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

UNITED STATES COAST GUARD

Complainant

vs.

KWAME REY MORRIS

Respondent

Docket Number 2012-0150
Enforcement Activity No. 4207491

DECISION AND ORDER

Issued: March 07, 2013

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

LCDR MAUREEN JOHNSON
JOHN HULSLANDER

For the Coast Guard

ANA MAGDALENA MORRIS
KWAME REY MORRIS

For the Respondent

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Kwame Rey Morris' (Respondent) Merchant Mariner's Document Number 106826. This action is brought pursuant to the authority contained in 46 U.S.C. Chapter 77 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 March 23, 2012, charging Respondent with use of or addiction to the use of dangerous drugs. Specifically, the Complaint alleges Respondent took a random drug test on October 14, 2011, which yielded a positive result for cocaine metabolites. Respondent submitted an Answer on April 30, 2012, admitting the jurisdictional allegations but denying the factual allegations contained in paragraphs one (1) and five (5). Paragraph 1 alleges: "On 10/14/2011 Respondent took a random drug test" and Paragraph 5 alleges: "That specimen subsequently tested positive for cocaine metabolites, as determined by the Medical Review Officer HISHAM ZAFARI." The undersigned conducted a telephone conference on May 15, 2012, and set the matter for hearing on August 20, 2012.

On June 5, 2012 the Coast Guard moved to withdraw the Complaint asserting a lack of jurisdiction because Respondent failed to renew his Merchant Mariner's Document before its expiration date of May 23, 2012. The Administrative Law Judge (ALJ) issued an Order dated June 19, 2012, denying the Coast Guard's Motion to Withdraw and finding there is jurisdiction to adjudicate this matter pursuant to the applicable law. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.57; 46 C.F.R. § 10.227(b) and (f) (12 month administrative grace period); Appeal Decision 2656 (JORDAN) (2006). The Coast Guard subsequently submitted documentation showing that Respondent's application for renewal was rejected, and the rejection was based specifically on the positive drug test that is the focus of this case. Therefore, if the case against Respondent is

not found proven, then the sole basis for denying renewal would no longer apply. At the beginning of the hearing it was noted that the Order of June 19, 2012, denying the Coast Guard's prehearing Motion to Withdraw the Complaint remained in effect. (Tr. at 39, 42).

The hearing initially commenced on August 20, 2012, however, the ALJ continued the matter until November to afford Respondent an opportunity to obtain new counsel. The hearing recommenced on November 8, 2012, in Buffalo, NY, with Respondent's mother, Ana Magdalena Morris, participating as Respondent's designated representative.

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 regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. The Coast Guard moved for admission of thirteen (13) exhibits, all of which were admitted, and presented the testimony of four (4) witnesses. Two exhibits previously identified during discovery as CG Exhibits 4 and 12 were not offered by the Coast Guard during the hearing. The Coast Guard Exhibits that were offered into evidence retained their pre-marked numbers. Respondent moved for admission of one (1) exhibit, which was admitted, and presented the testimony of one (1) witness. The Witness and Exhibit List is contained in **Attachment A**.

Respondent submitted a post hearing brief on December 10, 2012 that did not contain enumerated findings of fact or conclusions of law; therefore, individual rulings on Respondent's proposed findings of fact and conclusions of law are not made. However, all of the arguments and issues raised in Respondent's post hearing brief have been considered and addressed herein. The Coast Guard submitted their post hearing brief with proposed findings of fact and conclusions of law on December 12, 2012. Rulings on the proposed findings and conclusions are found in **Attachment B**. 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 documentary evidence, witness testimony, applicable statutes, regulations, and case law, I find the charged violation of use of or addiction to dangerous drugs **NOT PROVED**.

II. 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 October 14, 2011, Respondent was a holder of Merchant Mariner's Document Number 106826 issued by the United States Coast Guard. (CG Ex. 1; Tr. at 173).
2. Respondent did not dispute the jurisdictional allegations of the Complaint. (Tr. at 41).
3. Respondent was employed by International Ship Management on October 14, 2011 and was subject to required chemical testing under 46 C.F.R. Part 16, Subpart B. (CG Ex. 2).
4. On October 10, 2011, Medi+Physicals, Inc., the company used by International Ship Management for urinalysis services, selected Respondent and another crew member from his vessel to participate in a drug test. (CG Ex. 2; Tr. at 159-61).
5. Heather McEnery of Medi+Physicals, Inc. testified that the selection of Respondent was a random selection by a computer program. (CG Ex. 2; Tr. at 157-63).
6. On October 14, 2011, Respondent participated in a drug test at COMBI-Tampa collection facility. (CG Ex. 2, 5; Tr. at 157-63).
7. COMBI-Tampa's practice was for someone at the front desk to check for photo ID and to scan the ID provided at the front desk into their system, and enter personal information from the individual's ID into a flow chart. The flow chart is then attached to the Chain of Custody Form (CCF). (CG Ex. 14; Tr. at 54-60).

