UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	
	:	NO. 2704
MERCHANT MARINER LICENSE	:	
	:	
	:	
Issued to: MICHAEL AARON FRANKS	:	

APPEARANCES

For the Government:
CWO Christian Menefee, USCG
LT Christopher Jones, USCG
Coast Guard Sector Houston/Galveston
Mr. Brian C. Crockett
Suspension and Revocation National Center of Expertise

For Respondent:
Michael Aaron Franks, *pro se*

Administrative Law Judge: Dean C. Metry

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq*., 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated November 16, 2011, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard dismissed the Coast Guard's Complaint against Mr. Michael Aaron Franks (hereinafter "Respondent"). The Complaint alleged that Respondent was a user of or was addicted to the use of dangerous drugs. While the ALJ found that Respondent tested positive for cocaine metabolites during a drug test,

because the ALJ determined that Respondent's drug test was not conducted in accordance with the regulatory requirements of 46 C.F.R. Part 16 (the Coast Guard's chemical testing requirements), the ALJ found the Coast Guard's Complaint Not Proved and dismissed the matter with prejudice.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent's Merchant Mariner License on May 5, 2011. On May 10, 2011, Respondent filed his Answer to the Complaint, wherein he denied all jurisdictional and factual allegations.

The hearing convened at Houston, Texas, on October 17, 2011, and Respondent represented himself. At the hearing, the Coast Guard presented the testimony of five witnesses and introduced eight exhibits into the record. Respondent called one witness and offered one exhibit into the record.

Following the issuance of the ALJ's D&O dismissing the Complaint, on November 23, 2011, the Coast Guard filed a Motion for Reconsideration. In its Motion, the Coast Guard asserted that because the ALJ had found that Respondent tested positive for cocaine metabolites, under applicable Coast Guard case law precedent, the ALJ was required to find a *prima facie* case of drug use on the part of Respondent and order the revocation of his Merchant Mariner License. Respondent objected to the Coast Guard's Motion.

On December 14, 2011, the ALJ issued an Order wherein he rejected the arguments raised in the Coast Guard's Motion for Reconsideration and denied the relief requested by the Coast Guard.

On December 14, 2011, the Coast Guard filed its Notice of Appeal (appealing the original D&O). The Coast Guard perfected its appeal by filing its appellate brief on February 13, 2012. Respondent filed a Reply Brief on March 18, 2012. This appeal is properly before me.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner License issued to him by the United States Coast Guard. [D&O at 2, 10; Transcript (hereinafter "Tr.") at 134] On October 25, 2010, Respondent provided a urine specimen that the Coast Guard asserted was produced for a "periodic test" ordered by his employer. [D&O at 2, 10; Tr. at 13, 23, 38-39] 46 C.F.R. § 16.220 sets forth the Coast Guard's "Periodic testing requirements." Under the regulation, a periodic test is mandated when a mariner applies for an original issuance or a renewal of a Coast Guard-issued Merchant Mariner Credential or a raise of grade of a previously issued credential. However, as the ALJ said, the record is "devoid of any evidence tending to show why Respondent was asked to submit to a periodic drug test" and the "Coast Guard proffered nothing related to any change in licensing status on the part of the Respondent." [D&O at 8]

A certified specimen collector collected a split urine sample from Respondent. [D&O at 2; Tr. at 19, 23; Coast Guard Exhibit (hereinafter "CG Ex.") 1] Respondent's urine sample was sent to Alere Toxicology Service (hereinafter "Alere"), a DOT-certified laboratory, to be analyzed. [D&O at 2] Alere analyzed Respondent's specimen and determined that it was positive for cocaine metabolites. [D&O at 3, 10; Tr. at 67-68; CG Ex. 6] A Medical Review Officer discussed the positive drug test result with Respondent and, at Respondent's request, ordered that the split specimen be tested for confirmation. [D&O at 3; Tr. at 120-21, 128, 130-31; CG Ex. 3] On November 18, 2010, after confirmatory testing, a Medical Review Officer certified that Respondent's urine sample was positive for cocaine metabolites. [D&O at 4; CG Ex. 2]

