

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

UNITED STATES COAST GUARD

Complainant

vs.

DAVID ADDISON TURLEY

Respondent

Docket Number 2015-0015
Enforcement Activity No. 5053162

CORRECTED
DECISION AND ORDER

Issued: August 14, 2015

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

CWO JONATHAN B. ROY
Sector Ohio Valley

and

BRIAN CROCKETT, ESQ.
S&R- NCOE

For the Coast Guard

LARRY D. SIMON, Esq.

For Respondent

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I. PRELIMINARY STATEMENT

The United States Coast Guard initiated an administrative action seeking revocation of Merchant Mariner's Credential Number 000171060 issued to David Addison Turley (hereinafter "Respondent"). This action is brought pursuant to the authority contained in 46 U.S.C. § 7704(c) and its underlying regulations codified at 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

The Coast Guard issued a Complaint on January 16, 2015, charging Respondent with use of or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges Respondent took a pre-employment drug test on December 30, 2014, and that test yielded a positive result for amphetamines. On March 10, 2015, Respondent submitted an Answer. In his Answer Respondent admitted all jurisdictional allegations and denied paragraphs 4 and 5 of the factual allegations contained in the Complaint. Larry D. Simon Esq. entered an appearance to represent Respondent on March 19, 2015.

On March 26, 2015, the undersigned administrative law judge (ALJ) held a scheduling conference and subsequently issued an Order scheduling the hearing in this matter to be conducted in Louisville, Kentucky on May 19, 2015. The Scheduling Order also set forth deadlines for discovery, prehearing motions and the exchange of witness and exhibit lists.

The hearing commenced on May 19, 2015, at 9:30 AM in Louisville, KY. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. § 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. During the hearing, the Coast Guard offered twelve (12) exhibits, all of which were admitted, and presented the testimony of two (2) witnesses.¹ Brian Brunelli, Lab Director for Quest Diagnostics testified regarding the lab procedures followed in this matter and

¹ The Coast Guard had listed Ms. Maureen Gallagher and Ms. Mary Holzinger as witnesses. However, Respondent did not contest the urinalysis collection procedures in this matter and the parties stipulated the collection procedures were not in issue. After that stipulation the Coast Guard then decided not to call Ms. Gallagher or Ms. Holzinger to testify.

Dr. Anthony Minissale, the Medical Review Officer (MRO) testified regarding the Federal Drug Testing Custody and Control Form (DTCCF) form and his discussion with Respondent regarding the positive test.

At the hearing, Respondent did not contest that his specimen tested positive for amphetamines. Instead, Respondent claimed his stepson somehow put something into his coffee that caused his positive result on the drug test.

The Coast Guard bears the burden of proof throughout suspension and revocation proceedings. Even when the Coast Guard has presented a prima facie case, Respondent is entitled to present evidence to rebut the presumption of dangerous drug use. Pursuant to Title 46 U.S.C. § 7702 and 46 C.F.R. § 5.501 mariners are entitled to contest a proposed suspension or revocation at a hearing under the procedures of the Administrative Procedures Act, 5 U.S.C. § 551-559.

After reviewing Respondent's Answer, the exhibits (Ex.), and testimony presented at the hearing, and the parties' stipulations concerning the collection procedures, I find the Coast Guard met the burden of proof for presenting a prima facie case of use of dangerous drugs. See Appeal Decision 2584 (SHAKESPEARE) (1997) and Appeal Decision 2704 (FRANKS) (2014).

After the Coast Guard's presentation, Respondent testified on his own behalf and called two witnesses: his spouse, Mrs. Kelly Turley and Mr. Matthew Neighbors.² See Attachment A. Respondent's testimony at the hearing did not dispute either the jurisdictional allegations or Respondent's participation in a pre-employment drug test on December 30, 2014. Respondent, through counsel also submitted seven (7) Exhibits (A through G), which were admitted.

