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

UNITED STATES COAST GUARD
Complainant

vs.

MICHAEL ANDRE MCPHERSON
Respondent

Docket Number 2013-0434
Enforcement Activity No. 4756137

NOTICE OF DECISION AND ORDER
Issued: January 7, 2015

By Administrative Law Judge: Honorable George J. Jordan

DECISION AND ORDER

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I. PRELIMINARY STATEMENT

This case came before me after the United States Coast Guard filed a Complaint seeking to revoke Respondent Michael Andre McPherson's Merchant Mariner's Credential (MMC) for drug use. Respondent filed a timely Answer that did not address the jurisdictional or factual allegations but stated as an affirmative defense the expiration of the time limit to serve a complaint under 46 C.F.R. § 5.55. I held a hearing in this matter and, after carefully considering the testimony and evidence, find the allegations proved and order Respondent's credential revoked.

II. PROCEDURAL HISTORY

The Coast Guard initiated this proceeding on November 30, 2013 by filing a Complaint seeking revocation of Respondent's MMC for use of, or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges that Respondent took a drug test on January 4, 2013 and his sample tested positive for cocaine metabolites. Respondent filed an Answer on December 1, 2013, asserting an affirmative defense and requesting a hearing but not specifically admitting or denying the allegations in the Complaint.

I held a pre-hearing conference on February 6, 2014, of which both parties had notice. Lieutenant Commander Anthony S. Hillenbrand represented the Coast Guard. Respondent did not appear. The Coast Guard did not file a motion for default or motion for summary decision in this matter and stated that they believed the novel issues in this case warranted a hearing.

The hearing in this matter took place on April 22 and 23, 2014 in Portland, Oregon. Lieutenant Commander Anthony S. Hillenbrand and Lieutenant Sonha Gomez represented the Coast Guard. Respondent did not appear. However, Respondent sent an email the day prior to the

hearing requesting the hearing be rescheduled.[1] I treated the email as a request for a continuance and granted it in part and denied it in part. I permitted the Coast Guard to put on its case, as all its witnesses were available to testify on schedule, but I also scheduled a post hearing conference to discuss how to provide Respondent with an opportunity to cross-examine those witnesses and present his defense.

I held the post-hearing telephone conference on May 12, 2014. Lieutenant Commander Anthony S. Hillenbrand and Lieutenant Sonha Gomez appeared for the Coast Guard. Although Respondent had notice of the conference, he did not appear.

At the conference, I closed the record in this matter pursuant to 33 C.F.R. § 20.709. I also set the date for filing post-hearing briefs and any proposed findings of fact and conclusions of law under 33 C.F.R. § 20.710. At the hearing, I had set the date for June 13, 2014; however, due to a delay in getting the transcript, I extended the deadline. Subsequently, the Coast Guard made two motions for further extensions of time to file. Respondent did not reply to these motions and they were granted. The Coast Guard filed its proposed findings of fact, conclusions of law, and argument on July 21, 2014.[2] Respondent did not file any post-hearing documents.

III. FINDINGS OF FACT

I have based the following Findings of Fact and Conclusions of Law on the observations of the appearance and demeanor of the witnesses who testified at the hearing and upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

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[1] Due to a technical issue, my staff did not receive the email until the morning of the hearing. However, I was already en route to the hearing location before Respondent sent the email.

[2] The Coast Guard's Proposed Findings of Fact are accepted and incorporated into this Decision. Proposed Conclusion of Law I is accepted to the extent that the Coast Guard has proved by a preponderance of the evidence that Respondent used cocaine; however, the assertion that "[b]ecause the Respondent has neither questioned the test's accuracy nor provided a legitimate reason (or any reason at all) for the positive test, the positive results are a reliable indicator of the Respondent's drug use" is not accepted. The weight of all the evidence, rather than

Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration. My findings of fact are as follows:

1. Respondent holds a Merchant Mariner's Credential. (Tr. Vol. 1 pp. 14-15; EX CG-1).
2. The Coast Guard issued his current credential on January 11, 2010 and it expires on January 11, 2015. (EX CG-1).
3. Crowley Marine employed Respondent as a mariner (deckhand/cook). (Tr. Vol. 1 pp. 22-23).
4. Crowley Marine had a contract with Alyseka Pipelines, which operates a facility in Valdez. (Tr. Vol. 1 pp. 16-17; EX CG-4).
5. Respondent requested a position on that contract. (Tr. Vol. 1 pp. 22-23).
6. In addition to any Federal Drug Testing program, Alyseka requires all employees and contractors who have access to its facilities to take a drug test using hair samples. (Tr. Vol. 1 pp. 22-23).
7. Crowley Marine also had policies requiring all Crowley personnel working in Valdez to adhere to the Alyseka hair test requirement for access to the facility. (Tr. Vol. 1 pp. 28-31; EX CG-3).
8. On January 4, 2013, Respondent voluntarily provided a hair sample at Concentra Laboratories for Beacon Workplace in Portland, Oregon. (Tr. Vol. 2 pp. 11-13; EX CG-11).
9. Both Alyseka and Contentra Laboratories have procedures for collection of hair. (Tr. Vol. 2 pp. 7-11, 23-33; EX CG-10, EX CG-19, and CG-EX-22).

Respondent's failure to put on a defense, is the basis for the Decision in this case. Proposed Conclusion of Law II, regarding the scientific validity of the evidence presented, is accepted and incorporated into this Decision.

