retest. (Tr. 85.)

28. Dr. Darby certified that the specimen tested positive for marijuana metabolite because it was over the cutoff concentration of 15 nanograms per milliliter, and the chain of custody for the specimen was never broken. (Tr. 75.)

29. Dr. Darby is familiar with a number of scientific studies showing that it is not possible for a person who is passively exposed to marijuana smoke to have a concentration of 15 nanograms per milliliter of metabolite in a urine sample, and therefore such a person could not test positive. He considered the most reliable of these studies to be the one found in the 2010 Journal of Analytical Toxicology, volume 34, page 196. (Tr. 77.)

30. Respondent has never been evaluated by a substance abuse professional. (Tr. 102.)

IV. DISCUSSION

A. Principles of Law

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. §

5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-557. 46 U.S.C. § 7702(a).

Section 7(c) of the APA provides in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.... A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.
>
> 5 U.S.C. § 556(d).

In 1981, the Supreme Court stated that "[t]he language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." Steadman v. SEC, 450 U.S. 91, 98, (1981). Therefore, unless superseded by an express statutory provision the APA requires that the party who bears the ultimate burden of persuasion prove his case by a preponderance of the evidence. Greenwich Colleries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730, 736 (3d Cir. 1993).

A preponderance of the evidence is defined as "The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Black's Law Dictionary* (9th ed. 2009). "Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not." Greenwich at 736. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof when seeking suspension or revocation of a merchant mariner's credentials. 33 C.F.R. § 20.702(a).

In this case, the Coast Guard alleged that Respondent is a holder of Coast Guard-issued credentials and that he is addicted to, or a user of, dangerous drugs. The Coast Guard bears the burden of proving this allegation by reliable, credible, and probative evidence showing that it was more likely than not that Respondent has used dangerous drugs and that he holds a credential. If the Coast Guard establishes those facts, the statute mandates revocation of the Respondent's Coast Guard-issued credentials unless the Respondent provides reliable, credible, and probative evidence showing that it was more likely than not that Respondent has been cured of any drug use. 46 U.S.C. § 7704(c). If the Coast Guard relies on a positive result from a chemical test, under 46 C.F.R. Part 16 there is a presumption raised that the mariner is a user of dangerous drugs and that presumption establishes a prima facie case of drug use.

"Federal agencies are not bound by the strict rules of evidence that govern jury trials. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) citing Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Instead, the Administrative Procedure Act governs the admissibility of evidence before executive agencies and permits the trier of fact to receive any documentary or oral evidence. See 5 U.S.C. § 556(d); Gallagher, 953 F.2d 1214; Sorenson, 684 F.2d 683. Only irrelevant, immaterial or unduly repetitious evidence need be excluded. Id. "Under this standard, in order to be admissible for consideration in an administrative proceeding, the evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence." Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007). However, relevant evidence admissible under the Federal Rules of Evidence is generally admissible in administrative proceedings, as well.

B. Jurisdiction

While the jurisdictional facts alleged in the complaint were admitted, it has been held that the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); see also

Appeal Decision 2656 (JORDAN) (stating that, irrespective of Respondent's admission of charged offense, appeal must be granted where jurisdiction is not established). The Commandant has held that, "as stated in Appeal Decision 2560 (CLIFTON), Respondent's 'status aboard the vessel does not matter as it is his status as the holder of a merchant mariner's document [or license or certificate of registry] that establishes jurisdiction for purposes of suspension and revocation when use of a dangerous drug is charged.'" Appeal Decision 2668 (MERRILL) (2007).

While Respondent held his MMC for "personal enrichment" and recreational purposes rather than purposes of employment as a mariner, the record clearly establishes that Respondent was the holder of an MMC at the time he submitted the urine sample in question. Accordingly, I find jurisdiction is established.

C. Use of Dangerous Drugs: Elements of a *Prima Facie* Case

The Complaint alleges Use of Dangerous Drug. Title 46, U.S. Code § 7704(c) states as follows:

> 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.

The definition of dangerous drug orginally found in 46 U.S.C. § 7704(a) was moved to 46 U.S.C. § 2101(8a). It states:

> "'dangerous drug" means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).

The Controlled Substances Act (CSA) states that the "term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or

tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986." 21 U.S.C. § 802(6).

The current version of the statute 46 U.S.C. § 7704(c) was enacted in 1983 and the original version (46 U.S.C. 239b) was enacted in 1954[1]. Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine. House Report No. 338, 98th Cong., 1st Sess. 177 (1983); Appeal Decision 2634 (BARRETTA) (2002).[2] The statute mandates revocation on evidence of use or addiction and does not specifically relate to drug testing.

The Complaint alleges that Respondent was a user of marijuana. Marijuana is controlled under Schedule I of the CSA and is a dangerous drug for the purposes of 46 U.S.C. § 7704(c). Evidence of such use has come from different sources including admissions by a respondent, observation, medical treatment for use or addiction and drug testing. "The Coast Guard …, may offer evidence from any source, not only a drug test carried out pursuant to Part 16, to establish drug use in violation of 46 U.S.C. § 7704." Appeal Decision 2542 (DeFORGE) (1992).