The Coast Guard and Respondent submitted post-hearing briefs and proposed findings of fact and conclusions of law on June 22, 2015. Rulings on the parties proposed findings and

² Mr. Scott Cameron Mausey was listed as a witness but did not appear.

conclusions are contained in Attachment B. The record is closed and the case is ripe for a decision.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, I find the charged violation of use of or addition to dangerous drugs **PROVED**.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein, specifically on or about December 30, 2014, Respondent held Merchant Mariner's Credential number 000171060, issued by the United States Coast Guard. Respondent admitted the jurisdictional allegations of the Complaint. Respondent's Answer par. 1.
2. On December 30, 2014, Respondent submitted to a pre-employment drug test. Transcript (Tr.) page (p.) 169
3. Respondent David Addison Turley and the subject matter of this proceeding are within the jurisdiction of the Coast Guard vested under the authority of 46 U.S.C. Chapter 77. Respondent engaged in official matters relating to his Merchant Mariner credentials by reporting for drug testing. 46 C.F.R. § 5.57.
4. The collector followed Department of Transportation procedures in obtaining Respondent's specimen on December 30, 2014. Tr. p. 98-101.
5. Quest Diagnostics received Respondent's sample, labeled the sample with a unique internal tracking number (1536476), and logged the number into their computer system. Tr. p. 32-33.

6. Quest Diagnostics is certified by the national laboratory program and the Department of Health and Human Services to perform testing under federal regulations. Tr. p. 23.
7. The chain of custody for Respondent's specimen was not disputed. Tr. p. 96, 101.
8. The amphetamine level identified in Respondent's sample was positive for amphetamines and not consistent with legal use of amphetamines. Tr. p. 44-46; 49 C.F.R. § 40.87; 75 Fed. Reg, 49862 (August 16, 2010).
9. The Medical Review Officer (MRO) verified the positive drug test taken by Respondent on December 30, 2014. CG Ex. 11.
10. The MRO interviewed Respondent on January 5, 2015 and determined there was no valid excuse or medical explanation for Respondent's positive drug test. Tr. p. 84; Ex. 12.
11. Based on the testimony of the Lab Director and the Medical Review Officer, the positive test result was verified in accordance with 49 C.F.R. Part 40. Tr. pgs. 17-95.
12. Respondent denied any knowing use of amphetamines. Tr. p. 185.
13. Respondent could have had a split specimen test but declined to request one at the hearing. Tr. p. 191.
14. The Coast Guard presented a *prima facie*³ case of use of a dangerous drug in this matter.
15. Respondent did not provide a valid medical explanation for the positive test result for a dangerous drug. Tr. p. 80.
16. Respondent presented some evidence in support of a theory of innocent ingestion but failed to provide sufficient relevant and persuasive evidence to rebut the presumption he is a user of dangerous drugs.

³ A *prima facie* case of dangerous drug use based on urinalysis test results is presented when (1) a party is tested for use of a dangerous drug; (2) the test results show a positive result for a dangerous drug; and (3) the drug test is conducted in accordance with Coast Guard regulations in 46 CFR Part 16 and Department of Transportation procedures in 49 CFR Part 40. Appeal Decision 2584 (SHAKESPEARE) (1997).

III. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 C.F.R. § 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. 7704. Under 46 U.S.C. § 7704(c), a Coast Guard issued license or certificate or credential shall be revoked if the holder of that license or certificate has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. See generally Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (rev'd on other grounds)(definition of cure established).

The chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16 and 49 C.F.R. Part 40. If an employee fails a chemical test by testing positive for a dangerous drug and the test is demonstrated to be in compliance with the requirements of 46 C.F.R. Part 16, the individual is then presumed to be a user of dangerous drugs. See 46 C.F.R. § 16.201(b); Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs based on the Respondent's drug test results that were positive for amphetamines from a pre-employment drug test taken on December 30, 2014. The Coast Guard seeks revocation of Respondent's license in accordance with 46 C.F.R. § 5.569. For the reasons stated below, I find the Coast Guard **PROVED** the charged violation that Respondent is a user of or addicted to the use of a dangerous drug based on the evidence in the record as a whole.

A. **Burden of Proof**

The Administrative Procedure Act (APA), Title 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law

Judges. 46 U.S.C. § 7702(a). Sanctions may be imposed if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. See 5 U.S.C. § 556(d); 46 U.S.C. Chapter 77. Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. See 33 C.F.R. §§ 20.701, 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). See also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence “simply requires the Trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

B. Prima Facie Case of Use of a Dangerous Drug

As stated above, the Coast Guard bears the burden of proof. Where the sole basis of proof for the charged violation is a positive urinalysis test, the Coast Guard must establish a *prima facie* case in order to prove that a merchant mariner is a user of or addicted to dangerous drugs. See Appeal Decision 2584 (SHAKESPEARE) (1997)⁴; 46 C.F.R. § 16.201.