8. Mildred Gantvoort, the collector at COMBI-Tampa, did not have any personal memory of the events of October 14, 2011 but testified as to the process she normally follows in conducting urinalysis collections at the COMBI-Tampa facility. (CG Ex. 13 and 14; Tr. at 56-57, 60-70, 76-81).
9. Ms. Gantvoort is a certified urinalysis collector with approximately seventeen (17) years experience. (Tr. at 52).
10. Ms. Gantvoort stated she does not review the IDs of individuals who are being tested. (Tr. at 81).
11. Respondent signed the Federal Drug Testing Custody and Control Form for specimen ID number 2899124 on October 14, 2011. (CG Ex. 6, 11, 15; Tr. at 62-69, 198).
12. Dr. Lenox Abbott, Director of Laboratory Operations for Quest Diagnostics, stated that Quest Diagnostics is certified by the National Laboratory Program and the Department of Health and Human Services to perform DOT testing under federal regulations. (CG Ex. 8; Tr. at 92, 94-95).
13. There were no fatal flaws and no problems with the chain of custody for urine specimen ID number 2899124 at the lab. (Tr. 94-97; 108-111).
14. The bottle for specimen ID number 289912 was initialed and the seals were unbroken and affixed to the bottle properly. (CG Ex. 9; Tr. at 108).
15. The cocaine metabolite level identified in Specimen ID number 2899124 was 660 nanograms per milliliter. (CG Ex. 9; Tr. at 127).
16. Department of Health and Human Services' and DOT regulations provide that a cocaine metabolite concentration of greater or equal to 150 nanograms per milliliter is considered a positive drug test. (49 C.F.R. § 40.87; Tr. at 127).

17. On October 17, 2011 Ms. Akia Collins, a member of the Medical Review Officer's (MRO) staff, made initial contact with Respondent. (Tr. at 129, 181-83).
18. Respondent did not speak with the MRO when initially contacted by the MRO's staff. (Tr. at 129).
19. On November 4, 2011, the MRO discussed the results of the drug test with Respondent, and determined there was no valid medical explanation for Respondent's sample yielding a positive result for cocaine. (Tr. at 132-34).
20. The MRO verified the drug test taken by Respondent as positive. (Tr. at 132-34).
21. Respondent denied using cocaine. (Tr. at 173).

III. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings are to promote safety at sea. See 46 U.S.C. § 7701; 46 C.F.R. § 5.5. In furtherance of this goal, Coast Guard Administrative Law Judges (ALJs) have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. §§ 7703-7704. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 C.F.R. §§ 20.701-702. See also Appeal Decision 2485 (YATES) (1989). In this case, the Coast Guard seeks to prove Respondent is a user of or addicted to dangerous drugs based on test results from a urinalysis collected on October 14, 2011. 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 is found to be a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. See generally Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*). Revocation is mandatory and an order of suspension is not

allowed if use of dangerous drugs is proven. See Appeal Decision 2638 (PASQUARELLA) (2003).

The 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 and 49 C.F.R. Part 40. 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); Appeal Decision 2584 (SHAKESPEARE) (1997).

For the reasons stated below which is based on the evidence in the record as a whole, I find the Coast Guard has **NOT PROVEN** the charged violation that Respondent is a user of or addicted to the use of a dangerous drug.

Burden of Proof

The Administrative Procedure Act (APA), Title 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Coast Guard Administrative Law Judges. See 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. See 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. See 33 C.F.R. §§ 20.701 and 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). See also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a

preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of Use of a Dangerous Drug

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. See 46 C.F.R. § 16.201; Appeal Decision 2584 (SHAKESPEARE) (1997). "[W]here 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).