BASES OF APPEAL

This appeal is taken from the ALJ's D&O finding Not Proved the charge of use of, or addiction to the use of, dangerous drugs. The Coast Guard raises the following bases of appeal:

I. The prima facie test for proving the use of a dangerous drug requires compliance with 49 C.F.R. Part 40, not 46 C.F.R. Part 16;

II. Evidence that a drug test was administered in accordance with Part 16, Subpart B is not a required element of the prima facie test for use of a dangerous drug; and,

III. Even if Part 16 applies to cases involving use of a dangerous drug, exclusion of reliable and positive drug [test] results is not the proper remedy.

OPINION

I.

Whether the prima facie test for proving the use of a dangerous drug requires compliance with 49 C.F.R. Part 40, not 46 C.F.R. Part 16

In this case, the ALJ found the Coast Guard's Complaint Not Proved after stating that although the Coast Guard alleged that Respondent failed a periodic drug test—a test expressly authorized within 46 C.F.R. Part 16—it had not provided any evidence to support a conclusion that the test administered to Respondent was actually periodic in nature.

The Coast Guard argues that because several Commandant Decisions on Appeal decided in and after 2002 state that a *prima facie* case of drug use is established when (1) the respondent was the person who was tested for dangerous drugs, (2) the respondent failed the test, and (3) the test was conducted in accordance with 49 C.F.R. Part 40, proof of compliance with 46 C.F.R. Part 16 is not required and the ALJ's decision to the contrary was not in accord with applicable law, precedent or public policy. The Coast Guard thus argues that "[t]he reason for testing has never been a concern in [Coast Guard] drug cases" and instead asserts that the "only concern has been the reliability of the testing process." Coast Guard Appeal Brief at 4.

While the Coast Guard acknowledges that the third element of a *prima facie* case was originally identified as mandating that the relevant drug test complied with the requirements set forth in 46 C.F.R. Part 16, it argues that the third element referred solely to the testing protocols set forth in 46 C.F.R. Part 16, subpart C as it existed until 2001. Coast Guard Appeal Brief at 4-5, *citing* Appeal Decisions 2560 (CLIFTON) (1995) and 2603 (HACKSTAFF) (1998). Accurately noting that subpart C was removed from 46 C.F.R. Part 16 in 2001, the Coast Guard argues that subsequent and more recent Commandant Decisions on Appeal, which identify the third element of the *prima facie* case as mandating compliance with 49 C.F.R. Part 40, control here, and the ALJ's decision mandating proof of compliance with 46 C.F.R. Part 16 must be overturned. Coast Guard Appeal Brief at 6 *citing* Appeal Decisions 2632 (WHITE) (2002), 2633 (MERRILL)

(2002), 2657 (BARNETT) (2006), 2662 (VOORHEIS) (2007), and 2668 (MERRILL) (2007). I do not agree.

A number of recent Commandant Decisions on Appeal recite 49 C.F.R. Part 40 as the third element of a *prima facie* case of drug use. Other decisions cite 46 C.F.R. Part 16 as the third element. *See* Appeal Decisions 2637 (TURBEVILLE) (2003), 2653 (ZERINGUE) (2005), 2679 (DRESSER) (2008), and 2697 (GREEN) (2011). This inconsistency invites clarification. I conclude, as explained below, that a *prima facie* case requires proof of compliance with Part 16, which includes the reason that the drug test was conducted.

46 C.F.R. Part 16 mandates that marine employers conduct five specific types of drug testing programs: 1) Pre-employment drug testing, 2) Periodic drug testing, 3) Random drug testing, 4) Serious marine incident drug testing, and 5) Reasonable cause drug testing. *See* 46 C.F.R. §§ 16.210-16.250. 46 C.F.R. § 16.201(a) provides, "Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40." Finally, 46 C.F.R. § 16.201(b) provides: "If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." This presumption is the source from which were drawn the *prima facie* case elements discussed herein. *See* Appeal Decisions 2583 (WRIGHT) (1997) and 2560 (CLIFTON) (1995).

