

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

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UNITED STATES COAST GUARD  
Complainant

vs.

Allan Wayne LEFLER

Respondent

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Docket Number 2013-0484  
Enforcement Activity No. 4767097

**DECISION AND ORDER**

**Date Issued: September 25, 2014**

**By Administrative Law Judge: Honorable Bruce Tucker Smith**

**Appearances:**

**For the Coast Guard;**

**Mr. Jim A. Wilson  
Marine Safety Unit Morgan City**

**For the Respondent;**

**Paxton N. Crew Esq., Esq.**

## **I. STATEMENT OF THE CASE**

On December 23, 2013, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Allan Wayne Lefler (Respondent) seeking revocation of his Coast Guard–issued Merchant Mariner’s Credential (credential) alleging use of, or addiction to the use of, dangerous drugs under 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. More particularly, the Complaint alleged that on October 17, 2013, Respondent submitted to a drug test and provided a urine sample that subsequently tested positive for “THC,” the principal psychoactive ingredient in marijuana.

On January 11, 2014, Respondent filed his Answer admitting all jurisdictional allegations and admitting some factual allegations. In his Answer, Respondent specifically objected that the specimen collection process was “fatally flawed.”

On May 2, 2014, the Coast Guard filed an Amended Complaint correcting the location of the collection site as well as citations to relevant statutory authority.

On June 10, 2014, the hearing of this matter commenced in the Administrative Law Judge (ALJ) Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana. Jim Wilson, Esq. appeared on behalf of the Coast Guard; Paxton N. Crew, Esq., appeared on behalf of Respondent, who was also present in court. At hearing, the Coast Guard presented the testimony of four witnesses and offered eight exhibits into evidence, all of which were admitted into the record.<sup>1</sup>

One witness testified as part of the Respondent’s case–in–chief and the Respondent testified on his own behalf. Respondent offered two exhibits into evidence.<sup>2</sup>

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<sup>1</sup> Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at \_\_\_). Citations referring to Coast Guard Exhibits are as follows: CG followed by the exhibit number (CG Ex. 1, etc.); Respondent’s Exhibits are as follows: Resp. followed by the exhibit letter (Resp. Ex. A, etc.). Attachment A sets forth the parties’ witnesses and exhibits.

<sup>2</sup> Respondent’s Exhibit B was admitted only for the limited purpose of the ALJ referencing it in this decision.

At the conclusion of the hearing, Respondent's counsel contended that the Coast Guard's failed to establish a prima facie case because Respondent's urine specimen was not tested in accordance with 49 C.F.R. Part 40. (Tr. at 188).

On July 11, 2014, the undersigned issued a Decision and Order in this matter finding that the allegations in the Coast Guard's Amended Complaint were proved and revoked Respondent's credential.

On August 14, 2014, following the issuance of Appeal Decision 2704 (FRANKS) (2014), Respondent filed a "Motion to Vacate July 11, 2014 Order and Decision." The Coast Guard waived its right to file a responsive pleading. On August 18, 2014, the undersigned granted Respondent's Motion and issued an order vacating its July 11, 2014, Decision and Order.

Thereafter, the court asked the parties to submit post-hearing briefs to assist the court in applying FRANKS to the instant case. After both parties submitted their respective briefs, this court commenced its deliberation anew.

The principal legal issue for the court's consideration in this case is whether Respondent's selection for drug testing was truly random for the purposes of 16 C.F.R. §16.230 and Appeal Decision 2704 (FRANKS) (2014). In this case, the court finds that the Coast Guard did not prove by a preponderance of the evidence Respondent's selection was truly random.

Thus, after careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the court finds the allegations in the Complaint **NOT PROVED**. See 46 C.F.R. §5.567.

## **II. FINDINGS OF FACT**

Pursuant to the authority described in 33 C.F.R. §§20.701, 902, the court makes the following Findings of Fact based on the preponderance of the evidence after thorough and careful analysis of the documentary evidence, testimony of witnesses, stipulations made by the parties, if any, and the entire record taken as a whole.