⁴“However, where the Coast Guard seeks to rely upon the regulatory presumption, all the terms which form the predicates for the presumption must be established according to the same standard of proof. That is to say, the elements of the case must be shown by substantial evidence of a reliable and probative nature.” Appeal Decision 2603 (HACKSTAFF) (1998).

To establish a *prima facie* case for use of, or addiction to the use of, a dangerous drug the Coast Guard must prove the following three elements: 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2584 (SHAKESPEARE) (1997).

Once the Coast Guard establishes a *prima facie* case of use of or addiction to dangerous drugs as noted above, the Respondent may then present evidence to rebut the regulatory (46 C.F.R. § 16.201(b)) presumption of dangerous drug use. If Respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997); Appeal Decision 2603 (HACKSTAFF) (1998).

i. Respondent was the Person Tested for Dangerous Drugs

Respondent's Answer and the evidence at hearing show Respondent submitted a urine sample to Quest Diagnostics on December 30, 2014. CG Ex. 5, 7 and Tr. p. 169. The (Drug Testing Custody and Control Form) DTCCF also verifies that Respondent submitted to a drug test. CG Ex. 7. In the Answer and at hearing, Respondent did not dispute the specific procedures the collector followed when collecting the specimen on December 30, 2014. The parties agree the collection procedures followed were in accordance to 49 C.F.R. § 40. Tr. p. 96-101. There was no evidence presented which contradicts the evidence that shows the collection of Respondent's specimen and its custody and control and shipment to the testing facility (Quest Diagnostics) and maintenance and testing at that facility was done in compliance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.

ii. The Laboratory Found that Specimen 1536476 Yielded a Positive Drug Test Result

Quest Diagnostics tested Respondent's specimen for dangerous drugs and returned a positive result for amphetamines (1536476) at a level of 578 nanograms per milliliter. CG Ex. 7;

Tr. p. 35. Quest Diagnostics is certified by the national laboratory program and the Department of Health and Human Services to perform testing under federal regulations. Tr. p. 23; 79 Fed. Reg. 72006 (December 4, 2014); Court Exhibit I. The Coast Guard presented the testimony of Mr. Brunelli, the lab director to explain the receipt and processing of specimens at Quest Diagnostics in general and the process for Respondent's test results. Respondent did not raise any questions regarding collection procedures in the Answer or during the hearing. Tr. p. 96-101. Mr. Brunelli's testimony explained that he oversees the entire testing facility and ensures that the individuals are trained in the standard operating procedures of the facility and are capable of carrying out that job. Tr. p. 23. Assuming for purposes of argument that the MRO did not properly explain the option for a split specimen test or comply with a request by Respondent for a split specimen test, I find this issue constitutes only harmless error. During the hearing the Coast Guard offered to have the second specimen tested and Respondent declined. Tr. p. 191. Previous decisions by the Commandant have held that errors in testing that do not affect the specimen's integrity and the chain of custody are harmless. See Appeal Decision 2668 (MERRILL) (2007); Appeal Decision 2662 (VOOREIS) (2007); See also USCG v. Rockford Glyn Daire, 08-0231 (2008) McKenna, J. (noting the potential to cure any error by retesting retained sample).

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

The final element specifically requires drug tests ordered pursuant to 46 C.F.R. Part 16 be conducted in accordance with the procedures detailed in 49 C.F.R. Part 40. 46 C.F.R. § 16.201(a). The drug testing in question thus must meet the requirements of both 46 C.F.R. Part 16 and 49 C.F.R. Part 40. "In the interest of justice and the integrity of the entire drug testing system, it is important" that these procedures are followed to maintain the system. Appeal Decision 2631 (SENGEL) (2002).

There is no dispute that Respondent voluntarily participated in a pre-employment drug test on December 30, 2014. I find the United States Coast Guard has established each of the three factors necessary for a *prima facie* case by a preponderance of the evidence. The Coast Guard is entitled to the presumption that Respondent is a user of dangerous drugs.

iv. Respondent's Evidence was not persuasive and not sufficient to rebut the *prima facie* case presented by the Coast Guard.

Respondent testified that he does not use dangerous drugs and contended that his stepson (who did not appear at the hearing) must have put something in his coffee for him to have tested positive. He also argued the MRO failed to properly discuss and order a split specimen test for him. The Coast Guard offered to allow a split specimen test during the hearing, but Respondent declined.