Federal Transportation Workplace Drug Testing Programs began in 1988 and today most cases brought under 46 U.S.C. § 7704 (c) usually relate to DOT-mandated drug tests.

Evidence of Use based on Chemical Testing.

The Complaint alleges that Respondent took a drug test and the specimen subsequently tested positive for marijuana metabolites, as determined by the Medical Review Officer. Accordingly, the evidence of drug use by Respondent is based upon urinalysis test results.

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[1] Pub. L. 83-500, July 15, 1954, 68 Stat 484. This section states that the "Secretary may take action … based on a hearing before a Coast Guard [ALJ] under hearing procedures prescribed by the Administrative Procedure Act… to revoke the seaman's document of …any person who, unless he furnishes satisfactory evidence that he is cured, has been, subsequent to the effective date of this Act, a user of or addicted to the use of a narcotic drug."

[2] Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 546. This section was part of a major recodification of U.S. Shipping laws in Title 46 of the U.S.Code. However it also expanded the scope of this section to incorporate violations involving "controlled substances" which are not narcotic. This includes PCP and LSD. This section also provided that anyone who has been a user of or addicted to a dangerous drug since July 14, 1954, may be subjected to revocation procedures unless the individual provides satisfactory proof of being cured.

The Coast Guard has regulations implementing the Federal Transportation Workplace Drug Testing Program for the maritime sector. These rules are located in 46 C.F.R. Part 16. "Under 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. §§ 16.210-16.250; Appeal Decision 2641 (JONES)." Appeal Decision 2697 (GREEN) (2011).

"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" 46 C.F.R. § 16.201(b). Generally it has been held that this presumption arises when these three elements are established (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 and 49 C.F.R. Part 40 or that the test was voluntary and the technical and physical testing of the specimen was conducted in accordance with 49 C.F.R. Part 40 procedures.

In addition to creating a presumption of use and a prima facie case of drug use under 46 U.S.C. 7704(c), a broader series of consequences may flow from the presumption, such as denial of employment as a crewmember or removal from duties which directly affect the safe operation of the vessel. 46 C.F.R. § 16.201(c). Before the mariner may return to work aboard a vessel, an 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 a return to work. Further, the mariner must be subject to increased unannounced testing.

Thus, the first inquiry I must make in this matter is whether the Coast Guard has established the all elements necessary to establish a prima facie case of drug use under 46 C.F.R. Part 16 and to make the presumption applicable here. If it is, I must then determine whether Respondent has successfully rebutted the presumption.

1. Respondent Was Tested for a Dangerous Drug

The record establishes that Respondent submitted a urine sample for drug testing purposes at Franciscan Occupational Health on June 21, 2011. The sample was collected by Sandy Curley, a trained and certified collector. It was then transmitted to PAML, a SAMHSA-certified testing laboratory. At PAML, the sample underwent a D.O.T. five-panel drug testing analysis. Respondent admits to having given the sample in question for the purposes of drug testing relating to his Coast Guard-issued credentials. I therefore find that Respondent was tested for a dangerous drug.

2. Respondent Tested Positive for a Dangerous Drug

The Coast Guard has entered evidence into the record establishing that Respondent's urine sample was positive for marijuana metabolites. The current D.O.T. rules for drug testing are found in 49 CFR Part 40. A D.O.T. drug test screens for five types of drugs: (a) marijuana metabolites; (b) cocaine metabolites; (c) amphetamines; (d) opiate metabolites; and (e) Phencyclidine (PCP). 49 C.F.R. § 40.85.

The certifying scientist, Tammy Dixson, verified that she used an initial screening process known as EMIT to determine that the sample was presumptively positive for marijuana metabolites. Due to the positive result, she analyzed the sample under a confirmatory testing method, GCMS, which separates out the compound in question from other compounds in the sample and tests the concentration of the specific analyte. According to Dr. Darby, the MRO, the GCMS test is the "gold standard" for determining whether a sample is positive or negative for the presence of drugs. Ms. Dixson found a concentration of 25 nanograms per milliliter of marijuana metabolites, which is higher than the cutoff of 15 nanograms per milliliter, and reported the positive result to Dr. Darby.

After receiving the results of the drug testing, Dr. Darby certified that Respondent had given a drug test that was positive for marijuana metabolites. He testified that Respondent was given the opportunity to have his split sample retested, but did not exercise that option.

The evidence in the record establishes that Respondent's June 21, 2011 urine sample was positive for dangerous drugs. I therefore find the second element of the *prima facie* case satisfied.

3. The Drug Test Was Conducted in Accordance With 46 C.F.R. Part 16

The third element is proof that the drug test a respondent submitted was conducted "as required by [46 C.F.R. Part 16] and in accordance with the procedures detailed in 49 CFR part 40." 46 C.F.R. § 16.201(a). The testing therefore must comply with 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 the procedures outlined in 49 C.F.R. Part 40 are followed to maintain the system." Appeal Decision 2631 (SENGEL) (2002). The presumption will not arise if the evidence does not establish that the drug test complied with the procedures.