1. At all relevant times, Respondent was a holder of a valid Coast Guard-issued Merchant Mariner's Credential. (Respondent's Answer).
2. On October 17, 2013, Respondent was employed by SEACOR Marine, LLC (SEACOR).
3. On October 17, 2013, Respondent was serving as an engineer aboard SEACOR's OSV GERARD JORDAN (GERARD JORDAN). (Tr. at 196 – 198).
4. On October 17, 2013, SEACOR hired SECON to conduct drug and alcohol testing aboard the GERARD JORDAN in Port Fourchon, Louisiana. (Tr. at 37).
5. SECON is a commercial entity that performs specimen collection services for the oil, gas and marine industries. (Tr. at 35).
6. John Ducote is a Department of Transportation (DoT)-certified specimen "field collector" employed by SECON. (Tr. at 26 – 27, 35; CG. Ex. 1).
7. Russell Landry is a DoT-certified specimen collector employed by SECON. (Tr. at 89).
8. On October 17, 2013, Mr. Ducote and Mr. Landry boarded the GERARD JORDAN in Port Fourchon, Louisiana, to administer random drug and alcohol tests to GERARD JORDAN crewmembers. (Tr. at 32, 37, 41, 91).
9. Mr. Ducote and Mr. Landry were advised by SEACOR that the tests conducted were "random." (Tr. at 32; CG Ex. 2).
10. When Mr. Ducote and Mr. Landry boarded the GERARD JORDAN, a list of SEACOR employee names was already present and ready for use in administering the tests. (Tr. at 41 – 42).
11. While Mr. Ducote was aboard the GERARD JORDAN, he met and spoke with Respondent. (Tr. at 43).
12. Mr. Ducote reviewed documentary evidence that established Respondent's photo identification, Social Security number, date of birth and telephone number. That information was then recorded on Respondent's CCF, which bore a unique and discreet specimen identification number 501801316. (Tr. at 30 – 31, 43, 58, 128; CG Ex. 2).
13. Respondent's Federal Drug Testing Custody and Control Form (CCF), Step 1, §E clearly indicates: "Reason for Test – Random." (CG Ex. 2).
14. Mr. Ducote observed Respondent fill in certain blanks on Respondent's CCF. (Tr. at 29 – 32; CG. Ex 2).
15. After Mr. Ducote provided instructions to Respondent on how to provide a urine specimen, Respondent then personally provided Mr. Ducote with a urine-filled specimen cup for testing. (Tr. at 43).

16. After Mr. Ducote obtained Respondent's filled urine specimen cup, he shipped Respondent's sample, via FedEx, to Alere Toxicology Services, Gretna, Louisiana (Alere). (Tr. at 60).
17. Dr. David Green is the Alere laboratory director. (Tr. at 135; CG Ex. 3).
18. On October 19 – 20, 2013, Alere tested a human urine specimen, bearing a unique and discreet specimen identification number 501801316, the same unique and discreet number associated with the CCF that Respondent signed. (Tr. at 143 – 144, 164; CG. Ex 2, 4).
19. Alere performed two laboratory tests upon Respondent's urine sample; both tests resulted in a "positive" for the presence of the marijuana metabolite (THC) in Respondent's body. (Tr. at 154, 161; CG Ex. 4).
20. The first test conducted by Alere, known as an "immunoassay," revealed that Respondent's urine contained 52 nanograms per milliliter, which exceeded the established DoT cut-off level of 50 nanograms per milliliter, thus indicating a "positive" result. (Tr. at 163 – 164; CG Ex. 4).
21. The second test conducted by Alere, a confirmatory test, known as gas chromatography-mass spectrometry, revealed that Respondent's urine contained 31 nanograms per milliliter, which exceeds the DoT cut-off level of 15 nanograms per milliliter, thus indicating a "positive" result. (Tr. at 157, 164, 167; CG Ex. 4).
22. Dr. Brian Heinen is the DoT-certified Medical Review Officer who reviewed the results from Alere's tests of Respondent's urine sample. Dr. Heinen's review of the Alere laboratory report revealed the presence of THC in Respondent's body. (Tr. at 179; CG Ex. 5, 6, 7, 8).
23. After reviewing the Alere laboratory report, Dr. Heinen telephoned Respondent to discuss Respondent's test results. (Tr. at 183).
24. Dr. Heinen explained to Respondent his right to have his "B" sample tested; but Respondent never requested to have the "B" sample tested by another laboratory. (Tr. at 183, 187)
25. The laboratory tests performed by Alere on Respondent's sample were conducted in accord with 49 C.F.R. Part 40, subparts F and G. (Tr. at 153, 162).