A *prima facie* case of the use of a dangerous drug is made when the following three (3) elements are established: 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. See Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2584 (SHAKESPEARE) (1997); Appeal Decision 2697 (GREEN) (2011). If the Coast Guard establishes a *prima facie* case of use of a dangerous drug, then Respondent may present evidence to rebut the presumption of the positive drug test result.

If Respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. See Appeal Decision 2592 (MASON) (1997).

i. Whether Respondent was the Person Tested for Dangerous Drugs

Respondent contends the identification procedures followed by the COMBI-Tampa facility were insufficient, and therefore, the Coast Guard is not entitled to the regulatory presumption contained in 46 C.F.R. Part 16. Title 49 C.F.R. § 40.61 provides the steps that must be taken by the collector. Specifically, 49 C.F.R. § 40.61(c) states:

> Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (*e.g.*, a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a coworker or another employee being tested) is also acceptable. If the employee cannot produce positive identification you must contact a DER to verify the identity of the employee.

Respondent argues the collector's failure to check the photo ID and her actions in general in conducting the urinalysis were in violation of the regulations, and therefore the chain of custody has not been established to link Respondent and Specimen ID number 2899124. Respondent admitted to presenting an ID at the facility but did not admit to presenting the New York State Drivers License that was entered as CG Ex. 13. See Tr. at 178, 196-97. Respondent's position also includes contentions regarding potential confusion with the other member of the crew. While Respondent's assertions may not have any corroboration and are not persuasive, those arguments highlight that the Coast Guard bears the burden of proof of all elements of a prima facie case including establishing identity of the donor. Appeal Decision 2584 (SHAKESPEARE) (1997); 33 C.F.R. § 20.702.

The Coast Guard argues that Respondent's signature and social security number on the CCF, along with his initials on the specimen bottle label, are sufficient to prove Respondent was the person who submitted the sample. The Coast Guard also contends that minor technical errors do not invalidate the process and therefore the verification of identification and the procedures followed in this matter in general were sufficient. The Coast Guard asserts the collection of Respondent's specimen, its custody, control, and shipment to the testing facility (Quest Diagnostics), and testing performed at that facility were done in substantial compliance with 49 C.F.R. Part 40.

The collector's failure to personally check Respondent's ID may be considered "fatal" to proving the *prima facia* case, but is not a "fatal flaw" as defined in the DOT regulations. See Appeal Decision 2653 (ZERINGUE) (2005). "Adequate identification of the donor of a urine sample is a question of fact for the ALJ." Id. The Court in ZERINGUE determined that the collector's failure to verify photo ID was fatal. See U.S.C.G. v. ZERINGUE, Docket. No. 02-0462 (2003), aff'd. Appeal Decision 2653 (ZERINGUE) (2005). The failure of the collector to comply with a requirement of the mandatory guidelines, specifically 49 C.F.R. § 40.61(c), raises a substantial question of the sufficiency of the evidence regarding the identity of the donor and the chain of custody of the specimen. See Id.; Appeal Decision 2653 (ZERINGUE) (2005).

The Coast Guard contends this case should be distinguished from ZERINGUE, supra because in ZERINGUE, Respondent's identification was never obtained at any point in the process, and the collector relied on the donor's statements or actions for identification. The Coast Guard asserts that this matter is somehow different because Respondent's photo ID was viewed by someone at the front desk of the collection facility, and the information from the ID stayed attached to the CCF throughout the collection process.

In order for a test to be considered in compliance with 46 C.F.R. Part 16 the collector must carry out the procedures found in 49 C.F.R. Part 40 to insure there are no breaches in the chain of custody and that the integrity of the specimen is maintained. See Appeal Decision 2614 (WALLENSTEIN) (2000). Minor technical infractions of the regulations do not violate due process. See Appeal Decision 2688 (HENSLEY) (2010).