Respondent argues any positive test must be the result of his stepson intentionally putting something in his coffee. The stepson did not appear at the hearing, nor was there any statement or direct evidence from the stepson to support the supposed doctoring of Respondent's coffee. Respondent testified he never felt any effects of the alleged drug in his coffee. No one told him that his stepson put anything in his coffee until after he had been notified of his positive test. Respondent's spouse testified that after the MRO contacted Respondent and informed him of the positive test, she contacted two (2) young men who were friends of the stepson and had been visiting Respondent's house during the time of this incident. Only one of these visitor's to Respondent's home appeared at the hearing. The recollection of the alleged spiking of Respondent's beverage was only recalled after Respondent's wife contacted the witness who was then asked a suggestive question whether he recalled any such event. The stepson did not testify and there is no evidence other than Respondent's and Respondent's spouse's testimony to imply that the stepson knew Respondent was going for a pre employment test, and that he would have

knowledge of what would cause a positive test result, or that he would have intentionally acted to cause Respondent problems.

After considering all of the evidence, I do not find the testimony presented by Respondent or Respondent's witnesses to be sufficiently credible or persuasive so as to rebut the *prima facie* case presented by the Coast Guard.

I also find Respondent's evidence of negative drug test results taken prior to and after the December 30, 2014 test irrelevant and unpersuasive. Neither of these tests provides a sufficient basis to rebut the *prima facie* case of the Coast Guard based on the December 30, 2014 urinalysis. See generally Appeals Decision 2635 (SINCLAIR) (2002). Respondent's cross-examination of the MRO did not demonstrate any matters that would constitute a procedural defect that would invalidate the urinalysis testing. Cf. 49 C.F.R. § 40.209 (b). The evidence Respondent presented on his own behalf is not persuasive and not sufficient to rebut the evidence of the positive test result.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner's Credential 000171060.
2. Respondent and the subject-matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. 551-59.
3. On December 30, 2014, Respondent participated in a pre-employment drug test.
4. Respondent's Custody and Control Form shows Respondent's urine sample yielded a positive result for amphetamines.
5. The Coast Guard provided sufficient evidence that Respondent's positive drug test met all of the elements of a *prima facie* case in order to apply the rebuttable regulatory presumption that he is a user of dangerous drugs. 46 C.F.R. § 16.201(b).

6. Respondent failed to present persuasive or relevant evidence sufficient to rebut the presumption he is a user of dangerous drugs that arises under 46 C.F.R. § 16.201 based on the proof of a *prima facie* case by the Coast Guard because of the positive drug test.
7. The Coast Guard **PROVED**, by a preponderance of reliable, probative, and credible evidence that on or about December 30, 2014, Respondent was a user of or addicted to dangerous drugs.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 49 C.F.R. § 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

When the Coast Guard proves a mariner has used or is addicted to dangerous drugs, revocation of all Coast Guard issued licenses, documents, or other credentials is the appropriate sanction, unless cure is proven. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992).

Here, the Coast Guard proved by a preponderance of reliable, probative and credible evidence that Respondent was a user of or addicted to dangerous drugs. Therefore, the appropriate sanction is **REVOCAATION**.

WHEREFORE,

VI. **ORDER**

IT IS HEREBY ORDERED, Merchant Mariner's Credential Number 000171060, and all other licenses, documents, and endorsements issued by the Coast Guard to Respondent, David Addison Turley, are **REVOKED**.

PLEASE TAKE NOTICE, within three (3) years or less, Mr. Turley may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The revocation order may be modified upon a showing that the individual:

- (1) Has successfully completed a bona fide drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and
- (3) Is actively participating in a bona fide drug abuse monitoring program.

See generally 33 C.F.R. § 20.904; 46 C.F.R. § 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY) (1992).

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

Michael J Devine
US Coast Guard Administrative Law Judge

Date: August 14, 2015

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LIST

Coast Guard Witnesses

- 1 Brian Brunelli
- 2 Dr. Anthony Minissale (MRO)

Respondent Witness

- 1 Mrs. Kelly Turley
- 2 Matthew Neighbors
- 3 David A. Turley

EXHIBIT LISTS

Court Exhibit

Court Ex. I Human Services Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies, 79 Fed. Reg. 72005-01 (December 4, 2014).

Coast Guard Exhibits

CG Ex. 1 Coast Guard Marine Information for Safety and Law Enforcement (MISLE) screen shot of Respondent's Merchant Mariner Credential, showing endorsements. (02 pages).

CG Ex. 2 Seafarers Health and Benefits Plan medical department drug and alcohol testing policy. (01 page).

CG Ex. 3 Seafarers Management Information System screen shot of ordered pre-employment testing for Respondent. (01 page).

