

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

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UNITED STATES COAST GUARD,

Complainant

v.

JUSTIN DAVID JOHNSON,

Respondent

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Docket Number 2012-0469  
Enforcement Activity No. 4470513

**DECISION & ORDER**

Date Issued: July 11, 2014

Issued By: Honorable Bruce Tucker Smith  
Administrative Law Judge

**Appearances:**

**For the Complainant**

LT Zachary Wyatte  
CWO4 Quinn Quaglino

**For the Respondent**

Justin David Johnson, pro se

## I. PRELIMINARY STATEMENT

On October 23, 2012, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Justin David Johnson (Respondent) seeking revocation of Respondent's Coast Guard-issued Merchant Mariner's License (MML or credential) alleging use of, or addiction to the use of, dangerous drugs under 46 USC §7704(c) and 46 CFR §5.35. More particularly, the Complaint alleged that Respondent submitted to a random drug test and provided a urine sample that subsequently tested positive for marijuana metabolites, in violation of an extant Settlement Agreement between the Coast Guard and the Respondent.

On October 29, 2012, a Coast Guard Administrative Law Judge entered a Consent Order approving a Settlement Agreement between the Respondent and the Coast Guard, ostensibly resolving the matters contained in the Coast Guard's original Complaint. Paragraph 6 of the Settlement Agreement provided that Respondent must not, *inter alia*, "fail a [drug] test." (CG Ex. 3).<sup>1</sup>

On August 13, 2013, the Coast Guard filed a Notice of Failure to Complete Settlement Agreement, alleging that Respondent had tested positive for drugs. The Coast Guard contends that Respondent submitted urine specimen for chemical testing on July 8, 2013 and that, thereafter, that sample tested positive for Tetrahydrocannabinol (THC), the psycho-active ingredient in marijuana. (Tr. Vol. I at 16; CG Ex. 10).

On August 19, 2013, The Respondent contested the Notice and indicated his desire for a due-process hearing wherein the Coast Guard was obligated to prove he had, in fact, breached the Settlement Agreement by virtue of the failed drug test.

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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 Agency Exhibits are as follows: Investigating Officer followed by the exhibit number (Investigating Officer Exhibit 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.). Attachment A sets forth the parties' witnesses and exhibits.

On January 7, 2014, the hearing of this matter commenced in the ALJ Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana LT Zachary Wyatte and CWO4 Quinn Quaglino represented the Coast Guard; Respondent appeared pro se.

The hearing was conducted in four sessions: January 7, 2014; March 19, 2014<sup>2</sup>; May 14, 2014<sup>3</sup> and on June 16, 2014.

Respondent testified on his own behalf and did not call additional witnesses. Respondent offered seven exhibits into evidence all of which were admitted.

After all of the evidentiary hearings were concluded, both parties rested their respective cases and the court commenced its deliberation.<sup>4</sup>

## 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. On October 29, 2012, a Coast Guard Administrative Law Judge entered a Consent Order approving a Settlement Agreement between the Respondent and the Coast Guard, ostensibly resolving the matters contained in the Coast Guard's original Complaint filed against Respondent for illegal drug use. Paragraph 6 of the Settlement Agreement provided that Respondent must not, inter alia, "fail a [drug] test."
2. On July 8, 2013 the Respondent Justin David Johnson presented himself to a specimen collection facility known as "MEA Drug Testing" in Mississippi where he provided a urine specimen for

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<sup>2</sup> The telephonic testimony of Dr. Franz A. Michel was interrupted by a failure of the telephone/speaker system in the administrative courtroom. Immediate – and even repeated, subsequent – efforts to fix the telephone system were to no avail. Thus a two-month continuance followed until the telephone system could be repaired.

<sup>3</sup> Respondent failed to appear timely at the May 14, 2014 hearing, where the testimony of Dr. Franz A. Michel was continued. Respondent subsequently petitioned the court to keep the record open and to allow him to present his defense-in-chief. In an abundance of caution for the due-process interests of the pro se litigant, the court granted Respondent's request.