10. Both procedures allow for collection of hair from alternate locations including armpits, chest, or facial hair if the donor has insufficient head hair. (Tr. Vol. 2 pp. 7-11, 23-33).
11. Kieko Moseley, a medical assistant at Beacon Workplace during the relevant time period, collected the hair sample. (Tr. Vol. 2 pp. 11-13).
12. At the relevant time, she was a certified collector. (Tr. Vol. 2 p. 22, CG-Ex-12).
13. Ms. Moseley documented the collection using a non-Federal Drug Testing Custody and Control Form accompanying the sample as a "pre-employment" test. (Tr. Vol. 2 pp. 11-13; EX CG-11).
14. Respondent did not have sufficient head hair, so Ms. Moseley took the sample from Respondent's armpit. (EX CG-11).
15. Respondent's sample was collected, documented, and labeled using non-DOT testing procedures. (Tr. Vol. 2 pp. 11-13).
16. Respondent signed the Custody and Control Form certifying that he provided the sample and that the collector sealed the hair sample pouch with a tamper-evident seal in his presence. (EX CG-11).
17. Ms. Moseley sent the sample to the testing laboratory, Omega Laboratories, in Mogadore, Ohio. (Tr. Vol. 2 pp. 35; EX CG-11).
18. Omega Laboratories received and processed the sample on 7, 2013. (EX CG-13).
19. The laboratory copy of the Custody and Control Form indicates that the seal was intact on receipt. (EX CG-13).
20. The initial screening test for hair samples is the Enzyme-Linked Immunosorbent Assay technique (ELISA) test. (Tr. Vol. 2 pp. 36, 109).
21. ELISA is approved by the Federal Drug Administration. (Tr. Vol. 2 pp. 85-86).

22. The cutoff for cocaine under ELISA is 500 picograms per milligram. (Tr. Vol. 2 pp. 50-55; EX CG-13).

23. When Respondent's sample was screened using ELISA, the result was presumptively positive with a concentration of 2668 picograms per milligram. (Tr. Vol. 2 pp. 50-55; EX CG-13).

24. Gas chromatography mass spectrometry (GC/MS) is a confirmatory technique that separates the analyte from other substances and specifically tests for the analyte of interest. (Tr. Vol. 2 pp. 56-58; EX CG-13).

25. After the presumptive positive result from the ELISA test, Respondent's sample was analyzed by GC/MS. (Tr. Vol. 2 pp. 56-58 EX CG-13).

26. The GC/MS revealed the presence of benzoylecgonine, a primary cocaine metabolite, in a concentration of 124 picograms per milligram. (Tr. Vol. 2 pp. 56-58; EX CG-13).

27. The GC/MS also revealed the presence of cocaethylene, a metabolite generated when cocaine is consumed at the same time as alcohol, in a concentration of 324 picograms per milligram. (Tr. Vol. 2 pp. 56-58; EX CG-13).

28. Both concentrations constituted positive tests. (Tr. Vol. 2 pp. 56-58).

29. Dr. David Engelhart, who has been the Laboratory Director of Omega Labs since 2005, testified as to the results of the analysis and procedures at the laboratory. (Tr. Vol. 2 pp. 34-77).

30. Dr. Englehart has a Ph.D. and master's degree in chemistry from Case Western University and bachelor's degree in chemistry from Hiram College. (Tr. Vol. 2 p. 71).

31. Dr. Englehart is certified by the Forensic Toxicologist Certification Board as a diplomat in forensic drug toxicology and is also certified as a laboratory director by the New York State Department of Health. (Tr. Vol. 2 p. 71; EX CG-14).

32. The record does not indicate any abnormalities in the drug testing procedures or security protocols from the time the specimen reached Omega to the time the report was generated. (EX CG-13).

33. Leo Morresey, M.D. was the MRO who reported the results of Respondent's drug test. (Tr. Vol. 2 pp. 117-120; EX CG-15; EX CG-21).

34. Dr. Morresey is a licensed medical doctor, and has received specialized training and passed a certification examination in order to become an MRO. (Tr. Vol. 2 pp. 120-122; EX CG-16).

35. Dr. Morresey marked the result of the test as positive for cocaine on the non-DOT custody and control form accompanying Respondent's results. (Tr. Vol. 2 pp. 117-120; EX CG-15; EX CG-21).

36. When Dr. Morresey notified Respondent on or about January 10, 2013 that he had tested positive for cocaine metabolites, Respondent did not offer any medical explanation. (Tr. Vol. 2 p. 120).

37. Dr. Thomas Cairns is the senior scientific advisor and deputy lab director for Psychemedics Corporation, which is located in Culver City, California. (Tr. Vol. 2 pp. 80-113).

38. Dr Cairns holds a Bachelor of Science, a Ph.D., and a higher degree of Doctor of Science in toxicology, all of which he received from the University of Glasgow. (EX CG-20).

39. Dr. Cairns testified about the process for hair testing to determine drug use. (Tr. Vol. 2 pp. 80-113).

40. Dr Cairns also testified about the FDA clearance process 510(k) and the various hairs testing process that has been approved. (Tr. Vol. 2 pp. 80-113).

41. Dr. Cairns stated a person would only reach the cutoff for a positive test by ingesting cocaine several times per month. (Tr. Vol. 2 p. 88).

42. Dr. Cairns also stated that to reach a metabolite level of 2668 picograms per milligram, a person would have to use cocaine more than twice and less than twelve times per month. (Tr. Vol. 2 pp. 88-90).

IV. DISCUSSION

A. Principles of Law

1. General Authority

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. *See* 46 C.F.R. § 5.19(b). Suspension and revocation proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-557. 46 U.S.C. § 7702(a).

The Coast Guard's Rules of Practice and Procedure are located at 33 C.F.R. Part 20 and the substantive rules concerning suspension and revocation of mariner credentials are located at 46 C.F.R. Part 5. Decisions made by ALJs may come before the Commandant on appeal or review. "The Commandant's determinations are officially noticed, and the principles and

policies enunciated therein are binding upon all ALJs unless they are modified or rejected by competent authority." 46 C.F.R. § 5.65.