### **III. PRINCIPLES OF LAW**

#### **A. Suspension & Revocation Proceedings**

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. §7701(a). Under 46 U.S.C. §7704(c), a Coast Guard issued credential shall be

revoked if it is proven that the holder of the credential has been a user of or addicted to the use of dangerous drugs, unless the holder provides satisfactory proof that the holder is cured.

Administrative Law Judges therefore have the authority to revoke a mariner's credential for violations arising under 46 U.S.C. §7704. See 46 C.F.R. §5.19(b).

### **B. Jurisdiction**

In the instant matter, the Coast Guard brought charges against Respondent under the authority of 46 U.S.C. §7704(c). Title 46 U.S.C. §7704(c) provides:

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.

See also 46 C.F.R. §5.35.

Alleged violations of 46 U.S.C. §7704(c) are "holder offenses" in that the mariner need not have been acting under the authority of his credentials in order to be subject to the Coast Guard's jurisdiction. Jurisdiction is established for the purposes of suspension and revocation proceedings when the use of a dangerous drug is charged, so long as respondent is a current holder of any Coast Guard-issued credential. See Appeal Decision 2668 (MERRILL) (2007). Here, it is uncontested that Respondent is the holder of a credential and thus jurisdiction for the §7704(c) charge is established.

### **C. Burden of Proof**

The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation proceedings. 46 U.S.C. §7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. §556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a).

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. Constr. Laborers Pension Trust for S. 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(s) charged.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision (2640) (PASSARO) (2003). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

#### **D. Employer-Ordered Random Drug Cases**

Title 46 C.F.R. Part 16, subpart B mandates that employers conduct five specific types of drug testing programs: 1) Pre-employment drug testing; 2) Periodic drug testing; 3) Random drug testing; 4) Post-serious marine incident drug testing; and 5) Reasonable cause drug testing. 46 C.F.R. §§16.210-16.25.

Title 46 C.F.R. §16.201 provides, in pertinent part, as follows:

- (a) Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 C.F.R. Part 40.
- (b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs. (emphasis added).

The presumption of drug use or addiction described in 46 C.F.R. §16.201, above, is a highly significant evidentiary factor in a Suspension and Revocation hearing. The presumption only arises when the Coast Guard proves a prima facie<sup>3</sup> case by a preponderance of the evidence, thus shifting the burden to the respondent to produce persuasive evidence to rebut the presumption. A respondent faced with overcoming the presumption of dangerous drug use “may rebut the presumption by producing evidence (1) that calls into question any of the elements of a 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).

At the hearing, the Coast Guard tried to establish a prima facie case that Respondent either used, or was addicted to, a dangerous drug. To trigger the 46 C.F.R. §16.201(b) presumption, thus establishing a prima facie case of dangerous drug use, the Coast Guard must prove the following three elements:

(1) that the respondent was the person tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Proof of those three elements establishes a prima facie case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 2592 (MASON); 2584 (SHAKESPEARE); 2560 (CLIFTON); 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).

Appeal Decision 2603 (HACKSTAFF) (1998) at 4.

Appeal Decision 2704 FRANKS (2704) (2014), restated the above prima facie case elements and further clarified element 3 to establish a prima facie case (and thus trigger the presumption), the drug test must be conducted as required by 46 C.F.R. Part 16. Part 16 requires testing not only in accordance with the procedures in 49 CFR Part 40, but also the reason the

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<sup>3</sup>A prima facie case is one in which the facts as alleged will prevail until contradicted and overcome by other evidence. See Black’s Law Dictionary 1189 (6<sup>th</sup> ed. 1990).



drug test was conducted; that is, 1) pre-employment, 2) periodic, 3) random, 4) post-serious marine incident, and 5) reasonable cause drug testing.