<sup>4</sup> The court acknowledges and thanks student-legal externs Whitney Jansta and Joshua Hall, of the Norman Adrian Wiggins School of Law, Campbell University, Raleigh, North Carolina, for their research contributions in this case.

testing to Jim Warrick, a properly certified urine specimen collection technician. (Tr. Vol. I at 30 – 40; CG Ex. 6, 7).

3. On July 8, 2013, Respondent Justin David Johnson completed the appropriate federal custody and control forms bearing a discreet and unique specimen identification number, 502120007, and thereafter provided a sufficient quantity of urine for chemical testing. (Tr. Vol. I at 45 – 46; CG. Ex 8).

4. On July 8, 2013, Respondent Justin David Johnson's discreet specimen identification number, matching the same one on the federal custody and control form, was affixed to the urine specimen provided by the Respondent. (Tr. Vol. I at 47).

5. On July 8, 2013, James Warrick of MEA Drug Testing ensured that the Respondent Justin David Johnson's urine specimen was sent to Alere Toxicology services in Gretna, Louisiana for analysis. (Tr. Vol. I at 47 – 48; CG Ex. 9, 10).

6. Respondent Justin David Johnson's urine specimen bearing unique specimen identification number 502120007 – the same number on the federal custody and control form signed by the Respondent – was received in the Alere laboratory on July 9, 2013. (Tr. Vol. I at 66).

7. Alere Toxicology's laboratory and its professional services comport with all of the requirements set forth in 49 CFR Part 40. (Tr. Vol. I at 62).

8. Respondent Justin David Johnson's urine specimen, bearing unique specimen identification number 502120007, was twice tested (initially by a screening technique called "immunoassay" and secondarily by a technique called "gas chromatography.") (Tr. Vol. I at 67 – 69). Both tests resulted in a "positive" indication for the presence of THC in Respondent's urine. (Tr. Vol. I at 68; CG Ex. 10 at 33, 71).

9. The initial test of Respondent Justin David Johnson's specimen by Alere Toxicology's laboratory revealed Respondent's sample contained 99 nanograms per milliliter, well above the 50 nanogram per milliliter cut-off level prescribed by Department of Transportation regulations. (Tr. Vol. I at 70). Likewise, the second or confirmatory test revealed Respondent's urine contained 36 nanograms per milliliter, again above the Department of Transportation level of 15 nanograms per milliliter. (Tr. Vol. I at 70).

10. The Department of Transportation cut-off levels were established to prevent a "positive" test result from a person who

had passively inhaled or unknowingly ingested marijuana. (Tr. Vol. I at 76 – 77).

11. After Respondent Justin David Johnson’s urine specimen was tested, the positive results of the Respondent’s tests were reported to a Medical Review Officer for review and interaction with the Respondent. (Tr. Vol. I at 73).

12. Dr. Frantz Michel is the Department of Transportation Certified Medical Review Officer who received and reviewed the results of Respondent Justin David Johnson’s drug tests. Dr. Michel telephoned Respondent on July 10 2013 to review the results of the tests with the Respondent. (Tr. Vol. II at 11 – 13; CG Ex. 9, 14, 16).

13. On July 10, 2013, the Medical Review Officer Dr. Frantz Michel reviewed the test results of a specimen bearing the unique identification number 502120007, the same identification number associated with Respondent Justin David Johnson’s urine specimen and determined that Respondent’s urine specimen had tested positive for the presence of the marijuana metabolite. (Tr. Vol. II at 14 – 19; CG Ex. 14, 16).

14. On July 10, 2013, the Medical Review Officer Dr. Frantz Michel personally, telephonically reported his interpretation of a positive test result to the Respondent Justin David Johnson. Respondent denied having used marijuana. (Tr. Vol. II at 17 – 20; Vol. III at 12 – 14).

15. On July 11, 2013, Respondent Justin David Johnson telephoned the Medical Review Officer Dr. Frantz Michel and requested that his second or “B” sample be tested by another laboratory. (Tr. Vol. II at 19).