The DTTCF was marked as a pre-employment test but the test was scheduled by the Respondent as a periodic test. Respondent also signed and submitted a DOT/USCG Periodic Drug Testing Form (CG-719P) with the sample. Periodic tests occur when (1) a license, COR, MMD, or MMC is originally issued; (2) an officer endorsement on an MMC is issued, upon a raise of grade, or upon renewal; (3) upon a raise of grade of a license or COR; (4) upon the first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman; or (5) when a credential is reissued with a new expiration date. 46 C.F.R. § 16.220. None of those circumstances were present for this test. Accordingly, the test was not a periodic test required by 46 C.F.R. Part 16. This test also did not meet the requirements for the other reasons for chemical testing mandated by 46 C.F.R. Part 16. Therefore, pursuant to GREEN, the

Coast Guard did not establish a prima facie case of drug use based on the presumption in 46 C.F.R. § 16.201 based on a positive test result from a USCG-mandated test.

However, a series of Appeal Decisions establish that the presumption also arises in a mariner gave a sample voluntarily and if the sample was tested in accordance with the procedures of 49 C.F.R. Part 40.

a. Did Respondent Voluntarily Submit to a Drug Test?

As noted above, there was some confusion in this case about the reason Respondent submitted to a drug test on June 21, 2011. The collector, Sandy Curley, said she checked the "pre-employment" box on the custody and control form because Respondent told her it was a pre-employment test. Respondent denies that he told her this. However, Respondent said that he was, at one time, contemplating using his MMC for a commercial venture. Respondent also said he believed periodic drug testing was mandatory for the maintenance of his license, so he submitted to a drug test every 165 days. (Tr. 110.)

"There are numerous Coast Guard drug testing requirements for merchant mariners in 46 C.F.R. Part 16, including pre-employment, post-casualty, random, and reasonable cause drug testing. These types of testing represent the 'minimum standards, procedures, and means to be used to test for the use of dangerous drugs.' 46 C.F.R. § 16.101(b)." Appeal Decision 2679 (MILLS) (2007). However, precedent clearly establishes that a drug test need not be one of the types enumerated under Part 16 for the Coast Guard to rely on it, provided the tested sample is given voluntarily.

In Appeal Decision 2633 (MERRILL) (2002), the Commandant vacated a decision in which the ALJ dismissed allegations of drug use because the reason for the drug test in question was not enumerated under 46 C.F.R. Part 16. The Commandant also held that revocation of a mariner's license or document can be predicated upon a voluntarily submitted urine sample that

tests positive for the presence of a dangerous drug in Appeal Decision 2545 (JARDIN) (1992). Appeal Decision 2635 (SINCLAIR) (2002) held that the Coast Guard could rely on a voluntary test following a grounding that did not rise to the level of a serious marine incident, and in Appeal Decision 2668 (MERRILL) (2007), the Commandant held that a *prima facie* case was established in a voluntary but not D.O.T.-mandated drug test where the technical and physical testing of the specimen was conducted in accordance with 49 C.F.R. Part 40 procedures.

Neither the Coast Guard nor Respondent ever considered his drug test to have been taken for one of the other reasons set forth in Part 16, such as post-casualty or for reasonable cause. The initial confusion was merely whether the test was pre-employment, periodic, or a general test.

Pre-employment testing occurs when a mariner is entering maritime employment, and such mariners must either undergo a drug test, show that they have passed a D.O.T. drug test within the previous six months with no subsequent negative tests, or show that for the past 185 days they were subject to random testing under § 16.230 for at least 60 days and did not fail or refuse to take a drug test. 46 C.F.R. §16.201. Respondent testified that he had, at one time, thought about using his MMC for commercial purposes by opening a charter service with his family boat, however, he never followed through with this idea. (Tr. 39.) As entering into maritime employment was not the reason Respondent took the June 21, 2011 drug test, I find it was not a pre-employment test.

Periodic tests occur when (1) a license, COR, MMD, or MMC is originally issued; (2) an officer endorsement on an MMC is issued, upon a raise of grade,
or upon renewal; (3) upon a raise of grade of a license or COR; (4) upon the first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman; or (5) when a credential is reissued with a new expiration date. 46 C.F.R. § 16.220. Respondent believed his test to be periodic, as he was under the mistaken assumption that he had to test

regularly in order to maintain his MMC. However, he was not attempting to obtain an officer or other enumerated type of endorsement, raise the grade of his credential, or renew the credential. Thus, his test did not fall within any of the reasons a mariner would submit to a periodic drug test.

The testimony at the hearing established that, although Respondent's June 21, 2011 drug test was neither a pre-employment nor periodic test, it was nevertheless voluntary. Respondent went to Franciscan Occupational Health and gave a urine sample under his own volition. The fact that he believed the test was required when, in fact, it was not does not render the test unreliable.

b. Were the Testing Procedures Mandated by 49 C.F.R. Part 40 Followed?

