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DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | DECISION OF THE<br>COMMANDANT ON APPEAL |
| vs. | : | NO. 2571 |
| LICENSE NO. 646676 and<br>MERCHANT MARINER'S DOCUMENT<br>(REDACTED): | : | |
| Issued to: Albert O. DYKES, Jr.<br>Appellant | : | |

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated September 7, 1993, an Administrative Law

Judge of the United States Coast Guard at Mobile, Alabama, revoked Appellant's duly issued Coast Guard license and merchant mariner's document upon finding *a use of dangerous drugs* charge proved. The single specification supporting the charge alleged that Appellant, while being the holder of the above captioned documents, was found to be a user of dangerous drugs, to wit: marijuana, as a result of chemical tests conducted on a urine sample he provided on or about March 31, 1993.

The hearing was held at Mobile, Alabama, on August 27, 1993. At the hearing, Appellant, after being advised of the right to have counsel represent him, chose to represent himself. Appellant answered "no contest" to the charge and its supporting specification.

The Administrative Law Judge rendered a decision that the charge and specification had been found proved. The entire decision and order was served on Appellant on September 7, 1993. On September 22, 1993, Appellant filed a notice of appeal. Appellant timely submitted his completed appeal which is, accordingly, properly before the Commandant for review.

APPEARANCE: George J. Ledet, Jr., Attorney-at-Law,

16812 West Main St., Cut Off, Louisiana 70345

FINDINGS OF FACT

At all times pertinent, Appellant was the holder of Merchant Mariner's License No. 646676 and Merchant Mariner's Document No. [REDACTED]. Appellant was charged with being the user of marijuana, a dangerous drug, on or about 31 March 1993 based on the result of a drug screening test conducted by Drug Labs of Texas.

At the hearing, the Appellant was advised of the possible outcomes of the hearing in this case, which included dismissal if the charge was not proved and revocation of the Appellant's license and document if the charge was proved. Appellant acknowledged that he understood the possible results of the hearing. He was also apprised of the right to be represented by counsel and indicated that he was prepared to proceed *pro se*. After being apprised of his rights at the hearing, Appellant was instructed on the three answers to the charge that he could make, which included an admission, a denial, or an answer of no contest. Appellant answered no contest to the charge and was then instructed that an answer of no contest was the same as an

admission. Appellant responded that he understood this.

The Administrative Law Judge asked the Investigating Officer to make a statement, at which time the Investigating Officer stated what the Coast Guard would have proved through the testimony of the sample collector, the drug laboratory supervisor and the Medical Review Officer. The Investigating Officer stated that the Coast Guard would also have entered the collector's copy, the laboratory copy and the Medical Review Officer copy of the specimen chain of custody and control form. The Administrative Law Judge then requested that the Investigating Officer enter the documents into evidence, at which time the Investigating Officer produced facsimile copies of the collector's copy, the laboratory copy and the Medical Review Officer copy of the specimen chain of custody and control form. The Administrative Law Judge admitted these documents into evidence at the time they were submitted by the Investigating Officer.

The Administrative Law Judge then asked the Appellant if he had any statement that he wished to make. The Appellant introduced three letters from his present and past employers in the way of mitigation. He also stated that "I don't use drugs"

and stated that he had a urinalysis done on the day he was apprised of the positive result for marijuana, which was negative for the presence of drugs. Tr. at 20-21. No further inquiry by the Administrative Law Judge regarding these statements was made.

Subsequently, the Administrative Law Judge found that the charge and specification was proved by virtue of the answer and entered an order that revoked the Appellant's license and document.

## BASES OF APPEAL

On appeal, Appellant asserts the following as error:

1. He received bad advice from a third person to plea "no contest" to the *user of dangerous drugs* charge under the incorrect belief that a "no contest" plea would not result in adverse action against his documents. Based on this erroneous belief, Appellant did not present evidence, which would have shown he was not a drug user as charged.
2. The Administrative Law Judge did not advise Appellant, nor does the applicable statute define, what dangerous drugs are.
3. The positive drug result is the only apparent

"transgression" on Appellant's record.

Appellant requests that the opinion of the Administrative Law Judge be reversed or, in the alternative, that the case be remanded to allow the Appellant to present evidence to contest the allegations.

## OPINION

A

Appellant is required by regulation to answer either deny, no contest, or admit to each charge and specification. 46 C.F.R. 5.527. An answer of no contest is sufficient to support a finding of proved by the Administrative Law Judge. 46 C.F.R. 5.527(c); (Appeal Decision No. 2376 (FRANK)). As a result, all non-jurisdictional defects are waived by such an answer. Appeal (Decision No. 2385 (CAIN)). Thus, the order may not be set aside in such cases unless the answer was found to be improvidently made. (Appeal Decision No. 2458 (GERMAN)). Therefore, prior to eliciting an answer from a *pro se* respondent, the settled rule is that the Administrative Law Judge must be satisfied that the respondent understands the nature of the charges and the effect of an answer. (Appeal Decision No. 2466 (SMITH)).