16. On July 22, 2013, Respondent Justin David Johnson’s “B” urine specimen, also bearing identification number 502120007, was chemically tested at LabCorp, Raritan, New Jersey, and confirmed for the presence of the marijuana metabolite. (CG Ex. 17, 18)

### **III. DISCUSSION**

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 USC §7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to revoke a mariner’s license, certificate or document for violations arising under

46 USC §7704. See 46 CFR §5.19(b). Under 46 USC §7704(c), a Coast Guard issued license, certificate or document shall be revoked if the holder of that license or certificate has been a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. Id.; Appeal Decisions 2634 (BARETTA) (2002); 2535 (SWEENEY) (1992) (*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

The Coast Guard chemical drug testing laws and regulations require marine employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize the use of dangerous drugs by merchant mariners. See 46 CFR Part 16.

The Coast Guard filed its Notice of Failure to Complete Settlement Agreement because Respondent failed to comply with the terms of his Settlement Agreement, specifically, paragraph 6, which insisted that he not “fail any test.” (CG Ex. 3). Accordingly, the Coast Guard seeks revocation of Respondent’s license in accordance with the terms of the Settlement Agreement.

#### **A. Jurisdiction**

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975). “Where an Administrative forum acts without jurisdiction its orders are void.” Appeal Decision 2025 (Armstrong) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

In Suspension and Revocation cases wherein use of dangerous drugs has been charged, jurisdiction is established by the respondent’s status as a holder of a Coast Guard-issued credential. See Appeal Decision (CLIFTON) (1995). Respondent is a holder of a Coast Guard-issued credential (Tr. at 147-148), accordingly, jurisdiction is appropriately situated. Moreover,

jurisdiction in this case is conferred by Respondent's acquiescence, by virtue of his voluntary participation in the Settlement Agreement, the alleged breach of which is the subject of this litigation.

## **B. Burden and Standard of Proof**

### **1. Generally**

Suspension and Revocation proceedings are remedial, not penal in nature and are "intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea." 46 CFR §5.5. The Commandant delegated to ALJs the authority to suspend or revoke a license, certificate, or merchant mariner's document for violations arising under 46 USC §§ 7703 and 7704. See 46 CFR §5.19. In the instant matter, the Coast Guard charged Respondent under 46 USC §7704(a) and 46 CFR §5.35 alleging use of, or addiction to the use of, dangerous drugs and sought revocation of Respondent's credential.

As indicated above, Respondent and the Coast Guard entered into a Settlement Agreement which was subsequently approved by an Administrative Law Judge. (CG Ex. 3, 4). The Coast Guard contends Respondent breached that Settlement Agreement by failing a drug test.

It is important to note that determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. Appeal Decision 2640 (PASSARO) (2003). Also, 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. Appeal Decision 2639 (HAUCK) (2003).

In this case, the Coast Guard proved that prior to July 8, 2013, Respondent arranged with Ms. Candace Poche, who works as an assistant to a Medical Review Officer at International

Drug Detection, to take a drug test as per the requirements of his Settlement Agreement. (Tr. Vol. I at 30).

Thereafter, on July 8, 2013 the Respondent presented himself to a specimen collection facility known as “MEA Drug Testing” in Mississippi where he provided a urine specimen for testing. (Tr. at 30). There, he met Jim Warrick, an appropriately certified specimen collection technician. (Tr. Vol. I. at 39 – 40; CG Ex. 6, 7).

After Mr. Warrick and Respondent completed the appropriate federal custody and control forms (CG. Ex 8), Respondent provided a sufficient quantity of urine for chemical testing. (Tr. Vol. I at 45 – 46). Mr. Warrick ensured that a discreet specimen identification number, matching the same one on the federal custody and control form, was affixed to the urine specimen provided by the Respondent. (Tr. Vol. I at 47). Thereafter, Mr. Warrick ensured that the urine specimen provided by the Respondent was sent to Alere Toxicology services for analysis. (CG Ex. 9, 10).

Dr. David Green is a board-certified clinical chemist and toxicologist at Alere Toxicology in Gretna, Louisiana. (Tr. Vol. I at 61). Dr. Green testified that he is responsible for all of the laboratory operations at Alere and that his laboratory comports with all of the requirements set forth in 49 CFR Part 40. (Tr. Vol. I at 62).