2. Use of Dangerous Drugs, Generally

Title 46 U.S.C. § 7704(c) mandates revocation of a Coast Guard-issued credential where the Coast Guard proves by reliable, credible, and probative evidence that the holder of an MMC has used dangerous drugs. A respondent who is shown to have used drugs may avoid revocation by providing reliable, credible, and probative evidence of cure. *Id.*

The predecessor to § 7704 was 46 U.S.C. § 239a, which was passed by Congress in 1954 with the clear intent of removing drug users and addicts from the merchant marine.[3] In 1983, Congress engaged in a project to codify many maritime and shipping laws, during which § 239a was replaced by 46 U.S.C. § 7704(c) and the language simultaneously expanded in scope to incorporate violations involving additional non-narcotic "controlled substances." As a result, 46 U.S.C. § 7704(c) now mandates revocation of merchant mariner credentials in cases involving any controlled substance.

Congress enacted this law with the express purpose of removing individuals who possess and use dangerous drugs from service in the United States merchant marine. *House Report No. 338*, 98th Cong., 1st Sess. 177 (1983); *Appeal Decision 2634 (BARRETTA)* (2002).[4] The statute mandates revocation when there is evidence of use or addiction to any controlled substance, except where cure is proven. It does not specifically require drug testing. Evidence of use has

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

[4] Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 546. This section was part of a major recodification of U.S. Shipping laws in Title 46 of the U.S.Code. However it also expanded the scope of this section to incorporate violations involving "controlled substances" which are not narcotic. This includes PCP and LSD. This section also provided that anyone

come from different sources including admissions by a respondent[5], observation[6], and medical treatment for use or addiction[7] in addition to drug testing.

3. Standard of Proof

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order unless otherwise provided by statute. The fact-finder must consider the record as supported by "reliable, probative, and substantial evidence" before reaching a decision. 5 U.S.C. § 556(d). In administrative proceedings, the proponent must prove its case by a preponderance of the evidence. This means the fact-finder considers the evidence and argument in the record and determines it is more likely than not a fact is true. *Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Greenwich Collieries v. Dir., Office of Workers' Comp. Programs*, 990 F.2d 730, 736 (3d Cir. 1993).

In a suspension or revocation case, the Coast Guard is the proponent and therefore bears the burden of proof. 33 C.F.R. § 20.702(a). The Coast Guard must submit evidence showing it is more likely than not that Respondent is a user of dangerous drugs. Respondent may rebut the allegations by providing contrary evidence showing they are more likely than not to be untrue. He may also present affirmative defenses, in which case the burden shifts to the respondent to prove his defense by a preponderance of the evidence.

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who has been a user of or addicted to a dangerous drug since July 14, 1954, may be subjected to revocation procedures unless the individual provides satisfactory proof of being cured.

[5] *Appeal Decision 2570 (HARRIS)* (1995); *Appeal Decision 2538 (SMALLWOOD)* (1992) and *Appeal Decision 1489 (FERGUSON)* (1965)

[6] *Appeal Decision 2451 (PAULSEN)* (1987); *Appeal Decision 2424(CAVANUAGH)* (1986) and *Appeal Decision 2109 (SMITH)* (1977).

[7] *Appeal Decision 2026 (CLARK)* (1975) (admission of drug use to physician); *Appeal Decision 1833 (ROSARIO)* (1971) (treatment for symptoms of narcotic withdrawal) and *Appeal Decision 916 (ROBINSON)* (1956) (acute poisoning resulting from heroin use).

4. Evidentiary Standard

The APA governs the admissibility of evidence in proceedings before executive agencies and permits the finder of fact to receive any documentary or oral evidence. *See* 5 U.S.C. § 556(d); *Gallagher v. National Transp. Safety Bd.*, 953 F.2d 1214, 1214 (10th Cir. 1992); *Sorenson v. National Transp. Safety Bd.*, 684 F.2d 683, 683 (10th Cir. 1982). "Federal agencies are not bound by the strict rules of evidence that govern jury trials. *Gallagher* at 1218, citing *Sorenson* at 688. While relevant evidence admissible under the Federal Rules of Evidence is generally also admissible in administrative proceedings, the broader standard in an administrative proceeding allows additional evidence to be included in the record. For example, only irrelevant, immaterial, or unduly repetitious evidence need be excluded, and "evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence." *Gallagher* at 1218; *see also Appeal Decision 2664 (SHEA)* (2007).

The evidence in this matter largely consists of scientific evidence and expert testimony. In *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), the Supreme Court held that Rule 702 of the Federal Rules of Evidence imposes upon the trial court a gatekeeper obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The court later extended this requirement to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

Strictly speaking, the rule of *Daubert* does not apply to this proceeding, since *Daubert* and its progeny interpret the Federal Rules of Evidence, which do not apply to administrative hearings. Nevertheless, "the spirit of *Daubert*" does apply to administrative proceedings because "'[j]unk science' has no more place in administrative proceedings than in judicial ones." *Lobsters, Inc. v. Evans*, 346 F. Supp.2d 340, 344 (D. Mass. 2004) (quoting *Niam v. Ashcroft,* 354 F.3d 652, 660 (7th Cir.2004)). *See also Appeal Decision 2670 (WAIN)* (2007). Thus, one major

inquiry I must make in this matter is whether the scientific testimony or evidence introduced by the Coast Guard is not only relevant, but reliable.