CG Ex. 4 Drug Test Collector training course certificate for Mary Holzinger of AMO Medical Plan Clinic, Dania FL. (01 page).

CG Ex. 5 Federal Custody Control Form, Collectors Copy for Specimen ID number 1536476. (01 page).

CG Ex. 6 Curriculum Vitae of Brian A. Brunelli, B.S., M.S. (02 pages).

CG Ex. 7 Federal Custody Control Form, Testing Facility Copy for Specimen ID number 1536476. (01 page).

CG Ex. 8 Lab Litigation Package for Specimen ID Number 1536476. (191 pages).

CG Ex. 9 Curriculum Vitae of Anthony A. Minissale, D.O., F.A.C.O.S. (06 pages).

CG Ex. 10 Screen Shot from Medical Review Officer (MRO) Certification Council for Dr. Anthony Minissale. (01 page).

CG Ex. 11 Fax to USCG reporting positive drug test for Specimen ID 1536476, including Federal Custody Control Form; MRO copy, Test Facility Copy, and MRO Final Report. (04 pages).

CG Ex. 12 MRO worksheet and interview summary for Specimen ID 1536476. (02 pages).

Respondent Exhibits

RESP Ex. A Affidavit of Matthew Neighbors dated April 22, 2015. (02 pages).

- RESP Ex. B Patient History Report dated May 2, 201 – April 14, 2015. (01 page).
- RESP Ex. C List of Prescription Medications (Perdue Healthworks; Wellness Center). (01 page).
- RESP Ex. D Drug Testing Custody and Control Forms (for testing on Samples of Respondent prior to December 30, 2014. (07 pages).
- RESP Ex. E U.S.C.G. 86-067 Clearance Form dated June 7, 2012. (04 pages).
- RESP Ex. F LabCorp Drug Test Final Report, collection date March 16, 2015. (02 pages).
- RESP Ex. G Letters of Recommendation and Certificates of Completion. (05 pages).

ATTACHMENT B

COAST GUARD'S PROPOSED FINDINGS OF FACT

1. The Respondent, David Addison Turley, and the subject matter of this proceeding are within the jurisdiction of the U.S. Coast Guard vested under the authority of 46 U.S.C. Chapter 77. **ACCEPTED** as provided in the Decision and Order (D&O).
2. On December 30, 2014, the Respondent was a holder of Coast Guard issued MMC 000171060. [Coast Guard Exhibit 01 (CG Ex.)]. **ACCEPTED** as provided in the D&O.
3. On December 30, 2014, the Respondent was hired by Seafarers Union, Seafarers Health and Benefits Plan Medical Department. **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
4. On December 30, 2014, the Respondent submitted to a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16. [CG Ex. 02 & 03]. **ACCEPTED** as provided in the D&O.
5. The Respondent's urine specimen was collected by a trained and experienced human urine specimen collector at AMO Medical Plan Clinic. Prior to providing the specimen, the Respondent placed his signature on a Federal Drug Testing Custody and Control Form along with his date of birth, the testing date, and his telephone number. The Respondent's specimen was assigned the unique Specimen ID Number 1536476. The collector followed all required procedures set forth in 49 C.F.R. Part 40 in collecting the urine specimen of the Respondent. [CG Ex. 04 & 05]. **ACCEPTED** as provided in the D&O.
6. The urine specimen was sent to Quest Diagnostics, Inc. in Tucker, Georgia. Quest Diagnostics is a laboratory certified by SAMHSA and approved by the Department of Transportation to conduct chemical testing. [Court Exhibit I]. **ACCEPTED** as provided in the D&O.

7. Quest analyzed the specimen using procedures approved by the Department of Transportation. **ACCEPTED** as provided in the D&O.
8. The Respondent's urine specimen tested positive for amphetamines. [CG Ex. 06, 07, & 08]. **ACCEPTED** as provided in the D&O.
9. The Medical Review Officer (MRO), Dr. Anthony Minissale, reviewed the result and telephonically interviewed the Respondent. Based on his thorough review of the documentation forwarded to him by Quest and his interview with the Respondent, the MRO found legitimate medical excuse for the Respondent's positive test result. The MRO also credibly found no flaws or irregularities in the laboratory documentation he reviewed. [CG Ex. 09, 10, 11, & 12]. **REJECTED IN PART** as provided in the D&O. The MRO found no legitimate medical excuse for Respondent's positive test results. **ACCEPTED** with regard to the MRO's testimony finding no flaws in the reviewed documentation.
10. The MRO verified the positive test results as required by 49 C.F.R. Part 40. [Trial Tr. p. 75: 4-6]. **ACCEPTED** as provided in the D&O.