Dr. Greene testified that the urine specimen bearing specimen identification number 502120007 – the same number on the federal custody and control form signed by the Respondent – was received in the Alere laboratory on July 9, 2013. (Tr. Vol. I at 66). Dr. Green further testified that the Respondent’s urine specimen was twice tested (initially by a screening technique called “immunoassay” and secondarily by a technique called “gas chromatography.”) (Tr. Vol. I at 67 – 69). Both tests resulted in a “positive” indication for the presence of THC in Respondent’s urine. (Tr. Vol. I at 69; CG Ex. 10 at 33, 71).



Dr. Green testified that the initial test revealed Respondent's specimen contained 99 nanograms per milliliter, well above the 50 nanogram per milliliter cut-off level prescribed by Department of Transportation regulations. (Tr. Vol. I at 70). Likewise, Dr. Green testified the second test revealed Respondent's urine contained 36 nanograms per milliliter, again above the Department of Transportation level of 15 nanograms per milliliter. (Tr. Vol. I at 70).

Dr. Green testified that the Department of Transportation cut-off levels were established to prevent a "positive" test result from a person who had passively inhaled or unknowingly ingested marijuana. (Tr. Vol. I at 76).

Dr. Green testified that the positive results of the Respondent's tests were reported to a Medical Review Officer for review and interaction with the Respondent. (Tr. Vol. I at 73).

Dr. Frantz Michel is the Department of Transportation Certified Medical Review Officer who received and reviewed the results of Respondent's drug tests. Dr. Michel telephoned Respondent on July 10, 2013,<sup>5</sup> to review the results of the tests with the Respondent. (Tr. Vol. II at 11 – 13; CG Ex. 9, 14, 16). During that telephone conversation, Dr. Michel reported to Respondent that Respondent's urine specimen had tested positive for the presence of the marijuana metabolite. (Tr. Vol. II at 12; CG Ex. 14, 16). Despite this revelation, Respondent denied having used marijuana. (Tr. Vol. II at 18; Vol. III at 12 – 14).

Respondent correctly points to some confusion created by the "paper trail" generated by the Medical Review Officer(s) and his staff in this case. In particular, Coast Guard Exhibit 15 purports to be a chronological record of Dr. Michel's review of Respondent's test results and his telephone contact with the Respondent. The court notes, however, that CG Ex. 15 wasn't signed by Dr. Michel. Rather, the document was signed by another physician, a Dr. Dash. This

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<sup>5</sup> The court notes the peculiar dispatch with which Respondent's sample was tested and the results reported by the MRO. By the court's calculation, the entire sample-testing-reporting process took no more than three or four days. This is an unusually rapid processing of a subject's sample. Without further information regarding this particular test, the court can draw no other conclusion apart from curiosity.

confusion suggests, but does not establish, that Dr. Michel may, in fact, not have been the physician who contacted the Respondent. However, during his second day of testimony, on May 14, 2014, Dr. Michel assured the court that he had, in fact, spoken personally with the Respondent on July 10, 2013. (Tr. Vol. III at 12 – 14).

The next day, on July 11, 2013, Respondent telephoned Medical Review Officer Michel and requested that his second or “B” sample be tested by another laboratory. (Tr. Vol. II at 19). Thereafter, on July 22, 2013, Respondent’s “B” urine specimen, also bearing identification number 502120007, was chemically tested at LabCorp, Raritan, New Jersey, and confirmed for the presence of the marijuana metabolite. (CG Ex. 17, 18).

In his defense, Respondent denies having intentionally ingested marijuana in violation of the terms of his Settlement Agreement. He postulates the theory that he may have inhaled, passively, marijuana smoke at a bar. (Tr. Vol. IV at 32). In furtherance of his theory, Respondent offered his Exhibits E, F, and G which contend that the potency of marijuana has increased markedly since the 1980’s and ‘90’s. Respondent contends that the Department of Transportation cut-off levels for a “positive” marijuana test have not been raised to compensate for the increased potency of marijuana now in circulation and use. (Tr. Vol. IV at 38, et seq.). While Respondent’s argument may have some merit (begging the question whether the DOT currently maintains an appropriate “positive” cut-off level) his argument is, at present, no more than speculation or conjecture. Respondent was unable to establish a scientific foundation that his urine sample was adversely affected by his passive inhalation of smoke that was, indeed, “high-potency” marijuana.