The requirement for the collector to personally view the photo ID of the donor of a specimen is not a minor technical matter. Allowing the collector to delegate the required review of the photo ID circumvents a requirement of the regulations that is intended to insure accuracy and maximize the protections against the potential interference with the testing process. Appeal Decision 2542 (DEFORGE) (1992) includes dicta that that the HHS Guidelines only referred to Photo ID requirements as examples. The regulations have been updated a significant number of times since 1992 and the HHS regulations are Mandatory Guidelines (73 Fed. Reg. 71858 (Nov. 25, 2008)) and provides that Photo ID is required to be seen by the collector. DOT has incorporated the scientific and technical aspects of HHS Mandatory Guidelines. *Id*. at 71877. The prohibition against use of substitutes for actual employer or Government photo ID is clear in the regulations and this case is not significantly distinguished from ZERINGUE. These requirements for following specific identification and testing procedures are critical to fairness for the Mariner, especially since the only available sanction for the charge of use of or addiction to dangerous drugs is revocation. See Appeal Decision 2638 (PASQUARELLA) (2003).[1]

Respondent's Answer and the evidence presented at the hearing show Respondent submitted a urine sample to COMBI-Tampa on October 14, 2011. See CG Ex. 5; Tr. at 173. Respondent signed the CCF. See CG Ex. 6, 9, and 11. COMBI-Tampa employed, Ms. Mildred

[1]Although 46 U.S.C. 7704(b)(dangerous drug law conviction) allows suspension or revocation 46 U.S.C. 7704(c) requires revocation absent proof of cure..

Gantvoort, the collector, on October 14, 2011 and Ms. Gantvoort conducted urinalysis collection on that day. See Tr. at 51-70. Ms. Gantvoort is a certified urinalysis collector with approximately seventeen (17) years experience. See Tr. at 52. Ms. Gantvoort did not have an independent memory or personal recollection of Respondent or the collection conducted on October 14, 2011, but she testified as to the procedures she follows regularly during the collection process. (Tr. 60-63).

Ms. Gantvoort testified that she conducts urinalysis in a standard process as follows: she obtains an individual's paperwork from the front desk; she calls the individual to be tested by name; she asks the person to verify his or her Social Security Number; she provides the individual with the testing cup; the individual provides the specimen for the test into the testing cup; she seals the testing cup and the individual initials the seals on the testing cup indicating that they were sealed in her presence; and the individual signs the CCF underneath the certification statement. CG Ex. 13, 14; Tr. at 56-57, 65, 68, 76-81. She testified that she maintained custody of the specimen until shipping it to the lab. (Tr. at 65-66).

The only witness who testified from COMBI-Tampa during the hearing was Ms. Gantvoort who testified telephonically, and never viewed Respondent's photo ID. In the absence of testimony by the receptionist or the person who actually viewed Respondent's photo ID displayed in CG Exhibit 13, I do not find CG Exhibit 13 as persuasive evidence of compliance with 49 C.F.R. § 40.61 (c). Respondent's allegations that the other crew member must be the drug user are not corroborated and also not considered persuasive evidence. However, there was no dispute that two persons from the same ship were subject to testing that day. The sign in log (CG Exhibit 05) and testimony by Respondent make it clear that there was more than one person in the waiting room the day of the test. (Tr. at 178-79). The Court is obligated to weigh the

evidence and apply applicable precedent in determining the facts based on the evidence in the record. 46 C.F.R. § 5.65. The failure of the collector to comply with 49 C.F.R. § 40.61(c), combined with her lack of personal recollection of Respondent, results in insufficient evidence to demonstrate that the donor's Photo ID was verified and proper chain of custody initiated. The assertion that someone at the front desk verified the donor's Photo ID is not supported by testimony of a person with direct knowledge. The testimony of the collector is not sufficient to support a finding that Respondent's Photo ID was verified as required by the regulations. Additionally, presentation of CG Ex. 13 as proof of identification appears to be inconsistent with the regulations which prohibit the use of copies or facsimile photo ID. Based on the evidence as a whole I find that there is insufficient proof of Respondent's identification and the chain of custody for the urinalysis specimen submitted by Respondent on October 14, 2011 has not been properly established. Therefore, the first element of the Coast Guard's *prima facie* case has not been proven in keeping with the regulations and applicable precedent. Appeal Decision 2584 (SHAKESPEARE) (1997); Appeal Decision 2603 (HACKSTAFF) (1998).

ii. Specimen Yielded a Positive Drug Test Result

Quest Diagnostics tested Respondent's specimen for dangerous drugs and returned a positive result for cocaine metabolite (Benzoylecgonine) at a level of 660 nanograms per milliliter. Quest Diagnostics is certified by the National Laboratory Program and the Department of Health and Human Services to perform DOT drug testing in accordance with federal regulations. See 76 Fed. Reg. 61110, 61111 (October 3, 2011); CG Ex. 8; Tr. at 92. Dr. Lenox Abbott, Director of Quest Diagnostics, explained the receipt and processing of specimens at Quest Diagnostics and Respondent's test results. (Tr. at 90, 93-109). The evidence supports finding that Quest Diagnostics is certified and meets all DOT drug testing requirements.