COAST GUARD'S PROPOSED CONCLUSIONS OF LAW

1. On December 30, 2014, the Respondent was the holder of Merchant Mariner Credential #000171060. **ACCEPTED** as provided in the D&O.
2. On December 30, 2014, the Respondent was lawfully required to take a pre-employment drug test. **ACCEPTED** as provided in the D&O.
3. On December 30, 2014, Respondent submitted a urine sample which tested positive for methamphetamine. **ACCEPTED** as provided in the D&O.
4. Methamphetamine is a dangerous drug as contemplated by 46 U.S.C. § 7704(c).
5. While the holder of a Coast Guard license, Respondent was the user of a dangerous drug (methamphetamine). **ACCEPTED** as provided in the D&O.

RESPONDENT'S PROPOSED FINDINGS OF FACT

1. At all relevant times mentioned herein and specifically on or about December 30, 2014, Respondent was a holder of Merchant Mariner's Document Number 171060 issued by the United States Coast Guard. At the hearing Respondent did not dispute the jurisdictional allegations of the Complaint. (Tr. p. 8, 16; Complaint). **ACCEPTED** as provided in the D&O.
2. Respondent was directed to take a pre-employment drug test by Maureen Gallagher, Associate Director of the Medical Department of the Sea Farers Health and Benefits Plan, as a condition of an assignment to a vessel. (Tr. p. 14-15; Complaint). **NEITHER ACCEPTED nor REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
3. Mary Holzinger, a certified specimen collector with the AMO Medical Plan Clinic in Dania, Florida, collected a urine sample from Respondent for the purpose of performing a DOT urinalysis drug test in accordance with DOT collection standards as set out in 46 C.F.R. Part 40 (Tr. p. 14-15; Complaint). **ACCEPTED** as provided in the D&O.
4. The telephonic testimony of Brian Brunelli, Lab Supervisor of Quest Diagnostics in Tucker, Georgia, established that the pre-employment drug test urine sample of the Respondent (Specimen ID number 153676) resulted in a positive test for methamphetamine at a concentration of 578 ng/ml and the form of the methamphetamine was the D isomer form, which is consistent with the illegal or unprescribed form of methamphetamine. (Tr. p. 33; 47-48; CG Ex. 8). **ACCEPTED** as provided in the D&O.
5. Dr. Anthony Minissale is the Medical Review Officer (MRO) assigned to Respondent's case, and is employed by University Services Philadelphia, Pennsylvania. (Tr. p. 63, 69). **ACCEPTED** as provided in the D&O.
6. Included among Dr. Minissale's duties as a MRO are to review results from a DOT

certified laboratory and interpret the laboratory findings while providing the individual that submitted the sample the opportunity to discuss the positive test results and provide an acceptable medical reason for the positive finding (Tr. p. 67-68). **ACCEPTED** as provided in the D&O.

7. According to the MRO's worksheet, Dr. Minissale contacted Respondent after receiving the results from the laboratory on January 5, 2015. (CG Ex. 12). **ACCEPTED** as provided in the D&O.

8. Dr. Minissale testified on direct examination by the Coast Guard's representative that the Respondent did not provide an acceptable medical reason for a positive test result for illegal methamphetamine (Tr. p. 81-82; 86). **ACCEPTED** as provided in the D&O.

9. Dr. Minissale testified on direct examination that he explained to the Respondent what a split sample was and offered Mr. Turley the choice to request a split sample (Tr. p. 82). **ACCEPTED** as provided in the D&O.

10. Dr. Minissale testified that only the only item documented in his report is the fact that a split sample test was offered to a Respondent, as opposed to documenting a Respondent's request for a split sample test. (Tr. p. 84, CG Ex. 12). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

11. On cross-examination, Dr. Minissale testified that he had no present recollection as of the date of the hearing of his telephone conversation with Mr. Turley, other than the notations that he made on his Medical Review Officer Worksheet. (Tr. p. 88-89, 95; CG Ex. 12). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

12. The ALJ asked Dr. Minissale what he does when a person who has tested positive (for an illegal drug) requests a split sample (to be tested). (Tr. p. 93). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. Dr. Minissale answered the ALJ's question by testifying that he tells his assistants that the person tested is requesting a split (sample test), "but we usually ask them to confirm that with a written request and give instructions on how to do that." (Tr. p. 93). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