B. Issues Presented

The primary issue before me is whether the Coast Guard has proved by a preponderance of the evidence that Respondent was a user of dangerous drugs. The Coast Guard is relying on a drug test required for access to an oil terminal. The test in question is not a Federally-mandated drug test and was conducted using hair instead of urine. In order to reach an ultimate conclusion on this issue, I must make several interim determinations. These are:

1. May the Coast Guard rely on a hair test as evidence of drug use?
2. If so, is the test the Coast Guard relies on scientifically valid?
3. Does the evidence establish that Respondent has used a dangerous drug, specifically cocaine?

If I find the allegation proved, I must then decide on an appropriate sanction under the circumstances. 46 C.F.R. §§ 5.567-5.569.

C. Analysis

1. Jurisdiction

The Coast Guard introduced evidence that Respondent holds an MMC. (EX CG-1). The Commandant has held it is Respondent's "status as the holder of a merchant mariner's document [or license or certificate of registry] that establishes jurisdiction for purposes of suspension and revocation when use of a dangerous drug is charged." *Appeal Decision 2668 (MERRILL)* (2007). The record clearly establishes that Respondent was the holder of an MMC at the time he submitted the sample in question. Accordingly, I find jurisdiction is established.

2. The Test in Question Was Not a Federal Drug Test.

The Coast Guard has regulations implementing the Federal Transportation Workplace Drug Testing Programs, which began in 1988. These regulations are found at 46 C.F.R. Part 16. The testing mandated in the Coast Guard regulations follows the procedures set forth by the Department of Transportation (DOT) in 49 C.F.R. Part 40. Today, most Coast Guard cases brought under 46 U.S.C. § 7704(c) relate to the drug tests mandated in 46 C.F.R. Part 16 and conducted in accordance with 49 C.F.R. Part 40.

The Commandant recognizes that requiring a person to undergo drug testing may pose constitutional issues. In a recent appeal decision, the Commandant considered the preamble to the final rule establishing 46 C.F.R. Part 16 and held that the drafters "were cognizant of the constitutional issues associated with the drug testing program and that the identification of specific types of allowed tests was necessary to safeguard the constitutional rights of affected mariners." *Appeal Decision 2704 (FRANKS)*, 2014 WL 4062506 at *4 (2014).

In order to establish a prima facie case of drug use based on a Part 16 urinalysis test, "the Coast Guard **must** prove three elements: (1) that Respondent was tested for a dangerous drug, (2) that Respondent tested positive for a dangerous drug, and (3) **that the test was conducted in accordance with 46 C.F.R. Part 16**. *Appeal Decisions 2631 (SENGEL)*, *2621 (PERIMAN)*, *2592 (MASON)*, and *2584 (SHAKESPEARE)*." *Appeal Decision 2697 (GREEN)* (2011) (emphasis added). *Green* balanced mariners' Fourth Amendment privacy interests with the need to maintain a safe, drug-free maritime environment, holding that mandated tests are "limited, specific types of drug tests – pre employment, periodic, random, serious marine incident and reasonable cause drug tests." *Id.* When private employers conduct drug testing to comply with Federal regulatory requirements, this constitutes Government action and the risk exists that "that

mariners could be exposed to potentially unreasonable government action, through employers' testing practices apparently pursuant to the Coast Guard regulatory regime." *Id.*

The regulations define a chemical test as "a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use." 46 C.F.R. § 16.105. Title 46 C.F.R. Subpart B discusses required chemical testing, which "must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR Part 40." 46 C.F.R. §16.201(a). Currently, the DOT drug testing regime in 49 C.F.R Part 40 allows only urinalysis tests.

The Substance Abuse and Mental Health Services Administration (SAMHSA), the agency responsible for federal drug testing programs, has considered whether to expand those programs to include use of alternative testing methods, including hair, fluid, and sweat patch specimens. However, SAMHSA decided that "significant scientific, legal, and public policy concerns about the use of alternative specimens … in Federal agency workplace drug testing programs" remains. SAMHSA Revision to Mandatory Guidelines, 73 Fed. Reg. 71858 (Nov. 25, 2008). While the agency believes that the addition of alternative specimens to the Federal Workplace Drug Testing Program would complement urine drug testing, it has determined further study is required. *Id.*

It is clear from the evidence in the record, including the custody and control form and the policies of both Crowley Marine and Alyseka, that the test in question was not required under any federal laws or regulations, but was conducted entirely in accordance with a private employer's internal policies. Crowley Marine, a contractor of Alyeska Pipelines, employed Respondent. Prior to allowing any person—whether directly employed or a contractor—access to its facility, Alyeska Pipelines required a hair test. (Tr. Vol. 1 pp. 22, 66). This test is separate

from, and in addition to, any testing the contracted company requires of its employees. (Tr. Vol. 1 p. 69). All new hires not currently employed at the Alyeska facility are subject to pre-employment drug testing, regardless of whether they are also covered by a DOT drug testing regimen. (Tr. Vol. 1 pp. 72-73).

Crowley Marine does not utilize hair testing except as required by its contracts, such as the one it holds with Alyeska Pipelines. (Tr. Vol. 1 p. 23). Crowley's drug testing procedures, including the hair test requirement for positions on the Alyeska contract only, is contained in a marine personnel manual. (Tr. Vol. 1 pp. 28-32). Crowley makes all mariners aware of this policy when a job offer is made and before the employee has committed to the position. (Tr. Vol. 1 pp. 31-32). Respondent received and signed for copies of the drug and alcohol policies upon hire at Crowley and subsequently upon transfer among various contracts. (Tr. Vol. 1 pp. 50-53).