In FRANKS, the Complaint alleged Respondent was a user of or was addicted to the use of dangerous drugs. The ALJ found Respondent tested positive for cocaine metabolites but determined the employer did not conduct the drug test in accordance with 46 C.F.R. Part 16 because one element of the prima facie case was missing – evidence showing the test met the regulatory requirements for a Periodic test. 16 C.F.R. §16.220. The ALJ therefore found the Coast Guard’s Complaint Not Proved and dismissed the matter with prejudice. On appeal, the Vice Commandant in FRANKS held “when the test was ordered pursuant to the regulations but the justification for it is not consonant with the regulations, or the test is not conducted in accordance with 49 C.F.R. Part 40 and is therefore unreliable, there is no prima facie case proved.” Id. “Because the Coast Guard failed to show that the relevant drug test was properly ordered fewer than 46 C.F.R. Part 16, it failed to establish the third element of its prima facie case and the ALJ was correct to dismiss the matter.” Id. at 12.

FRANKS recognized Part 16 implicates the Fourth Amendment because drug testing undertaken by private employers that must comply with federal regulatory requirements constitutes Government action. Id. at 7. As restated on pages 5-7 in FRANKS and summarized herein for the sake of brevity, the Fourth Amendment protects individuals against unreasonable searches and seizures conducted by or mandated by the government. For a search to be considered reasonable the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual’s legitimate expectation of privacy. Thus, the courts must “. . . consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” Id. at 6,

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(quoting from the Final Rule, Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 47,064, 47,065-66 (Nov. 21, 1988) (internal citations omitted)).

### **Requirements for a Random Test**

To qualify as a “random drug test,” 46 C.F.R. §16.230(c) provides, as follows:

The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection.

### **Id.**

Here, the Coast Guard bears the burden of proving, by a preponderance of the evidence, that Respondent's employer selected him (or his vessel) for a random drug test by a scientifically valid method in accordance with 46 C.F.R. §16.230(c).

## **IV. ANALYSIS**

### **A. Elements of the Prima Facie Case for Employer-Ordered Drug Tests**

In the instant case, the Coast Guard charged Respondent with use of, or addiction to the use of, dangerous drugs because his urine tested positive for marijuana metabolites following an October 17, 2013, employer-ordered drug test. 46 C.F.R. §16.230.

It is noteworthy, however, that the Amended Complaint does not allege that the drug test at issue was a random drug test. In fact, at the hearing, the Coast Guard representative specifically denied that the test at issue was a random test and explained: “So to be on the safe side, this was charged as a non-Part 16 drug test... We wanted to avoid the random

issue...[W]e're going straight to the code, the United States Code. It says if you have a Coast Guard credential and you're using drugs, it's a revocation." (Tr. at 17 – 18).

The court recognizes that the results from non-Part 16 drug tests are admissible in Suspension and Revocation hearings, although those non-Part 16 tests do not enjoy the benefit of the evidentiary presumption defined in 46 C.F.R. §16.201. Nevertheless, non-Part 16 drug tests can form the basis for a revocation action. See, e.g., Appeal Decisions 2668 (MERRILL) (2003) (voluntary test); 2625 (ROBERTSON) (2002) (employer's policy); 2545 (JARDIN) (1992) (voluntary test).

In this case, however, the evidence reveals that the test at issue originated as a Part 16 test and was conducted and reviewed as a Part 16 case throughout. That the Coast Guard later made a tactical decision to charge this as a non-Part 16 case, does not convert this case into an otherwise legitimate non-Part 16 drug test.