Mandatory provisions governing the collection process are set forth at 49 C.F.R. Part 40. The regulations also specify several "fatal flaws" which require cancellation of the test. See 49 C.F.R. § 40.199. Other procedural deviations do not mandate cancellation, provided it is "an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test." 49 C.F.R. § 40.209. "This is a safety rule, and it is not consistent with safety to permit someone with a positive drug test to continue performing safety-sensitive functions because a collector made a minor paperwork error that does not compromise the fairness or accuracy of the test." 65 FR 79462, 79503 (December 19, 2000).

Respondent raised issues, though somewhat vaguely and inarticulately, with the collection of his sample. He stated, "[f]rom the beginning I felt it had to be secondhand smoke or some breakdown in the chain of custody. It does appear from what I have heard that the procedures have been followed. I just don't know that I'm convinced that there is no margin of error. I think that errors have occurred. I can't specifically point to them except to say that an error had occurred in the past 12 months prior." (Tr. 97.)

The testimony in this case establishes that the chain of custody of Respondent's sample was unbroken. Ms. Curley testified that the sample was given, documented, prepared, and couriered to the laboratory in accordance with the requirements in 49 C.F.R. Part 40 Subpart E. Ms. Dixson testified that the sample arrived at the laboratory intact and was processed using correct procedures within the chain of custody, and Dr. Darby certified that his review of the results showed that proper procedures were used.

Although the reason for the test was not correctly marked, this is a minor issue which does not affect the fairness or accuracy of the test; it had no bearing on the collection procedures or the manner in which the sample was tested. "A number of Coast Guard appeal decisions have held that minor technical infractions of the drug testing regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. *See* Appeal Decisions 2668 (MERRILL), 2575 (WILLIAMS), 2546 (SWEENEY); *aff'd sub nom* NTSB Order No. EM-176 (1994), 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994), 2537 (CHATHAM) and 2522 (JENKINS)". Appeal Decision 2685 (MATT) (2010). Here the checking of the wrong box on the DTTCF was obviated by the inclusion of a DOT/USCG Periodic Drug Testing Form (CG-719P) with the sample. (EX. CG-02),

Title 49 C.F.R. § 40.81 sets forth the laboratories which may conduct D.O.T. drug testing, and the testimony and evidence shows that the testing facility, PAML, met this criteria. The laboratory is listed in the Federal Register as a SAMHSA-certified facility, and Ms. Dixson testified that it is in compliance with all SAMHSA requirements. (Tr. 64; EX 8.) Ms. Dixson also testified that the incoming sample was processed correctly and that the integrity of the sample was maintained throughout the testing process. (Tr. 54-56.) Dr. Darby testified that the paperwork he received from the laboratory was in order and that he properly certified the results as showing a positive test. (Tr. 75.) Each witness stated that he or she saw no flaws or errors in the testing process.

The weight of the evidence here shows no merit to Respondent's contention that a break in the chain of custody may have occurred. The Coast Guard's witnesses also unanimously testified that they were familiar with the regulations and saw no flaws or errors in the collection or testing procedures. Accordingly, I find the Coast Guard has established that the procedures mandated in 49 C.F.R. Part 40 were complied with regarding Respondent's June 21, 2011 drug test.

As I have determined that the Coast Guard may rely on Respondent's voluntarily-submitted drug test and that the collection and testing was done in accordance with D.O.T.-mandated procedures, I find that based on Appeal Decision 2668 (MERRILL) (2007) the Coast Guard established a *prima facie* case and a presumption of use arose. MERRILL states that "[a] *prima facie* case of use of a dangerous drug is shown when (1) a party is tested for use of a dangerous drug, (2) test results show that a party has tested positive for the presence of a dangerous drug, and (3) the drug test is conducted in accordance with 49 CFR Part 40. …If the Coast Guard establishes a *prima facie* case, a presumption of use of a dangerous drug arises, and the burden then shifts to the Respondent to produce persuasive evidence to rebut the presumption. … If the Respondent fails to rebut the presumption, the ALJ may find the charge proved on the basis of the presumption alone." (Citations omitted)

c. Appeal Decision 2697 (GREEN) is distinguished from cases involving voluntarily-submitted chemical testing.

The decisions of the Commandant in cases of appeal or review of decisions of Administrative Law Judges are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority." 46 C.F.R. § 5.65. A recent Coast Guard Appeal Decision stated that in a drug case based solely upon urinalysis test results, to "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 (PERIMAN), 2592 (MASON), and 2584 (SHAKESPEARE)." Appeal Decision 2697 (GREEN) (2011) (emphasis added). The Green decision seems to limit findings of drug use based on urinalysis test results to tests conducted under 46 C.F.R. Part 16 and analyzed using DOT standards. However, for the following reasons, such a narrow reading would be inconsistent with other Appeal Decisions.