The evidence further establishes that Respondent affirmatively sought a position on the Alyeska contract. (Tr. Vol. 1 pp. 42-43). Had he chosen to work at any of the other sites where Crowley supplies services, he would not have been required to take a hair test. (Tr. Vol. 1 pp. 25, 31). As a current employee of Crowley, Respondent was subject to the DOT random drug testing program required of all marine employers and did not need to take a federally-mandated pre-employment urine test before beginning a new position on another Crowley contract. Although the position Respondent held prior to the hair test was ending, he could have stayed in the West Coast fleet at Crowley, which was considered continuing service; Crowley offered him a position on the Alyeska contract but did not require him to accept it. (Tr. Vol. 1 pp. 25-26).

Thus, it is clear "the testing was not conducted by or for the State; and the testing was not required by the State. The testing … in this context was not a search within the meaning of the Fourth Amendment." *Whye v. Concentra Health Servs., Inc.*, CIV.A. ELH-12-3432, 2013 WL

5375167 (D. Md. Sept. 24, 2013). "The Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative." *Whye* at *21, citing *Skinner v. Railway Labor Exec. Assn.,* 489 U.S. 602, 614 (1989). The evidence shows Respondent did not have to take a position on the Alyeska contract to continue his employment with Crowley, and knew prior to accepting the offer that a hair test for drugs was required. Thus, I find the hair test does not pose constitutional issues which would affect the Coast Guard's ability to seek revocation of Respondent's MMC.

3. The Presumption of Use in 46 C.F.R. Part 16 Does Not Apply

Under Coast Guard drug testing rules, if an individual fails a chemical test for dangerous drugs under 46 C.F.R. Part 16, "the individual will be presumed to be a user of dangerous drugs." 46 C.F.R. § 16.201(b). Since this is not a test under 46 C.F.R. Part 16, the regulatory presumption that arises from a positive test does not arise. I must instead make an independent determination of whether the evidence submitted is sufficient to establish that Respondent is a user of dangerous drugs.

4. Evidence of Drug Use based on Chemical Testing of Hair.

The Complaint alleges that Respondent took a drug test and the specimen subsequently tested positive for cocaine metabolites, as determined by the Medical Review Officer. The record establishes that Respondent submitted a hair sample for drug testing purposes at Concentra Laboratories for Beacon Worksafe on January 4, 2013. The sample was collected by Kieko Moseley, a trained and certified collector. It was then transmitted to Omega Laboratoies. At Omega, the sample underwent an ELISA test and a GC/MS drug testing analysis. The test results

were transmitted to an MRO, Dr. Leo Morrisey, who reported the test as being positive for cocaine. Accordingly, the evidence of drug use by Respondent is based upon hair test results.

As previously noted, this is not a chemical test under 46 C.F.R. Part 16 and the presumption that arises from a positive DOT is not applicaple to this matter. Rather the question I must address is whether the results of a hair test provide reliable, credible, and probative evidence showing that it was more likely than not that Respondent has used dangerous drugs.

a. Cocaine is a Dangerous Drug.

The Complaint alleges Use of a Dangerous Drug. Title 46 U.S.C. § 7704(c) states that if a holder of a Coast-Guard issued document has been shown to be 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."

A dangerous drug is defined in 46 U.S.C. § 2101(8a) as "a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))."[8] The Controlled Substances Act (CSA) states that the "term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." Title 21 U.S.C. § 812 lists cocaine as a Schedule II drug. Cocaine is therefore a "dangerous drug" for purposes of § 7704(c).

[8] This definition was moved from its original location in 46 U.S.C. § 7704(a).

b. Hair Testing is a Reliable, Scientifically Valid Method of Testing for Cocaine Use

Although hair testing is not permitted for purposes of a federal drug test, the Coast Guard asks me to find it is nevertheless reliable, probative, and may be used as general evidence of cocaine use.

Two Coast Guard witnesses testified regarding collection procedures for hair testing. Keiko Mosley, the collector who secured Respondent's hair sample, testified about general testing procedures. (Tr. Vol. 2 pp. 7-11). She stated leg, chest, and armpit hair can be used if a donor does not have enough head hair, and it is up to the collector to decide which site will yield the best sample. (Tr. Vol. 2 pp. 9-11). She verified the custody and control form for the hair sample underlying this case, but did not remember the actual collection. (Tr. Vol. 2 p. 11).

Another collector, Elwood Ramirez, corroborated Ms. Mosely's description of collection procedures. (Tr. Vol. 2 pp. 23-28, 31-33). He did not see any errors on the custody and control form except that the collection site address pre-printed on the form was not the actual location of Concentra's facility. (Tr. Vol. 2 p. 30). For purposes of a DOT test, an address discrepancy is not a fatal flaw; however, for non-DOT tests, the MRO decides how serious a flaw it is. (*Id.*)

The Coast Guard presented two witnesses who testified about the science underlying hair testing: Dr. David Englehart, director of Omega Labs, and Dr. Thomas Cairns, Senior Scientific Advisor and Deputy Lab Director of Psychemedics Corporation. Dr. Englehart also testified about the specific procedures his laboratory used in analyzing Respondent's sample.

When a drug enters the body, it is transported in the bloodstream to the liver and broken down into metabolites. (Tr. Vol. 2 p. 81). These metabolites will not occur in the body unless the individual has ingested the drug, here cocaine. (Tr. Vol. 2 p. 91). Some of these metabolites are

processed through the kidneys and bladder and expelled in urine. (Tr. Vol. 2 p. 82). Cocaine metabolites can be detected in urine for up to 72 hours after use. (Tr. Vol. 2 pp. 39, 83).