The court regards as dispositive the fact that John Ducote, the DoT-certified urine specimen "field collector" who administered Respondent's test, had been informed by SEACOR that the test at issue was random. (Tr. at 32). Moreover, Step 1, §E of Respondent's Federal Drug Testing Custody and Control Form (CCF) (CG Ex. 2) clearly reveals: "Reason for Test – Random."

Russell Landry is also a DoT-certified specimen collector in the employ of SECON. (Tr. at 89). Mr. Landry testified that on October 17, 2013, he accompanied Mr. Ducote in the administration of the drug test at issue, see below. Mr. Landry also testified that his presence aboard Respondent's vessel was to administer a random alcohol screen of SEACOR employees. (Tr. at 91).

Based upon the uncontested evidence presented by the Coast Guard, the court specifically finds that the October 17, 2013, drug test Respondent participated in was intended to be a random urinalysis, as per the requirements of 46 C.F.R. Part 16.

In this case, it is clear that SEACOR intended to conduct a random urinalysis when it selected Respondent for testing.

Thus, it is appropriate to analyze the test at issue as a government-mandated drug test under 46 C.F.R. Part 16 and to evaluate this case in light of the three required elements of a prima facie case, described above.

**1. Element One: Was Respondent the person tested for dangerous drugs?**

Proof of this element of the prima facie case “involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number . . . which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of the sample.” Appeal Decisions 2662 (VOORHIES) (2007); 2603 (HACKSTAFF) (1998).

John Ducote was a DoT-certified urine specimen “field collector” in the employ of an entity called SECON. (Tr. at 26 – 27, 35; CG. Ex. 1). SECON performs urine specimen collection services for the oil and gas and marine industries. (Tr. at 35). Mr. Ducote testified that on October 17, 2013, SECON’s services had been retained by a marine employer, SEACOR, to collect urine specimen samples from SEACOR’s employees. (Tr. at 37). Mr. Ducote testified that on October 17, 2013, he reported to SEACOR’s facility in Port Fourchon, Louisiana. (Tr. at 38). There, he boarded SEACOR’s supply vessel, the GERARD JORDAN, for the purpose of conducting a random urinalysis. (Tr. at 32, 41).

Mr. Ducote testified that when he boarded the GERARD JORDAN, he was given a list of names of SEACOR employees who were to be tested. (Tr. at 41 – 42).

The Coast Guard did not elicit testimony from any witness to describe why Respondent’s name was on that list or how either the vessel or the Respondent had been “randomly” chosen for testing. 46 C.F.R. §16.230(c).

Mr. Ducote further testified that while aboard the GERARD JORDAN, he met and spoke with Respondent. (Tr. at 43). Mr. Ducote explained that during his interaction with Respondent, he provided information necessary to allow Mr. Ducote to fill in certain blanks on Respondent's CCF. (Tr. at 29 – 30; CG. Ex 2).

Mr. Ducote testified that Respondent provided photo identification, his Social Security number, date of birth and his telephone number. (Tr. at 30 – 31, 43, 58, 128; CG Ex. 2). That personal information was recorded on Respondent's CCF, which bore the unique and discreet specimen identification number 501801316. (CG Ex. 2). Mr. Ducote testified that after he gave instructions to Respondent on how to provide a urine specimen, Respondent then provided Mr. Ducote with a urine-filled specimen cup for testing. (Tr. at 43).

Hence, the uncontroverted evidence establishes that the Coast Guard proved by a preponderance of the evidence that Respondent was the person who was tested for dangerous drugs on October 17, 2013.

## **2. Element Two: Did Respondent Fail the Drug Test?**

Mr. Ducote testified that after he obtained Respondent's urine specimen cup, he shipped Respondent's sample, via FedEx, to Alere Toxicology Services in Gretna, Louisiana (Alere). (Tr. at 60).

Dr. David Green testified that he is the laboratory director at Alere. (Tr. at 135; CG Ex. 3). The court recognized Dr. Green as an expert in the field of forensic toxicology and the relevant laboratory science appropriate to the testing for THC and other illicit substances in the human body. (Tr. at 143).