The MRO, Dr. Hisham M. Zafari, received the results from the Quest Diagnotics and ultimately verified the test as positive for cocaine metabolite. See Tr. at 134. Respondent contends the MRO failed to comply with the regulations and the Complaint should also be dismissed on that basis. In support of this argument Respondent submitted Exhibit A (copy of U.S.C.G. v. PYATT, Docket No. 99-0023 (2000)). Previous ALJ decisions may be considered as persuasive authority; however, only Commandant Decisions on Appeal or higher authority are binding on this Court. See 46 C.F.R. § 5.65.

Respondent testified that Ms. Akia Collins from the MRO's office called to inform him that his sample had tested positive for cocaine. See Tr. at 182. The regulations provide authority for the MRO to have his staff make initial contact. See 49 C.F.R. § 40.131(b). Dr. Zafari stated he did not know the substance of Ms. Collins' conversation with Respondent but that his practice is to have her contact the individual to set up the required discussion with the MRO. See Tr. at 135-36. Eventually, Respondent did speak with Dr. Zafari and received the opportunity to provide any medical explanation for the test results and request the split specimen be tested. Respondent's split specimen was tested and yielded a positive result for cocaine metabolite.

Respondent's contentions that the MRO process was not in substantial compliance with the regulations is rejected. I find that the laboratory process and the MRO procedures were in sufficient compliance with DOT requirements. The problems identified in Exhibit A (U.S.C.G. v. PYATT, Docket No. 99-0023 (2000) are not applicable to this matter. The MRO reviewed the information provided by the lab and after discussing the findings with Respondent determined there was no valid medical explanation and verified the positive test result.

iii. Drug Tests Must be Conducted in Accordance with 46 C.F.R. Part 16

The final step to establishing *prima facie* case 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. The drug test 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).

Title 46 C.F.R. § 16.230(c) provides examples of valid random selection processes. Computer-based random number generators are among the acceptable valid selection methods. See 46 C.F.R. § 16.230(c). Respondent challenged the validity of the random selection process. Respondent argued that the two (2) vessels of the company and their two crews never mix for testing which makes the test selective and not random. Tr. at 192-93. Heather McEnery from the consortium company testified that Respondent was selected for a random drug test on October 10, 2011. See Tr. at 160-61 and CG Ex. 2. She explained that random selections of mariners are done quarterly, and using a computer program, mariners' names are drawn from a consortium of companies with every individual having an equal likelihood of being selected. See Tr. at 162, 166-67.

Respondent cross examined her regarding how the crews between the companies two ships do not seem to mix and that the test seemed more selective than random, but Ms. McEnery testified that each individual has an equal likelihood of being selected. (Tr. at 164-65). Although Respondent has consistently challenged the random selection that required him to provide a specimen on October 14, 2011, his contentions that the selection always comes from the same ship is not supported or corroborated by other evidence. More specific testimony

should have been presented to address the details of compliance with 46 C.F.R. 16.230(c) which uses an example of computer based random number generator matched with crew member's identification numbers. Since the first element of a *prima facie* case has not been satisfied the question of whether the evidence is sufficient to comply with 46 C.F.R. Part 16 as required by Appeal Decision 2697 (GREEN) (2011) does not need to be addressed.

iv. Respondent's Rebuttal to the Coast Guard's Case-In-Chief.

Respondent testified on his own behalf and presented one (1) Exhibit in support of his opposition to the Coast Guard evidence. Respondent does not bear the burden of proof, however, if the Coast Guard presents sufficient evidence of a *prima facie* case of drug use the presumption of 46 C.F.R. 16.201(b). Where a *prima facie* is not sufficient the matter may be dismissed on that basis. See Appeal Decision 2603 (HACKSTAFF) (1998).

v. Ruling on Admissibility of Respondent's Previous Conviction

In attacking Respondent's credibility the Coast Guard asserted that Respondent's conviction for a drug offense from 1997 should be considered by the Court for impeachment. Respondent objected to this as irrelevant and prejudicial. The conviction is more than ten (10) years old and predates Respondent's service as a mariner. The Coast Guard contended that this was not offered as a matter of aggravation but for impeachment purposes. The Coast Guard contends that use of the prior conviction is allowed for impeachment under 33 C.F.R. § 20.1309 (b). The Coast Guard also argued that the regulations do not provide for a ten (10) year limitation in using prior convictions for impeachment purposes under § 20.1307 and § 20.1309. The Coast Guard contends that the ten (10) year limitation only applies to § 20.1315 (evidence of aggravation).