In GREEN, the Commandant stated 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." GREEN, supra. The decision continued that "46 C.F.R. Part 16 requires … that crewmembers selected for random drug testing be selected by a scientifically valid method" and remanded the case because" the ALJ should have sought clarification from Respondent concerning his statement that there 'was no probable or reasonable cause for the random drug test.'" Id.

The GREEN case stands in sharp contrast to the holding in Appeal Decision 2633 (MERRILL) (2002). That decision vacated an ALJ decision that dismissed allegations of drug use. The ALJ had determined that the drug testing of Mr. Merrill was not in accord with U.S. Coast Guard regulations for chemical testing of mariners as set forth in 46 C.F.R. Part 16 because the respondent's injury could not be categorized as either a marine casualty or a serious marine incident and was, therefore, not within the scope of 46 C.F.R. Part 16. Accordingly, the ALJ found that the respondent's employer lacked the authority to require the respondent to submit to a drug test. On appeal, the Commandant held that, "even if the urinalysis in issue was not within one of the five categories specifically delineated in 46 CFR Part 16, because the test was voluntarily taken, it [was] relevant, material and admissible in determining whether Mr.

Merrill is a user of dangerous drugs." Citing Appeal Decision 2545 (JARDIN), the Commandant remanded the matter for the ALJ to determine whether the test was voluntary.

Similarly, in Appeal Decision 2635 (SINCLAIR) the respondent asserted that "since he voluntarily submitted his urine …, he cannot be presumed to be a user of a dangerous drug pursuant to 46 C.F.R. 16.201(b) because that section only provides for chemical drug testing in pre-employment, periodic, random, post-serious marine incident, and reasonable cause situations." Id. The Commandant concurred with Respondent's assertion that the test was "non-mandatory or voluntary," finding that "[s]ince the grounding did not rise to the level of a serious marine incident …, the Respondent was not required to submit a urine sample." Id. However, the Commandant stated,

> I have held that revocation of a mariner's license can be predicated upon a voluntarily submitted urine sample testing positive for an illegal drug. Appeal Decision 2545 (JARDIN). In Jardin , I found that the Coast Guard could rely on a voluntary test for suspension and revocation proceedings. I find the Jardin analysis is equally applicable in this case. Respondent's voluntary sample can be used as the basis for a charge of use of a dangerous drug.

In Appeal Decision 2545 (JARDIN) (1992) the employer, a state agency, sought to test a mariner because of information they had received, to the effect that the mariner might have used illicit drugs the evening before. The mariner was called to the employer's administrative offices. Upon questioning by the employer's Port Captain and Personnel Manager, the mariner denied any drug use and volunteered to take a drug test. The Commandant found that the test was voluntary. Further, the Commandant noted that the" argument that the test was not voluntary…seems to have been intended as foundation to support the assertion that the requirements for "reasonable cause" testing [under 46 C.F.R.16.250] were violated." Id. Having found the test voluntary, the Commandant declined "to explore the bounds of reasonable cause testing." Id.

In Appeal Decision 2668 (MERRILL) (2007), the Commandant held that a prima facie case was found to be established in a voluntary (non-DOT mandated) drug test where the technical and physical testing of the specimen was conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. I have considered the ramifications of GREEN and MERRILL, SINCLAIR and JARDIN because the test in this matter does not fall squarely into the U.S.C.G. Drug Testing regime under 46 C.F.R. Part 16. A thorough reading of GREEN yields no indication that this decision was meant to overrule the large body of prior Appeal Decisions.

Additionally, the GREEN decision cites as authority Appeal Decisions 2631 (SENGEL), 2621 (PERIMAN), 2592 (MASON), and 2584 (SHAKESPEARE). GREEN and the cases cited therein all relate to the presumption in 46 C.F.R. 16.201(b) that a mariner who fails a Part 16 drug test is presumed to be a drug user. Accordingly, it should be distinguished from cases involving non- Coast Guard tests and it does not preclude me from finding that a scientifically valid company-ordered urinalysis test result could provide substantial probative evidence that a mariner used a prohibited dangerous drug in violation of 46 U.S.C. § 7704(c).

The historical context of 46 U.S.C. § 7704(c) also supports a reading of GREEN which limits its holding to Part 16 tests. The predecessor to § 7704 was 46 U.S.C. § 239a, which was passed by Congress in 1954 with the clear intent of removing drug users and addicts from the merchant marine. In 1983, Congress engaged in a project to codify many maritime and shipping laws, during which § 239a was replaced by 46 U.S.C. § 7704(c) and the language simultaneously expanded in scope to incorporate violations involving additional non-narcotic "controlled substances," including PCP and LSD. As a result, 46 U.S.C. § 7704(c) now mandates revocation of merchant mariner credentials except where cure is proven in cases involving any controlled substance, not just those tested under the DOT/SAMSHA drug testing protocols. However, there is no indication that Congress intended to deviate from the original purpose in revising this provision; to the contrary, § 7704(c) allows for removal of an expanded class of drug users and

addicts from the merchant marine. A reading of GREEN which limits urinalysis testing solely to those tests conducted under Part 16 standards would clearly run contrary to Congressional intent.