Dr. Green testified that on October 19 – 20, 2013, his laboratory tested a human urine specimen bearing specimen identification number 501801316, the same unique and discreet number associated with the CCF that Respondent signed. (Tr. at 143 – 144, 164; CG Ex. 2, 4).

Dr. Green explained the two tests his lab performed upon Respondent's sample resulted in a "positive" for the presence of the marijuana metabolite in Respondent's body. (Tr. at 154, 161; CG Ex. 4).

Dr. Green testified that the first test, an "immunoassay," revealed that Respondent's urine contained 52 nanograms per milliliter, which exceeded the established DoT cut-off level of 50 nanograms per milliliter, thus indicating a "positive" result. (Tr. at 148, 157, 163 – 164; CG Ex. 4).

Dr. Green then testified to a second, or confirmatory, test by a process known as gas chromatography-mass spectrometry. He testified that Respondent's sample contained 31 nanograms per milliliter, a number which exceeds the DoT cut-off level of 15 nanograms per milliliter, thus indicating another "positive" result. (Tr. at 157, 164, 167; CG Ex. 4).

The Coast Guard elicited testimony from Dr. Brian Heinen, the DoT-certified Medical Review Officer who reviewed the results from the laboratory's tests of Respondent's urine sample. Dr. Heinen testified that the laboratory tests reveal the presence of THC (the psycho-active ingredient in marijuana) in Respondent's body. (Tr. at 179; CG Ex. 5, 6, 7, 8). Dr. Heinen testified that, as per DoT protocol, he telephonically interviewed Respondent regarding the test results. (Tr. at 183). Dr. Heinen testified that he explained to Respondent his right to have his "B" sample tested; but that Respondent never requested to have that sample tested by another laboratory. (Tr. at 187)

Respondent produced no evidence that the samples tested by Dr. Green at Alere were not the Respondent's. Further, Respondent did not produce any evidence to suggest the test procedures employed by Dr. Green's lab were either flawed or inaccurate.

Thus, the Coast Guard established by a preponderance of credible evidence that Respondent's urine specimen failed a drug test.

**3. Element Three: Was Respondent Properly Ordered to Test Under 46 C.F.R. Part 16 and was Respondent's Drug Test Conducted in Accordance with 49 C.F.R. Part 40?**

The Coast Guard provided no testimony or evidence regarding the manner by which Respondent was selected for, or ordered to submit to, the "random" urinalysis. Moreover, the Coast Guard specifically represented to the court that it would not present this case as a random urinalysis. (Tr. at 17 – 18). Yet the CCF clearly reflects that the test was originally ordained as a DoT "random" urinalysis; a fact confirmed by the testimonies of the DoT-certified specimen collectors who were present at Respondent's testing. (Tr. at 32, 89 – 91; CG Ex. 2).

Thus, the court specifically finds that the test at issue was originally intended to be a "random" urinalysis, per the dictates of 46 C.F.R. Part 16.

Hence, the Coast Guard was required to prove by a preponderance of the evidence that the test was conducted in accordance with 46 C.F.R. §16.230(c); i.e., that Respondent was randomly selected for testing by a scientifically valid method. Here, the Coast Guard did not meet that burden. Thus, the "ALJ [would be] correct to dismiss the matter" at this juncture. Appeal Decision 2704 (FRANKS) (2014).

Likewise, noticeably absent from the Coast Guard's presentation was substantive evidence from the DoT-certified specimen collectors that they actually followed the dictates of 49 C.F.R. Part 40, subparts D and E during the collection of Respondent's urine specimen. An examination of the court transcript reveals little testimony from either of the DoT-certified collectors about the urine-specimen collection procedures that were actually employed and followed aboard the GERARD JORDAN, in Port Fourchon, Louisiana, on October 17, 2013, aboard the GERARD JORDAN. The testimonies of both Mr. Ducote and Mr. Landry are generally couched in abstract terms of what procedures are generally followed during a specimen

collection process – but not what procedures were actually followed on October 17, 2013. (Tr. 45 – 55). However, cobbling together the contents of Coast Guard Exhibit 2 with some of the testimony provided by Mr. Ducote, it is apparent that a urine specimen was collected from Respondent and that specimen was sent, via FedEx, to Alere in Gretna, Louisiana for testing. (Tr. at 60).