In this case, the Administrative Law Judge asked the Appellant specifically if he understood that a "no contest answer is the same as an admission?" The Appellant responded, "Yes, sir, I understand that." Tr. at 12. Additionally, the Administrative Law Judge had informed the Appellant that:

> [t]here are just two possible results of this hearing. If the charge and specification are found not proved, the charge and specification will be dismissed. On the other hand, if the charge and specification are found proved, this hearing will result in the revocation of your license and Merchant Mariner's document. Do you understand the two possible results of the hearing?

The Appellant responded, "Yes, sir." Tr. at 6. Ordinarily, this inquiry by the Administrative Law Judge and the affirmative responses by the Appellant would suffice to indicate the Appellant understood the effect of the no contest answer he gave and its ramifications with regard to his license and document.

However, in cases involving admit and no contest answers, Administrative Law Judges must remain constantly vigilant for statements or evidence that are inconsistent with the answer. Appeal Decision Nos. (2559 (NIELSEN)); (2107 (HARRIS)); (1953 (CRUZ)). This is particularly true where, as here, Appellant proceeded *pro se* at the hearing below. *See* Appeal Decision Nos. (2559)

((NIELSEN)); (2466 (SMITH)).

Coast Guard regulations require that,

> [s]hould the respondent's presentation be inconsistent with an admission or answer of *no contest*, the Administrative Law Judge will reject the answer, enter a denial and continue with the hearing.

46 C.F.R. 5.533(b). In this case, after the close of the Investigating Officer's case, the Administrative Law Judge asked the Appellant if he had any statement that he wished to make. Appellant produced three letters from present and former employers, which were admitted into evidence. Additionally, Appellant stated:

> I want to say that I don't use drugs. I never have used narcotics or alcohol while operating as captain. I didn't consent to the random test. And the day they pulled me off the boat, I went down to Lafourche Medical Clinic and had another urinalysis done, and it come up negative. And I had it checked to 20 nanograms, and it -- I got a negative on it.

Tr. at 20-21. Appellant clearly, despite his answer of no contest to the charge of drug use, contended in his statement that he was not a drug user and stated that there was additional contradictory evidence, in the form of the subsequent drug test, to rebut the admission that he was a drug user made through his answer of no contest. In this case, "the failure of the Administrative Law Judge to detect the Appellant's assertions of innocence and in turn reject the Appellant's no contest plea in

accordance with 46 C.F.R. 5.533(b) . . . constitute[s] reversible error." (Appeal Decision 2559 (NIELSEN)).

B

Having determined that there is reversible error related to the failure of the Administrative Law Judge to follow the regulations controlling assertions of innocence by a respondent inconsistent with an admit or no contest answer, I am compelled to point out that the Investigating Officer also has a role in ensuring that procedural regulations are followed. The Investigating Officer presenting the case on behalf of the government must know the applicable regulations and must ensure that not only he or she, but also the Administrative Law Judge and the respondent, especially when the respondent is *pro se*, are apprised of the regulatory requirements when the requirements are not being followed. The Investigating Officer has a responsibility to forestall, to the best of his or her ability, potential issues for appeal.

In this case, the Investigating Officer should have been aware of the regulatory requirement in 46 C.F.R. 5.533(b) and, upon hearing Appellant's assertion of innocence that contradicted his no contest answer, should have apprised the

Administrative Law Judge of the applicable regulatory procedures and requested that a denial of the charge be entered on behalf of the respondent. It is apparent from the record that the Investigating Officer had the necessary government witnesses available and was prepared to proceed with the hearing had the denial been entered on behalf of the respondent as was proper in this case. Because of the failure to follow the procedural requirements in this hearing, on remand the Investigating Officer must now reconstruct the case, which is certainly more difficult to do at this time, if the decision is made to go forward with another hearing. This could have been prevented had the Investigating Officer taken appropriate action to protect the administrative process at the time of the hearing.

C

Review of the record indicates another issue that must be addressed. One of the tenets of administrative due process as established under the Administrative Procedures Act is that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

In this case, the Investigating Officer stated:

> Your Honor, the Coast Guard would have proved with evidence of a reliable and substantial nature the charge of use of drugs by the testimony of Kermit Griffin of Lafourche Industrial Medical Clinic, the collector of the specimen in question; the testimony of Dr. Lykissa, the supervisor at Drug Labs of Texas, the lab that analyzed the specimen; and the testimony of Dr. Robert Pflug, the medical review officer for Otto Candies, Inc., who was Mr. Dykes' employer on the 31st of May 1993.
>
> We would have also entered into the record the collector's copy, the laboratory copy, and the medical review officer's copy of the drug custody and chain of -- chain of custody and control form, Your Honor.
>
> And in light of the plea, we will not have to do any of those things except enter the documentary evidence.

Tr. at 12-13. The collector's copy, the laboratory copy and the Medical Review Officer's copy of the Urine Drug Testing Custody and Control Form for the Appellant's urine sample were then admitted into evidence. Aside from this documentary evidence, the Appellant's no contest plea, his unsworn statement and the documentary evidence he submitted in mitigation constituted the entire record for purposes of findings.