The drug and some metabolites are also circulated in the bloodstream to the base of hair follicles on the head and other parts of the body. The follicles draw on nutrients from the bloodstream, thus trapping the drug and metabolites as the hair grows. (*Id.*) Head hair grows at approximately a half-inch per month, so it allows scientists to reliably look back at specific time periods; for instance, an inch and a half of hair will show drug use for approximately the past 90 days. (Tr. Vol. 2 pp. 39, 82-83). Head hair is thus the standard collection site for drug testing. (Tr. Vol. 2 p. 83). However, it takes five to seven days for a growing hair to emerge from a follicle, so the test will not detect approximately the most recent week of use. (Tr. Vol. 2 p. 103).

If an individual does not have enough head hair, other body hair can be used but the time frames are less reliable. The overall validity of the test is not affected, though. (Tr. Vol. 2 p. 76). Armpit hair, which was used here, grows more slowly than head hair and, once it reaches a length of about an inch and a half, goes dormant and detaches from the bloodstream. (Tr. Vol. 2 pp. 40, 84). After about a month, it falls out and the follicle starts to produce a new strand of hair. (*Id.*) A sample of armpit hair will therefore contain a mix of newly sprouted hair, hair in the process of growing, and dormant hair. This represents approximately a six- to seven-month time frame. (*Id.*)

In addition to the expanded time frame for which a hair test can reveal drug use, it is also more difficult to adulterate or substitute than a urine sample. (Tr. Vol. 2 p. 39). Although products exist which claims to defeat hair testing, studies have shown that none is effective. (Tr. Vol. 2 pp. 40, 102). Certain chemical processes, such as bleaching, perming, and relaxing the

hair, can have a minimal effect on results such that a level just above the cutoff could be reduced to just below the cutoff. (Tr. Vol. 2 p. 102).

Hair testing can also allow scientists to interpret the drug usage habits of an individual, called "dose response." (Tr. Vol. 2 p. 85). While the concentration of a drug in urine can fluctuate, hair records every instance of usage and can show whether the use is recreational, regular, or chronic and addictive. (*Id.*) This is done by comparing a sample's concentration to the cutoff level. "A concentration of the drug that clearly differentiates a user, meaning someone who used multiple times versus someone who is only once . . . or twice exposed with a conservative margin between the cutoff and the . . .once or twice exposure rate." (*Id.*) Hair testing generally does not show a single use of a drug, since the metabolites would not reach the cutoff levels for a positive test. (Tr. Vol. 2 p. 41).

The cutoff for cocaine is 500 picograms per milligram, which has been approved by the FDA and published in the Federal Register. (Tr. Vol. 2 pp. 85-86). The cutoff level was established by a large clinical study of individuals at rehabilitation clinics who were still using cocaine. (Tr. Vol. 2 pp. 87-88). To reach the cutoff, an individual must use cocaine on multiple occasions in a month, and this is true whether head hair or body hair is analyzed. (Tr. Vol. 2 pp. 88-89). All three labs cleared to conduct hair testing – Psychemedics, Omega, and Quest – use this cutoff level, though the way they report the results varies. (Tr. Vol. 2 pp. 87, 89).

When a hair sample is analyzed for drugs, it is initially screened using ELISA. This test allows the laboratory to quickly screen samples to determine whether they are negative or potentially positive for drugs. (Tr. Vol. 2 pp. 36, 109). Only a portion of the hair sample is used and the remainder reserved in case further testing is needed. (Tr. Vol. 2 p. 94). The test uses a "lock and key process" where the combination of the chemicals in the test (the "lock") and the

cocaine (the "key") causes a reaction called immunoassay. (Tr. Vol. 2 p. 93). This means there is a high probability the drug is present and the result is called a presumptive positive. (*Id.*) The FDA grants clearance to laboratories for the ELISA portion of a drug test. (Tr. Vol. 2 p. 105).

If a hair sample tests positive under ELISA, the laboratory conducts a confirmatory test using a new portion of hair from the same sample. For this test, the hair must be decontaminated before it is tested so no external factors affect the result. (Tr. Vol. 2 pp. 93, 96). The technique utilized is mass spectrometry, which allows the laboratory to specifically identify drugs and/or metabolites and to quantify the results. (Tr. Vol. 2 p. 36). Mass spectrometry is an unambiguous way of identifying the presence of a drug, since every type of molecule has a different molecular fingerprint. The cocaine molecule and its metabolites, as well as molecules of other drugs such as opiates, PCP, amphetamines, and marijuana, can all be positively identified and quantified. (Tr. Vol. 2 pp. 93, 95).

Omega Labs uses gas chromatograph mass spectrometry (GC/MS), which separates molecules by chemical class or molecular weight.[9] Mass spectrometry is the scientific "gold standard" of testing. (Tr. Vol. 2 p. 37). Although SAMHSA accredits the use of GC/MS for urine testing, it is still considering its use for hair testing. (Tr. Vol. 2 pp. 111-12). However, other accreditation programs through the College of American Pathologists and International Standards Organization (ISO) 17025 specifically address hair testing. (*Id.*) Various states also accredit laboratories after conducting site visits and testing. (*Id.* at 106, 111). Many entities use hair testing, including large and small companies, law enforcement agencies, the Department of Justice for parolees, and the armed forces in certain circumstances. (Tr. Vol. 2 pp. 99-100).

[9] Another type of mass spectrometry, which uses liquid rather than gas, also exists. Psychemedics uses the liquid version, but the results of both types are considered equally valid. (Tr. Vol. 2 pp. 105, 106).