The conviction occurred prior to Respondent's entry into service as a mariner. It was not offered by the Mariner so he did not cause it to be admitted under 33 C.F.R. § 20.1309(a). It is not allowed as aggravation evidence as part of his prior disciplinary record as a mariner under 33 C.F.R. § 20.1315(a) which has a ten (10) year limit. Although 33 C.F.R. § 20.1309 does not expressly include a ten (10) year limit, it is appropriate to apply the 10 year limit because the prejudicial value of the previous conviction outweighs its probative value. See 33 C.F.R. § 20.802; Fed. R. Evid. 609(b). See generally 46 C.F.R. § 10.211; Table 10.211(g). Where the Coast Guard procedural regulations do not specifically address an issue, the regulations provide for reference to Federal Rules. See 33 C.F.R. § 20.103. Federal Rule of Evidence 609(b) provides for exclusion of such convictions that are more than ten (10) years old. Therefore, the conviction presented by the Coast Guard should not and has not been considered for any purpose in this matter.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On October 14, 2011 and at all times relevant to this matter, Respondent was a holder of Coast Guard issued Merchant Mariner's Document Number 106826.
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 as codified at 5 U.S.C. §§ 551-59.
3. On October 14, 2011 Respondent participated in a drug test.
4. Specimen ID number 2899124 yielded a positive result for cocaine metabolite.
5. The Coast Guard did not provide sufficient evidence that the positive drug test met all of the elements of a *prima facie* case in order to apply the rebuttable regulatory presumption of 46 C.F.R. § 16.201(b).

6. The Coast Guard has **NOT PROVEN** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that the charge against Respondent is **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 C**).

_____

Michael J Devine
US Coast Guard Administrative Law Judge

Date: March 07, 2013

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LIST

Coast Guard Witnesses

1. Mildred Gantvoort
2. Lenox Abbott
3. Hisham M. Zafari
4. Heather McEnery

Respondent's Witness

1. Kwame Morris

EXHIBIT LIST

Coast Guard Exhibits

CG Ex. 1 Merchant Marine Licensing and Documentation system printout for Kwame Rey Morris, Merchant Mariner Document #106826

CG Ex. 2 Notification form from ASAP Programs to International Ship Management representative selecting Kwame Morris for random drug testing

CG Ex. 3 Alpha Pro Solutions DOT collector training certificate for Mildred Gantvoort

CG Ex. 4 DOT Collection procedures used at (COMBI) – Tampa (**Not Offered/Withdrawn**)

CG Ex. 5 COMBI-Tampa daily sign-in log for October 14, 2011

CG Ex. 6 Collector copy of Federal Drug Testing Custody and Control Form (CCF) #2899124

CG Ex. 7 Curriculum Vitae for Dr. Abbott

CG Ex. 8 Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory list, Federal Register Notices October 3, 2011 (76 FR 61110) and November 3, 2011 (76 FR 68201)

CG Ex. 9 Laboratory copy of CCF #2899124

CG Ex. 10 Medical Review Officer (MRO) training certificate for Dr. Hisham Zafari

CG Ex. 11 MRO copy of CCF #2899124

CG Ex, 12 MRO test results Report **(Not Offered/Withdrawn)**

CG Ex. 13 Copy of New York State Identification card for Kwame Morris that was presented to COMBI-Tampa personal for identification on October 14, 2011.