Dr. Green testified that the Alere tests performed on Respondent's sample were conducted in accordance with 49 C.F.R. Part 40, subparts F and G. (Tr. at 153, 162). Respondent offered no evidence to the contrary.

In sum, the Coast Guard failed to prove by the requisite preponderance of the evidence that Respondent was properly ordered to submit his urine sample for testing. Likewise, the Coast Guard did not prove by the requisite preponderance of the evidence that Respondent's urine specimen was collected in accordance with the provisions of 49 C.F.R. Part 40, subparts D and E. However, the Coast Guard did prove by the requisite preponderance of the evidence that the Respondent's urine specimen was tested – and the results reviewed – in accord with the provisions of 49 C.F.R. Part 40, subparts F, G.

## **V. CONCLUSION**

The Coast Guard did not establish a prima facie case that Respondent was a user of, or addicted to, dangerous drugs by a preponderance of the evidence.

## **VI. ULTIMATE FINDINGS OF FACT**

1. At all relevant times, Respondent was a holder of Coast Guard-issued Merchant Mariner's Credential.
2. Respondent's marine employer, SEACOR, intended to conduct a random urinalysis, per the provisions of 46 C.F.R. Part 16 on October 17, 2013, when it selected Respondent for testing.
3. Respondent was not randomly selected for testing by a scientifically valid method.
4. Respondent was the individual who was tested for dangerous drugs.



5. Respondent's urine tested positive for the presence of THC, the psychoactive ingredient in marijuana.

## **VII. ULTIMATE CONCLUSIONS OF LAW**

1. 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.
2. Respondent was not properly ordered to submit for testing in accordance with 46 C.F.R. Part 16 in that he was not randomly selected by a scientifically valid method.
3. Respondent's urine specimen was not collected in accordance with 49 C.F.R. Part 40, subparts D and E.
4. Respondent's urine specimen was tested in accordance with the provisions of 49 C.F.R. Part 40, subparts F and G.
5. Respondent is not a user of, or addicted to the use of dangerous drugs. 46 U.S.C. §7704(c); 46 C.F.R. §5.35.

## **VIII. DECISION**


The allegations set forth in the Amended Complaint are found **NOT PROVED**.

**IX. ORDER**

The Complaint is hereby **DISMISSED WITH PREJUDICE** per 46 C.F.R. 5.567.

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

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**Bruce Tucker Smith**  
**US Coast Guard**  
**Administrative Law Judge**

Date:

## **ATTACHMENT A: WITNESS & EXHIBIT LISTS**

### **Coast Guard Exhibits**

1. Certificate of Training for John Ducote
2. Alere Federal Drug Testing Custody and Control Form, ID No. 501801316, Copy 3
3. Curriculum Vitae of David Austin Green, Ph.D., DABCC, FACB
4. Litigation Package for Lab Number 81898367, Specimen ID 501801316
5. Alere Federal Drug Testing Custody and Control Form, ID No. 501801316, Copy 1
6. Alere Drug Test Report
7. Heinen Medical Review/MRO Verification Worksheet
8. Alere Federal Drug Testing Custody and Control Form, ID No. 501801316, Copy 2

### **Respondent Exhibits**

- A. Photograph of diagram drawn on white board
- B. Quest Diagnostic Drug Detail Report

### **ALJ Exhibits**

None

### **Coast Guard Witnesses**

John Ducote  
Russell J. Landry  
David A. Green, Ph.D.  
Brian Heinen, M.D.

### **Respondent Witnesses**

Richard P. Lucas  
Allan Wayne Lefler

## **ATTACHMENT B: SUBPART J, APPEALS**

### **33 C.F.R. §20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

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

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

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

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    - (i) Basis for the appeal;
    - (ii) Reasons supporting the appeal; and
    - (iii) Relief requested in the appeal.
  - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
  - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
  - (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

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

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.