In *United States v. Bush,* 44 M.J. 646 (A.F.Ct.Crim.App.1996), *aff'd,* 47 M.J. 305 (C.A.A.F.1997), *cert. denied,* 522 U.S. 1114 (1998), the U.S. Air Force Court of Criminal Appeals held in a case of first impression that GC/MS hair analysis was properly admitted in a court-martial to prove the accused's unlawful use of cocaine. Applying *Daubert* and Military Rule of Evidence 702, the court found that mass spectrometer analysis of hair samples was accepted as scientifically reliable in the relevant community of forensic chemistry, had been subjected to peer review, and was the subject of a growing body of professional publications and studies. *Id.* at 651-52.[4] *See also Woods v. Wills*, No. 1:03-CV-105 CAS, 2005 WL 5990326, at *6 (E.D. Mo. Oct. 27, 2005) (discussing the *Bush* court's analysis of GC/MS hair testing, as well as other courts' treatment of radioimmunoassay hair analysis, and finding the testimony of an expert is necessary to establish validity and reliability).

In *U.S. v. Medina*, 749 F. Supp 59, 61 (E.D.N.Y. 1990), the court found that extensive scientific writings on radioimmunoassay hair analysis establish both its reliability and its acceptance in the field of forensic toxicology when used to determine cocaine use. The *Medina* court also held that in addition to "satisfying itself on general theoretical soundness, before admitting relatively novel scientific evidence the court should determine that (1) the sample was properly obtained—here, for example, by obtaining hair from appropriate portions of the body, (2) the particular laboratory technique used was sound and (3) the laboratory was careful and accurate in its use of that technique." (*Id.* at 61-62).

I have weighed the testimony of the collectors regarding collection techniques and the scientific testimony of the expert witnesses and find it credible. The initial stage of hair testing, ELISA, has been cleared by the FDA, and multiple accrediting institutions consider GC/MS to be a reliable way of determining the presence of drugs from hair samples. Omega Labs, the

laboratory that conducted the testing, is accredited and uses accepted technology. I therefore find the use of hair testing for non-federal drug tests is within the "spirit of Daubert" and the Coast Guard may rely on it when the test in question is directed by a private employer separate and apart from any testing required by law or regulation.

c. Respondent's Hair Tested Positive for Cocaine

The Coast Guard's evidence establishes that Respondent's hair sample tested positive for cocaine metabolites. The collectors both testified that all collection procedures were followed and properly documented in this case. The only flaw in the collection process was an incorrect address listed on the custody and control form. Dr. Leo Morrisey, the Medical Review Officer (MRO), found no fatal flaws and considered this a good test. (Tr. Vol. 2 p. 117). He did not consider it a problem that Beacon uses its general address even though it has a network of collection sites and subcontracted groups to perform the testing. (Tr. Vol. 2 p. 119).

Dr. Englehart testified as to the contents of the laboratory package, which included evidence that the chain of custody was unbroken, the laboratory equipment used in the tests was functioning properly, and all protocol was followed. (Tr. Vol. 2 pp. 42-70). He explained that the sample was initially analyzed using ELISA and found to be presumptively positive for cocaine at 2,668 picograms per milligram.

Due to the presumptively positive ELISA test, the laboratory analyzed the sample using GC/MS and found benzoylecgonine (BE), a primary cocaine metabolite, in a concentration of 124 picograms per milligram. (Tr. Vol. 2 pp. 56-58, 82, 90; EX CG-13). If cocaine is found in the hair, BE should also be present. (Tr. Vol. 2 p. 90). Dr. Cairns testified that if there is no BE in a sample, he would not consider it positive for cocaine. (Tr. Vol. 2 pp. 91-92). The GC/MS test also revealed cocaethylene, a metabolite generated when cocaine is consumed at the same time

as alcohol, in a concentration of 324 picograms per milligram. (Tr. Vol. 2 pp. 56-58, 91; EX CG-13). The presence of cocaethylene provides additional validation that Respondent used cocaine. (Tr. Vol. 2 p. 91).

The expert witnesses disagreed somewhat about the extent of Respondent's drug use. Dr. Englehart said the sample was clearly positive for cocaine but was at the lower end of what his laboratory typically sees. (Tr. Vol. 2 pp. 72, 75). Results there are often in the tens of thousands of picograms per milligram. Dr. Cairns, on the other hand, said a level of 2,888 picograms per milligram is "exceptionally high" because it is nearly six times the cutoff level. (Tr. Vol. 2 pp. 89-90). Dr. Cairns estimated that this would translate into "certainly . . . a lot more than two and somewhere less than 12" ingestions per month, depending on the quality of the cocaine. (Tr. Vol. 2 pp. 88-90). Even so, both witnesses agreed that the sample yielded a positive result well above the cutoff level.

The Laboratory reported the positive result to the MRO, Dr. Morresey. After receiving the results of the drug testing and the custody and control form, Dr. Morresey contacted Respondent and did not receive any medical explanation for the positive results. (Tr. Vol. 2 p. 120). He therefore certified that Respondent's sample tested "quite strongly positive" for cocaine. (Tr. Vol. 2 p. 119; CG EX-15).

The testimony in this case establishes that the chain of custody of Respondent's sample was unbroken. Ms. Moseley said the sample was properly collected, documented, prepared, and couriered to the laboratory. The evidence establishes that the sample arrived at the laboratory intact and laboratory personnel processed it using correct procedures within the chain of custody. Finally Dr. Morresey certified that he reviewed the results and found proper procedures were used.