CG Ex. 14 Two flow sheets from COMBI-Tampa created after a photo ID is presented to the desk in order to track the person's information

CG Ex. 15 Lab Documentation Package for Specimen ID 2899124

Respondent's Exhibit

Resp. Ex. A Decision and Order for U.S.C.G. v. PYATT, Docket No. 99-0023 (2000)

ATTACHMENT B

The United States Coast Guard's

Proposed Findings of Fact and Conclusions of Law

1. Respondent's credential No. 106826 was issued on May 23, 2007 and expired on May 23, 2012. [46 C.F.R. §10.205(a), CG-01, Hearing Transcript (Tr.) at 39, 42]

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

2. On October 14, 2011, Respondent took a drug test that he was randomly selected for in accordance with 46 C.F.R. §16.230. [CG-02, CG-06, CG-13, CG-14, Tr. at 161-163, 165]

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

3. On October 14, 2011, Respondent submitted a urine specimen (bearing a specimen ID number 2899124) for chemical analysis. [CG-05, CG-06, Tr. at 54-56, 64, 67, 68]

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

4. Specimen ID number 2899124 was collected by Mildred Gantvoort, a certified collector at COMBI-Tampa, the collection site. [49 C.F.R. 40 Subparts C, D and E, CG-03, CG-05, CG-06, Tr. at 53-56, 64, 67, 68]

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

5. On October 14, 2011, Respondent signed the Federal Drug Testing Custody and Control Form (CCF) for specimen ID number 2899124. [49 C.F.R. §40.73, CG-06, CG-11, Tr. at 198]

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

6. On October 15, 2011, Specimen ID number 2899124 was analyzed by Quest Diagnostics Laboratory located in Tucker, GA, using procedures approved by the Department of Transportation, listed in Title 49 Code of Federal Regulations (C.F.R.) Part 40. [49 C.F.R. 40 Subpart F, CG-09, CG-15, Tr. at 92 & 108-109]

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

7. On October 15, 2011, Quest Diagnostics Laboratory, Tucker, GA, was a Substance Abuse and Mental Health Services Administration (SAMSHA) certified laboratory, and at all times relevant while analyzing specimen ID number 2899124. [49 C.F.R. §40.81, CG 08, Tr. at 92]

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

8. Quest Diagnostics Laboratory reported specimen ID number 2899124 as positive for cocaine metabolites to Dr. Hisham Zafari, a certified MRO for ASAP Programs. [49 C.F.R. §40.87, §40.97, CG-09, CG-10, CG-11, Tr. at 121-122, 125]

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

9. On October 17, 2011, an MRO staff member contacted the Respondent to gather initial information and arrange for the Respondent to speak to the MRO. After being informed

NEITHER ACCEPTED NOR REJECTED, the MRO staff member did contact the Respondent on October 17, 2011 but it is not clear if Respondent declined speaking to the MRO. 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.

10. Respondent's results were then verified as positive by the MRO, Dr. Hisham Zafari. [49 C.F.R. §40.133(a)(1), CG-09, Tr. at 129, 131]

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

11. On November 04, 2011, the MRO, Dr. Hisham Zafari, conducted an interview with the Respondent after the Respondent re-initiated contact with the MRO's office. [49 C.F.R. §40.133(d), Tr. at 131]

    ACCEPTED IN PART, Dr. Hisham Zafari testified that he had called the Respondent on November 4, 2011 and conducted an interview. 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.

12. The MRO found no legitimate medical reason that the Respondent's urine tested positive for cocaine metabolites. [49 C.F.R. § 40.137, Tr. at 131-134]

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

13. Respondent requested that his split specimen be tested at a laboratory of his choice. However, Respondent never informed the MRO as to which laboratory to use, therefore the MRO was unable to have the split specimen tested. [49 C.F.R. §40.153, §40.171, §40.175(f), Tr. at 133, 204-205, 215]

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

14. Cocaine is a "dangerous drug" as contemplated by 46 U.S.C § 7704 (c) and tested for in accordance with 49 C.F.R. §40.85.

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

15. While the holder of a Coast Guard Merchant Mariner Document, Respondent was the user of a dangerous drug (cocaine).

    REJECTED, as provided in the Decision and Order.

ATTACHMENT C - NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 C.F.R. § 20.1001 General.

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

(b) No party may appeal except on the following issues:
(1) Whether each finding of fact is supported by substantial evidence.
(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
(3) Whether the ALJ abused his or her discretion.
(4) The ALJ's denial of a motion for disqualification.

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

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

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

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

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 C.F.R. § 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 C.F.R. § 7.45.

33 C.F.R. § 20.1003 Procedures for appeal.

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

(i) Basis for the appeal;
(ii) Reasons supporting the appeal; and
(iii) Relief requested in the appeal.

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

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

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

(c) No party may file more than one appellate brief or reply brief, unless --
(1) The party has petitioned the Commandant in writing; and
(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

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

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

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

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