Moreover, both DOT regulations[3] and Coast Guard drug testing policy[4] clearly permit marine employers to test for substances beyond the DOT/SAMSHA five. This, coupled with the Commandant's holding in Appeal Decision 2542 (DEFORGE) (1992) that "The Coast Guard, following the procedures of 46 C.F.R. 5, may offer evidence from any source, not only a drug test carried out pursuant to Part 16, to establish drug use in violation of 46 U.S.C. 7704," makes clear that Part 16 tests are not the only method by which the Coast Guard may prove drug use through urinalysis results.

Therefore, I believe GREEN is appropriately applied to cases in which the Coast Guard seeks to establish a prima facie case based on urinalysis test results from tests mandated under 46 C.F.R. Part 16, but is distinguished from the case at hand, which involves a voluntarily-submitted urine sample outside the scope of Part 16.

4. The Presumption That Respondent is a User of Dangerous Drugs Has Arisen

The Coast Guard submitted evidence that Respondent was tested for dangerous drugs and that Respondent's drug test was positive for marijuana metabolites. The Coast Guard's witnesses also verified that the urine sample was collected in accordance with proper D.O.T. collection procedures, was transmitted via a proper and unbroken chain of custody to a properly certified testing facility, was handled according to D.O.T. protocol at the facility, and was analyzed in accordance with all regulations. Thus, the Coast Guard has satisfied all three elements of a *prima facie* case of drug use. As the drug test in question here was collected and analyzed under D.O.T.

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[3] See 49 C.F.R. § 40.13 (outlining the relationship between DOT and non-DOT tests).

[4] The Marine Employers Drug Testing Guidebook - September 2009 clearly allows for non-DOT testing. "A marine employer may conduct other types of tests, but the DOT 5-panel test, using a Federal CCF, is the only test that will be accepted for showing compliance with the regulations. If a marine employer conducts testing for more drugs than is permitted by Coast Guard regulations, that testing shall be separate from any Coast Guard mandated program, including specimen collection." Guidebook at 5.

protocol, a presumption that Respondent is a user of dangerous drugs has arisen in this case under Appeal Decision 2668 (MERRILL)

D. Respondent's Rebuttal of the Presumption

A respondent may overcome the presumption of use of a dangerous drug "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 introduces sufficient evidence to rebut the presumption, the burden of proof regarding drug use shifts back to the Coast Guard, which bears the ultimate burden of proof on the issue. Id.; 33 C.F.R. § 20.703(b).

Here, Respondent admitted to having taken the drug test in question. Respondent's questions to Ms. Dixson and Dr. Darby appear to go toward the reasonableness of the cutoff value. Implicit in his line of questioning was that he believes the cutoff is either arbitrary or without a proper basis in science. His other arguments regarding the Coast Guard's *prima facie* case went to the second and third prongs, as he contended the test was flawed in some way and should not have tested positive.

Respondent did not dispute that his urine sample contained a concentration of 25 nanograms per milliliter of marijuana metabolites, which is above the 15 nanograms per milliliter threshold. This threshold is set in 49 C.F.R. § 40.29. 40.87 When questioning Ms. Dixson, the certifying scientist, Respondent asked whether the concentration of metabolites in his urine was considered "high" or "low," as it was just past the cutoff. (Tr. 61.) Ms. Dixson explained that a test is considered either positive if above the cutoff, or negative if below, and that they "don't use low and high as qualifiers." (Tr. 61.)

Respondent also questioned Dr. Darby, the MRO, about how the 15 nanograms per milliliter threshold was chosen. (Tr. 77-79.) Dr. Darby explained that the cutoff was chosen by scientists associated with the Department of Transportation and that the thresholds are generally determined based on multiple scientific studies. (Tr. 78.) He was not personally involved in setting the cutoff values, and merely applies the rules as they currently exist.

The Commandant has previously stated:

> The cutoff level for the gc/ms is fifteen nanograms per milliliter. The Department of Defense has established the same cutoff limits for the initial immunoassay and the final mc/gs tests. The U.S. Court of Military Appeals stated that these settings were "designed to prevent misidentifying nonusers [of marijuana]…[The cutoff values are set high to] prevent a positive reading which might result from some extraneous cause (such as passive inhalation)." Arguello at 202-203. Thus, if the first test result is erroneous, the second, more accurate test will expose the error. Moreover, the cutoff limits are high so that "false positives are virtually nonexistent." Id. at 204.

Appeal Decision 2584 (SHAKESPEARE) (1997) (citing U.S. v. Arguello, 29 M.J. 198 (C.M.A. 1989). Thus, it is clear Coast Guard policy that the thresholds are sufficiently high that mariners cannot be misidentified as marijuana users due to a false positive on a urine test.