I find the evidence in the record establishes that Respondent was tested for dangerous drugs and provided a hair sample that tested positive for cocaine, a dangerous drug. The Coast Guard provided reliable, credible, and probative evidence of Respondent's drug use. Respondent had the opportunity to present a defense but did not appear at the prehearing conference, the formal hearing, or the post-hearing conference. The evidence in the record therefore establishes it is more likely than not that Respondent is a user of dangerous drugs.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner's Credential.
3. On June 21, 2011, Respondent voluntarily gave a hair sample for a non-DOT drug test because he desired a position at a facility where drug testing was a prerequisite for gaining access to the premises.
4. Hair testing was not routinely conducted by Respondent's employer, except to the extent its contract with a third-party facility required contracted personnel to be tested.
5. The hair test was not required by or conducted in accordance with federal mandates.
6. The hair sample was collected using a process that had sufficient safeguards to prevent contamination and preserved the chain of custody.
7. The FDA has approved the ELISA process for initially analyzing hair samples.
8. The laboratory used a gas chromatography/mass spectrometry as a confirmatory test.
9. Although GC/MS is not FDA approved, various other institutions accredit its use.

10. Respondent's hair sample tested positive for cocaine metabolites.
11. Respondent did not successfully rebut the Coast Guard's prima facie case, show that there was an alternative medical explanation for the positive test, or show that the cocaine use was not wrongful or not knowing.
12. Respondent has been shown to be a user of dangerous drugs.
13. The allegations in the Coast Guard's Complaint are PROVED.

VI. SANCTION

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

Respondent has been shown to be a User of Dangerous Drugs and there has been no satisfactory proof of cure in this case. Accordingly, Revocation of his MMC is mandated. If at any point within the next three years, Respondent wishes to avail himself of the cure process, he may request modification of this decision in accordance with 33 C.F.R. § 20.904. Additionally, Respondent may request administrative clemency under 46 C.F.R. § 5.901.

ORDER

WHEREFORE:

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

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

The parties have a right to appeal, as set forth in 33 C.F.R. Subpart J, Section 20.1001 (Attachment A).

George J. Jordan
US Coast Guard Administrative Law Judge

APPENDIX A: WITNESS AND EXHIBIT LISTS

Coast Guard Witnesses:

Tony Sellers	Chief, Regional Exam Center Portland
Charles Bowen	Crowley Marine
Steven Browning	Security Director, Alyeska Pipeline
Keiko Moseley	Collector
Elwood Ramirez	Collector
Dave Engelhart, PhdD	Laboratory Director, Omega Labs
Thomas Cairns, PhD	Senior Scientific Advisor and Deputy Lab Director, Psychemedics Corporation
Dr. Leo Morresey	MRO, Beacon/Workesafe Anchorage

Respondent's Witnesses:

None

Coast Guard Exhibits:

CG-01	Regional Exam Center MMC Verification Database Screenshot
CG-02	Crowley Marine Statement
CG-03	Crowley Marine, Marine Personnel Manual, Crew Procedures, Part 02-005
CG-04	Article 18 Drug and Alcohol Policy – TAPS Contract 400704
CG-05	Alyeska Hair Testing Requiements Letter to Crowley Marine
CG-06	IBU Transfer Request
CG-07	Crowley Marine Positive Test Notification Letter to USCG
CG-08	Crowley Drug Policy
CG-09	Crowley Proof of Employment, Random Drug Testing Program Enrollment, and Drug Testing History for McPherson.
CG-10	Alyeska Drug Policy Rev. 16
CG-11	Non-DOT Drug Testing Custody and Control Form Labortory Copy
CG-12	Collector's Training Certificates
CG-13	Omega Laboratories, Inc., Laboratory Documentation Package
CG-14	Laboratory Director's Resume and Certificates
CG-15	Medical Review Officer Non-DOT Drug Test Results Letter
CG-16	Medical Review Officer's Training Certificate
CG-17	E-mail concerning testing location
CG-18	Respondent's employment record aboard Crowley Marine vessels
CG-19	Concentra Hair Collection Policy
CG-20	Expert Witness Curriclum Vitae
CG-21	Non-DOT Drug Testing Custody and Control Form MRO copy
CG-22	Alyeska Drug Policy (2010) Rev. 15

Respondent's Exhibits:

None

APPENDIX B:
33 C.F.R. PART 20- APPEALS
SUBPART J

§ 20.1001 - General

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

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

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

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

§ 20.1002 - Records on Appeal

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

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, -

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 - Procedures for Appeal

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

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the –

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record. (3) The appellate brief must reach the Docketing Center sixty (60) days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

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

(c) No party mail file more than one appellate brief or reply brief, unless –
   (1) The party has petitioned the Commandant in writing; and
   (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

APPENDIX C:
NOTICE CONCERNING REVOCATION OF CREDENTIAL

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

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

2. You may no longer use your credential.

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

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

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

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

6. You also may request issuance of a new credential under the provisions of 46 C.F.R. Subpart L. You may apply three years after revocation. 46 C.F.R § 5.901(a). The three-year time period may be waived by the Commandant if you can show you (1) have successfully completed a bona fide drug abuse rehabilitation program; (2) have demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the rehabilitation program; and (3) are actively participating in a bona fide drug abuse monitoring program. 46 C.F.R. § 5.901(d). If you decide to avail yourself of this option, please see 46 C.F.R § 5.903 for the application procedures.

CERTIFICATE OF SERVICE

I hereby certify that I have transmitted the above document to the following persons, as indicated:

LCDR Anthony S. Hillenbrand
USCG MSU Portland
By electronic mail.

Michael A. McPherson
8500 SE Flavel Drive Apt 3
Portland OR 97206
By electronic mail to: mcpherson9767@gmail.com.

ALJ Docketing Center
By electronic mail to: aljdocketcenter@uscg.mil.

Heather MacClintock, Attorney-Advisor
USCG Office of the Administrative Law Judge, Seattle
By electronic mail.

Dated: January 8, 2015

Tobi C. Erskine
Paralegal Specialist to the
Administrative Law Judge