As part of the ultimate findings in this case, the Administrative Law Judge stated that "Drug Labs of Texas is a National Institute on Drug Abuse (NIDA) certified drug testing facility in accord with 46 C.F.R. 16.301." Review of the record and the evidence indicates that there is no evidence on the record that supports this finding nor is there any indication that judicial notice of this fact was taken.

Additionally, the Administrative Law Judge made ultimate findings that the laboratory results were forwarded to Dr. Robert K. Pflug, that Dr. Pflug was the assigned Medical Review Officer, and that Dr. Pflug determined that the Appellant's specimen contained marijuana metabolites. However, review of the evidence in the record supports none of these findings. The custody and control forms indicate that the assigned Medical Review Officer was Dr. Felix Bopp. The signature of the Medical Review Officer on the appropriate form is indistinguishable without any kind of identification or authentication. The only indication in the record that Dr. Pflug was the Medical Review Officer was the assertion of the Investigating Officer in his opening statement quoted above, which is not evidence and can not be considered as such. *See* Appeal Decision Nos. (2455) ((WARDELL)); (1716 (ROWELL)).

The Administrative Law Judge also made ultimate findings to the effect that Appellant's specimen, after collection, was packaged in a box and sent to Drug Labs of Texas. Once again, there is absolutely no evidence on the record on which these findings can be based. There was also an ultimate finding that the sample was subjected to precise and accurate scientific

analyses. The sole evidence on the record regarding testing is the faxed copies of the Urine Drug Testing Custody and Control Forms. The forms do not indicate the type of tests conducted or the manner in which they were conducted. There is an attestation on the laboratory copy of the form that, at the laboratory, the specimen was handled and analyzed "in accordance with applicable federal requirements." These federal requirements are not specifically identified on the form.

Additionally, the Administrative Law Judge states in the opinion section of the Decision and Order that Mr. Dykes' signature appears on the Custody and Control Form certifying that he provided the urine specimen to the collector and that it was sealed in a tamper-proof bottle marked with the proper identification number that appeared on the form, yet he did not ask the Appellant whether it was his signature that appeared on the form, nor was there any other evidence on the record to indicate that it was the Appellant's signature on the form.

Finally, faxed copies of the Urine Drug Testing Custody and Control Forms were admitted into evidence without any testimony as to their origin or authenticity other than the oral statement of the Investigating Officer. While strict adherence to Federal Rules of Evidence is not required at these hearings, the Rules

are the primary guide for evidentiary matters. 46 C.F.R. 5.537(a). Thus, there is a minimum level of identification and authentication that must occur before documentary evidence may be admitted on the record. This view is supported by the provisions of 46 C.F.R. 5.543, which states:

> [i]n addition to other rules providing for authentication and certification, extracts from records in the custody of the Coast Guard . . . may be identified and authenticated by certification of an investigating officer or custodian of such records, or by any commissioned officer of the Coast Guard. . . . Certification must include a statement that the certifying individual has seen the original and compared the copy with it and found it to be a true copy. The individual so certifying shall sign name, rank or title, and duty station. (Emphasis added)

In this case, there were faxed copies of documents admitted without any authentication or identification except for the Investigating Officer's statement of what the documents were. Given that the documents were faxed, it is unlikely that the Investigating Officer could have compared the faxed copies to the original as required by 46 C.F.R. 5.543. In any case, there is no certification from anyone indicating that the faxed documents were a true copy of the original. Thus, the faxed copies should not have been accepted into evidence.

An answer of no contest is sufficient to support a finding of proved by the Administrative Law Judge. 46 C.F.R. 5.527(c).

This is the sole reason for the conclusion that the charge was proved as expressed by the Administrative Law Judge during the hearing. Tr. at 22. If the Administrative Law Judge in his formal Decision and Order had found only that the Appellant had pleaded no contest and then concluded that the charge was proved by answer as authorized by the regulations, there would not be these evidentiary concerns. However, action in a case based on formal findings and opinions that are supported by no evidence on the record, or based on findings and opinions supported by evidence that has been entered into the record without any proper foundation, is disturbing. If formal findings are made, it must be presumed on review that the findings had a bearing on the decision in the case. The fact that the decision may be based on numerous findings which are not supported on the record by reliable, probative and substantial evidence might of itself have constituted reversible error in this case. The fact that reversible error was found on another basis renders this issue moot.

D

Finally, because the other issues raised by Appellant on appeal are moot by virtue of the reversible error found, I will not address them in this case.

## CONCLUSION

The Administrative Law Judge did not remain alert to the Appellant's assertion of innocence and reject the Appellant's no contest answer as required by the regulations. Because the Administrative Law Judge did not suspend the proceedings, reject Appellant's no contest answer, and enter an answer of "deny", the case should be remanded for further proceedings permitting the Appellant to put on a defense.

## ORDER

The decision and order of the Administrative Law Judge dated September 7, 1993, is VACATED, and the findings are set aside. The charge and specification are REMANDED for further proceedings consistent with this decision.

ROBERT E. KRAMEK
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 6th day of November, 1995.

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