Respondent further offers the results of a drug test he voluntarily submitted on July 12, 2013 – two days after he was notified by the MRO of his failed test, and four days after he submitted the sample which resulted in the positive findings. (Tr. Vol. IV at 31; Resp. Ex. A). Respondent contends that if the urine sample he provided on July 8, 2013 tested positive for

marijuana, the results of his July 12, 2013, test should be the same. He argues that his July 12, 2013, negative test results prove that his July 8, 2013, test results were in error. (Tr. Vol. IV at 31 – 32). Simply said, the July 12, 201, negative test results do not prove that his July 8, 2013, test results were in error. The court notes that marijuana metabolite can, and does, pass from the human body fairly rapidly. Hence, a human can have a quantity of the metabolite in his/her body sufficient to fail a drug test on one day—but an insufficient amount of the metabolite 24 hours later. Moreover, Respondent’s July 12, 2013, test results only report a “negative” finding and do not make any reference to any level of marijuana metabolite in Respondent’s body. Such a “negative” test result might have revealed the presence of the marijuana metabolite; albeit one of an insufficient level for the purposes of the law. The court will not speculate what the negative test actually revealed...

Even though the results of the July 12, 2013, test are intriguing, Respondent could lay no appropriate evidentiary foundation for proving the relevance of such test results. (Had he been able to do so, the outcome of this litigation might have been different.) Hence, the court cannot give probative weight to the results of the July 12, 2013 test.

Respondent also provided a copy of an Alcoholics Anonymous “sign in” form reflecting his attendance at twenty-four such meetings from November 2012 through October 2013. (Resp. Ex. B). While the court commends Respondent on his efforts to make positive changes in his life, such participation does not constitute a defense to his use of marijuana in violation of the terms of his Settlement Agreement.

#### **IV. CONCLUSION**

After careful consideration of the testimony and documentary evidence offered at the hearing, and of the entire record, the court finds that the Coast Guard met its burden to establish that the Respondent entered into a Settlement Agreement following an original Complaint and that the Settlement Agreement provided Respondent could not fail a drug test. The Coast Guard

further met its burden by establishing that: (1) the Respondent was tested for a dangerous drug, and that (2) the Respondent tested positive for a dangerous drug, and that (3) the test was conducted in accordance with 46 CFR Part 16. Therefore, the Coast Guard **PROVED** that the Respondent breached the terms of his Settlement Agreement.

Thus, the allegations contained in the Coast Guard's Complaint are **PROVED**.

**WHEREFORE,**

#### **VI. ORDER**

**IT IS HEREBY ORDERED**, that Respondent Justin David Johnson breached the terms of his Settlement Agreement. Thus, his Coast Guard-issued Merchant Mariner's Credential is hereby **REVOKED** per the express terms of that Settlement Agreement.

**IT IS SO ORDERED.**



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**Hon. Bruce Tucker Smith**  
**US Coast Guard Administrative Law Judge**

Date:

## **VII. ATTACHMENT A: LIST OF WITNESSES & EXHIBITS**

### **Coast Guard Exhibits**

1. 49 CFR Part 40
2. Federal Register, July 2, 2013
3. Settlement Agreement
4. Consent Order
5. Return-to-duty documents
6. Collector's certification
7. Collection facility certification
8. Custody and Control Form – Collector's copy
9. Custody and Control Form – Testing facility copy
10. Alere Laboratory report
11. Alere drug test result
12. MRO training certificates

### **Respondent Exhibits**

- A. Custody and Control forms
- B. AA meeting sign-in sheet
- C. "Positive Result" MRO form
- D. LabCorp form
- E. "High potency" marijuana news article from Internet
- F. "Medical Marijuana" news article from Internet
- G. "Why Cannabis Is Now So Different from 1970's Cannabis?"

### **ALJ Exhibits**

None

### **Coast Guard's Witnesses**

1. Candace Poche
2. James Warrick
3. Dr. David Green
4. Dr. Frantz Michel

### **Respondent's Witnesses**

1. Justin Johnson