14. The ALJ followed up and asked if the MRO tells the person tested to "give your office a written request" by providing him with the MRO's office phone number and address. (Tr. p. 93). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

15. Dr. Minissale testified that a Respondent's request for a split (sample) test is received by his office by a fax communication. (Tr. p. 93). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

16. In contrast to the MRO, the Respondent testified that he had strong present recollection of his telephone conversation with Dr. Minissale, due to the fact that their conversation turned into a "heated discussion," with Mr. Turley adamantly denying the use of any illegal drug. Mr. Turley testified that he went so far as to tell the MRO that "he didn't know me, he better watch

what he said, I'd sue him for defamation of character.” (Tr. p. 177-178). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

17. Respondent testified that he was asked by Dr. Minissale if he wanted a second test performed and he told the MRO “yes.” (Tr. p. 178). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. There was not any testing of Respondent's split sample, collected on December 30, 2014. (Tr. p. 96). **ACCEPTED** as provided in the D&O.

19. There was no request made to Quest Diagnostics by MRO Minissale for the testing of Respondent's split sample by another laboratory. (Tr. p. 52-54). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

20. Respondent's wife, Kelly Turley, testified that she has been in a husband -wife relationship with the Respondent for nearly 20 years and during this time never observed anything about Mr. Turley that would lead her to believe that he used any illegal drugs. (Tr. p. 117, 128). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

21. Kelly Turley testified that her oldest son, Dustin Rogers, is the Respondent's step-son. She testified that Dustin was living in her residence in Morgantown, Kentucky, in December of 2014, along with her husband, two younger sons and her 14 year old daughter. (Tr. p. 117-118).

NEITHER ACCEPTED nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

22. Kelly Turley testified in detail about Dustin's addiction to illegal drugs before, during and after this point in time and recounted admissions and attempted admissions of Dustin into either substance abuse counseling facilities or mental health facilities. (Tr. p. 119, 123).

NEITHER ACCEPTED nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

23. Kelly Turley testified that Dustin had wrongfully accused the Respondent of impregnating their 14 year old daughter (Tr. p. 123-126). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

24. Kelly Turley testified that between Christmas of 2014 and New Years Day, two friends of Dustin stayed overnight at her residence. One of the friends was Matthew (Neighbors) and the other was named Scott. (Tr. p. 121-122). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

25. Kelly Turley testified that after she and her husband had been informed of the positive test result by the MRO that she contacted Dustin's two friends and was told by Matthew Neighbors and Scott that they saw Dustin take some substance out of a plastic bag and put it in a cup of coffee that her husband drank. They also told Mrs. Turley of a statement made by Dustin when this occurred. (Tr. p. 131-132; Respondent's Ex. A). To the extent the testimony was not

consistent with the findings in the D & O it is **REJECTED**.

26. Kelly Turley testified that she listened to the conversation between MRO Dr. Minissale and her husband on her husband's cellular or smart phone, while in speaker-phone mode. Mrs. Turley testified that her husband was asked if he wanted another test (of his urine sample) and that Respondent told the MRO that "he would like for them to re-test him...because at that point he didn't know what was going on." (Tr. p. 132-133). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

27. Mrs. Turley testified that after orally making this request for a second test, the MRO said nothing that would indicate her husband needed to take any further steps to have the second test. (Tr. p. 133-134). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

28. Matthew Neighbors testified that he was turning 18 years of age in a few months, that he lived in Morgantown, Kentucky, and that he had been friends with Dustin Rogers for many years. (Tr. p. 145-147). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

29. Matthew Neighbors testified that he stayed overnight at Mr. Turley's residence as their guest with another friend named Scott. This was around Christmastime in 2014. (Tr. p. 147-148). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

30. Matthew Neighbors described seeing Dustin pull a plastic baggy out of his pocket and

start to pour the contents into one of the two cups of coffee that Dustin had made. (Tr. p. 149-150). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

31. According to Matthew Neighbors, after Dustin Rogers put the contents of the baggy in the coffee cup, Dustin stated “I got him now.” (Tr. p. 161; Respondent’s Ex. A). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

32. Matthew Neighbors testified that Mr. Turley has always been “sober and straightforward” around him and not a person who “acted strange or used drugs.” (Tr. p. 160). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