Respondent argued that he did not "think they can say to a statistical certainty that secondhand smoke did not cause this reading" and said he had found some online studies showing that secondhand smoke exposure can lead to a positive reading. (Tr. 97.) He believed that the studies the D.O.T. has relied on are outdated because, since the 1980s, "[m]arijuana may be stronger; tests may be better." (Tr. 98.) Respondent did not introduce any of these studies into evidence. Moreover, Respondent is not an expert in this field and is not qualified to testify about the ways various types of marijuana may affect the test results. The Coast Guard introduced an article from the May 2010 Journal of Analytical Toxicology that was cited by Dr. Darby (Tr. 77, 89) as CG exhibit 9. That article reported a study that concerning passive exposure to cannabis smoke in a real world environment. The study found that none of the passive inhalers had results

above the cut-off of 25 ng/ml for an immunoassay screening test and concluded that "none of the passive inhalers would be misjudged for cannabis use in a routine drug screening." Thus, I find the results of the study and the testimony of Dr. Darby to be more credible than Respondent's unsupported assertions.

Furthermore, Respondent's apparent challenge to the reasonableness of the regulation is not for me to determine. If Respondent wishes to challenge the validity of the D.O.T. drug testing regulations, he must raise that issue in the appropriate forum. See, e.g., Appeal Decisions 2236 (CLUFF) (1981) (administrative hearing is not the proper forum in which to challenge regulations); 1944 (HAYNIE) (1973) ("[s]o long as regulations are properly promulgated and are properly within the ambit of the governing statutory authority, they will be in force and effect in [administrative] proceedings.").

Respondent also attempted to undermine the integrity of the collection facility, testing laboratory, and/or the MRO by offering as evidence a test he had taken one year earlier, on June 21, 2010. The 2010 test was marked "Negative Dilute." (EX R-A.) Respondent retested and the subsequent sample was found negative. (EX R-A; Tr. 35.) Respondent asserted that, although the initial test was marked dilute, incorrect standards were applied in making that determination. (Tr. 82.) However, Respondent did not present any evidence to support his assertions. The exhibit he offered into evidence contained only the D.O.T. Custody and Control forms and Occupational Health forms on which Dr. Darby marked the results as 'negative, however dilute" and "negative." (EX R-A.) He did not supply any exhibits showing the actual testing data or the standards for marking a test dilute.

On the evidence presented, I cannot find Respondent's argument that the initial sample he gave on June 21, 2010 was incorrectly reported. Nor can I determine that the collection facility, laboratory, or MRO have shown a pattern of erroneous behavior, as Respondent appears to believe. Moreover, this test occurred a year prior to the test in question and has no relationship

to the 2011 positive test. As previously discussed, the evidence presented in this case shows that Respondent's urine sample, that was given on June 21, 2011, was properly collected, transmitted, analyzed, and reported. Thus, I do not find Respondent has successfully rebuttted any element the Coast Guard's *prima facie* case.

The other ways in which a respondent can rebut the presumption of being a user of dangerous drugs are to provide an alternative medical explanation for the positive test result, or to show that the drug use was "not wrongful or not knowing." CLIFTON, supra. Appeal Decision 2592 (MASON) (1992) states that a "once the Coast Guard has presented a *prima facie* case of drug use, respondent has the responsibility of producing persuasive evidence to rebut this presumption" As in MASON, in contending that he only passively inhaled second-hand marijuana smoke, Respondent presented only his own testimony as proof. Respondent has not offered any evidence of an alternative medical explanation. He argued that he tried to avoid secondhand smoke exposure by standing upwind of the people who were smoking marijuana, but this does not establish cause for rebuttal. On the contrary, as discussed above the cutoff levels in 46 C.F.R. § 40.87 are sufficiently high that mariners cannot be misidentified as marijuana users.

Respondent's testimony shows that he was well aware that the smoke was from marijuana cigarettes and that marijuana is a prohibited substance under the regulations. Even assuming *arguendo* that a positive test result could have stemmed from secondhand exposure, Respondent knowingly chose to associate with people who were smoking marijuana, assumed the risk of exposure, and must accordingly be held accountable.

I find that Respondent has not rebutted the regulatory presumption that he is a user of dangerous drugs. The Coast Guard's allegation that Respondent is a User Of or Addicted to Dangerous Drugs is PROVED.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner's License.
3. On June 21, 2011, Respondent voluntarily gave a urine sample for drug testing.
4. The drug test was collected and analyzed using D.O.T.-mandated procedures which complied with 49 C.F.R. Part 40.
5. Respondent's urine sample tested positive for marijuana metabolites.
6. Respondent did not successfully rebut the Coast Guard's prima facie case, show that there was an alternative medical explanation for the positive test, or show that the use was not wrongful or not knowing.
7. Respondent has been shown to be a user of dangerous drugs.
8. The allegations in the Coast Guard's Complaint are proved.

VI. SANCTION

In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a) (2). Here, the Coast Guard has proposed an order of revocation. Having found the Coast Guard's allegation against Respondent proved, I must enter an order against Respondent. The pertinent statute requires revocation of a respondent's credentials unless satisfactory proof of cure is provided. 46 U.S.C. § 7704. Likewise, 46 C.F.R. § 5.59 requires revocation in this matter.