33. The Respondent testified that he is 47 years of age. He recounted his employment history after an honorable discharge from the armed services: a machinist for three years; with the Army Corps of Engineers for two years; a truck driver for seven years. He became a Merchant Marine in 2005, starting in a beginner’s position as a “wiper,” then progressing as a “Q med pumpman,” responsible for the ballast of the ship that he is assigned. (Tr. p. 165-168). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

34. The Respondent testified that he is currently in a time-sensitive period in which he has made application for his “third engineer’s license,” an officer’s position. (Tr. p. 169; 187-188; Respondent’s Ex. G). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence

including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

35. Respondent testified about an accident that he had on October 25, 2010, which resulted in the insertion of “two titanium rods and ten screws in his back,” but stated that he foregoes any prescription pain medications so that he can sail and continue to be employed. (Tr. p. 170).

NEITHER ACCEPTED nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

36. The Respondent testified that as he was preparing to leave his residence on the morning of December 28, 2014, to fly to Florida to take a physical examination and to provide a urine sample at the designated collection location, his step-son Dustin (Rogers) made a pot of coffee. Mr. Turley did not suspect anything out of the ordinary from this situation until he was contacted by the MRO and was informed of the positive tests for an illegal drug. (Tr. p.175-177).

NEITHER ACCEPTED nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

37. The Respondent testified as to the negative drug screen results that were taken randomly during previous periods of employment on August 13, 2012; February 29, 2012; April 7, 2011; and May 22, 2007. (Tr. p. 179-181; Respondent’s Ex. D). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

38. The Respondent testified that he had been subject to drug testing as a condition of his employment by his Union from 2012 through the summer of 2014, and these tests results were all negative. (Tr. p. 183-184; Respondent’s Ex. E). **NEITHER ACCEPTED** nor **REJECTED**;

the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

39. The Respondent testified that he scheduled the physical examination for December 30, 2014, approximately four months in advance. This examination would include providing the urine sample for the pre-employment drug test. Mr. Turley was planning to stay with relatives that he has in Florida after taking the physical examination until he would be assigned to a ship. (Tr. p. 191-193). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

40. Mr. Turley adamantly testified that he would never intentionally ingest methamphetamines, did not intentionally ingest this illegal substance during this time period, and will not “admit guilt to something that I did not do.” He acknowledged the fact that CWO Jonathan Roy offered the Respondent an opportunity to settle the Complaint by enrolling in a drug rehabilitation program and being subject to numerous random drug tests during a one year suspension, but this proposal was declined because “he did not do it.” (Tr. p. 188-190). To the extent Respondent’s testimony conflicts with the D & O it is **REJECTED**.

41. The Coast Guard’s Representative at the hearing declined to cross-examine the Respondent (Tr. p. 191; 194). **NEITHER ACCEPTED** nor **REJECTED**; the weight of any evidence including testimony during the hearing is to be determined by the Court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

RESPONDENT’S PROPOSED CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner’s License Number 171060. **ACCEPTED** as provided in the D&O.

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under U.S.C. 7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. 551-59. **ACCEPTED** as provided in the D&O.

3. On December 30, 2014, Respondent participated in a pre-employment drug test. **ACCEPTED** as provided in the D&O.

4. Respondent's Custody and Control Form shows Respondent's urine sample yielded a positive result for illegal methamphetamine. **ACCEPTED** as provided in the D&O.

5. The Coast Guard failed to provide sufficient evidence that Respondent's positive drug test met all of the elements of a prima facie case in order to apply the regulatory presumption that he is a user of dangerous drugs. 46 C.F.R. 16.20(b). **REJECTED** as provided in the D&O.

6. Absent sufficient substantial evidence in the record, the Coast Guard cannot prove Respondent is a user of or addicted to dangerous drugs without the presumption. **REJECTED** as provided in the D&O.

7. Accordingly, the Coast Guard has NOT PROVED by a preponderance of reliable, probative, and credible evidence that on or about December 30, 2014, Respondent was a user of or addicted to dangerous drugs. **REJECTED** as provided in the D&O.

7 (A). Alternatively, the testimony of the Respondent and the witnesses called to testify on his behalf has sufficiently rebutted the presumption of the positive drug test, such that the Coast Guard has NOT PROVED by a preponderance of reliable, probative and credible evidence that on or about December 30, 2014, Respondent is a user of or addicted to dangerous drugs. **REJECTED** as provided in the D&O.

ATTACHMENT C

NOTICE OF APPEAL RIGHTS

33 CFR 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 CFR 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 CFR 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 CFR 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.