Respondent was afforded the opportunity to see a Substance Abuse Professional after the hearing and submit the report into the record. I held the record open for approximately six weeks

for Respondent to submit this report. Respondent then requested and received a two-week extension of time. This time period elapsed without further contact from Respondent, and to date no Substance Abuse Professional's report has been received by my office. Thus, the record does not establish that Respondent has taken any steps toward fulfilling the cure process. If, at any point within the next three years, Respondent wishes to avail himself of the cure process, he may request modification of this decision in accordance with 33 C.F.R. § 20.904.

Respondent has been shown to be a User of Dangerous Drugs and there has been no satisfactory proof of cure in this case. Accordingly, I find that Revocation is mandated.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED that the Coast Guard's allegation that Respondent is a User of, or Addicted to Dangerous Drugs is **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's credential is **REVOKED**.

IT IS SO ORDERED.

The parties have a right to appeal, as set forth in 33 C.F.R. Subpart J, Section 20.1001 (Attachment A) An Administrative Law Judge may set aside this finding of Default under the provisions of 33 C.F.R. § 20.310(e) for good cause shown. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: September 19, 2012

APPENDIX A: WITNESS AND EXHIBIT LISTS

Coast Guard Witnesses:

Sandra Lynn Curley
Tammy Lorraine Dixon (by telephone)
Paul S. Darby, M.D. (by telephone)

Respondent's Witnesses:

James Arthur Winn, Respondent

Coast Guard Exhibits:

EXCG-1	Drug Testing Custody and Control Form for June 21, 2011 Test, MRO Copy
EX CG-2	DOT/USCG Periodic Drug Testing Form, June 21, 2011
EX CG-3	MMLD Snapshot; Credential Verification
EX CG-4	PAML Laboratories Testing Results for June 21, 2011 Test
EX CG-5	MRO Employer Notification Form for June 21, 2011 Test
EX CG-6	PAML Litigation Package for June 21, 2011 Test
EX CG-7	Drug Testing Custody and Control Form for June 21, 2011 Test, Laboratory Copy
EX CG-8	Federal Register List of Laboratories
EX CG-9	Article, Journal of Analytical Toxicology

Respondent's Exhibits:

EX R-A	Periodic Drug Testing Form for June 21, 2010 Test

APPENDIX B:
33 CFR PART 20- APPEALS
SUBPART J

§ 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 thirty (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 such conclusion of law accords with applicable law, precedent, and public policy. (3) Whether the ALJ abused his or her discretion. (4) The ALJ's denial of a motion for disqualification.
(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 - Records on Appeal

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

§ 20.1003 - Procedures for Appeal

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center, Attention: Hearing Docket Clerk, Room 412, 40 S. Gay Street, Baltimore, MD 21201-4022 and shall serve a copy of the brief on every other party.
  (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the –
    (i) Basis for the appeal;
    (ii) Reasons supporting the appeal; and
    (iii) Relief requested in the appeal.
  (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record. (3) The appellate brief must reach the Docketing Center sixty (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 thirty-five (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 mail 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.

APPENDIX C: NOTICE CONCERNING REVOCATION OF CREDENTIAL

This order has revoked your credential and any endorsements to it.

1. Your credential must be surrendered immediately. 46 C.F.R. § 5.567(d). You have already made a good faith deposit of your credential with the Coast Guard, so no further action is required on your part.

2. You may no longer use your credential.

3. If you use your REVOKED credential or accept employment under authority of your REVOKED credential, you may be subject to the criminal penalties described in 18 U.S.C. 2197. U.S. v. Morris, 203 F.3d 423 (6th Cir. 2000).

4. Section 2197 of Title 18 of the U.S. Code provides, in pertinent part, that:

> Whoever, not being lawfully entitled thereto, uses, exhibits, or attempts to use or exhibit, ... any certificate ... issued to ... seamen by any officer or employee of the United States authorized by law to issue the same ... shall be fined under this title or imprisoned not more than five years, or both.

5. You may request modification of this order of revocation. Coast Guard regulations at 33 C.F.R § 20.904(f) provide that "[t]hree years or less after an S&R proceeding has resulted in revocation of a credential, endorsement, license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center." The motion "must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new merchant mariner credential with appropriate endorsement is compatible with the requirement of good discipline and safety at sea." 33 C.F.R § 20.904(f)(1).

6. You also may request issuance of a new credential under the provisions of 49 C.F.R. Subpart L. You may apply one year after revocation. 46 C.F.R § 5.901(c). For a person whose credential or endorsement has been revoked or surrendered for offenses related to alcohol abuse, the waiting period may be waived by the Commandant upon a showing that the individual has successfully completed a bona fide alcohol abuse rehabilitation program and is actively participating in a bona fide alcohol abuse monitoring program. 46 C.F.R § 5.901(e). See 46 C.F.R § 5.903 for the application procedures.