The preamble to the Final Rule establishing 46 C.F.R. Part 16 addressed the constitutionality of the mandatory drug testing of maritime employees at length. That analysis shows that the drafters of 46 C.F.R. Part 16 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:

> The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures." . . .
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> * * *

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. Thus, the courts must ". . . consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel's navigation or operations do so free of prohibited substances. The drug problem in society in general and evidence of drug use in the maritime industry in particular are discussed elsewhere in the preamble of this final rule. The impairing effects of drugs and the substantial risks to public safety posed by merchant vessel personnel who use drugs underlies the compelling governmental interest in promulgating this rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. The drug testing requirements of the final rule place constraints on an employer's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule also are narrowly tailored to respect an employee's reasonable expectations of privacy. The procedures governing collection of urine samples, as referenced in the final rule, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging results.

* * *

While not totally free from doubt, it is the opinion of the Department of Transportation that the Coast Guard's anti-drug program, and similar drug testing regimens proposed by other administrations within the Department, will be determined to be constitutional. The critical need for properly administered drug

> testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their systems while performing sensitive safety- or security-related functions outweighs the reduced privacy interest of these employees.

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

Clearly, the procedures in 46 C.F.R. Part 16 were established not only to protect public safety interests, but also to ensure that the constitutional rights of the mariner were safeguarded throughout the drug testing process. By expressly mandating limited, specific types of drug tests — pre-employment, periodic, random, serious marine incident and reasonable cause drug tests — the drafters of the regulations ensured that constitutionally protected privacy interests of the mariner were balanced with the overriding need to ensure a drug-free and safe workplace. The drafters recognized that the Fourth Amendment applies and that testing undertaken by private employers to comply with Federal regulatory requirements constitutes Government action. Hence, when the employer tests to comply with 46 C.F.R. Part 16, the employer acts as an instrument or agent of the Government. *Cf. Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 611-615 (1989) (permissive breath or urine tests authorized by the Federal Railroad Administration regulations involve sufficient Government action to implicate the Fourth Amendment).

As the Coast Guard notes in its Appeal, the regulations in 46 C.F.R. Part 16 were changed in 2001 to, among other things, eliminate 46 C.F.R. Part 16, subpart C. At the time the regulations were changed, the Coast Guard stated that it was "revising its chemical drug testing regulations to conform with the Department of Transportation's (DOT) final rule on drug testing procedures in 49 CFR part 40." Chemical Testing, 66 Fed. Reg. 42,964 (Aug. 16, 2001). The agency further noted that the regulations were being revised "by removing obsolete sections and sections duplicating the DOT regulations; adding new definitions required by the DOT regulations; and modifying existing text to incorporate new terms and procedures contained in the DOT procedural requirements." *Id.*

The Coast Guard argues that the Commandant Decisions on Appeal that identified compliance with 46 C.F.R. Part 16 as the third element of the *prima facie* case — those typically adjudicated based on the regulation as it existed before the changes of 2001— should not be read as mandating compliance with all portions of the regulation, but rather should be interpreted as mandating only compliance with the portions of the regulation that addressed testing reliability, i.e., those portions of the regulation formerly set out in 46 C.F.R. Part 16, subpart C. Since most Commandant Decisions on Appeal issued after subpart C was removed from 46 C.F.R. Part 16 identified compliance with 49 C.F.R. Part 40 — which focuses on measures meant to ensure the reliability of the testing process — as the third element of the *prima facie* case, the Coast Guard surmises that the reason the test was conducted, whether it be pre-employment, periodic, random, serious marine incident, or reasonable cause, is of no consequence in these proceedings and only the reliability of the test should be considered.

Significantly, most of these cases, citing compliance with 49 C.F.R. Part 40 as the third element of the *prima facie* case, turned on the specific drug testing requirements set out in Part 40. *See, e.g.,* Appeal Decisions 2657 (BARNETT) (2006) and 2688 (HENSLEY) (2010). Each involved examination of the validity of the tests under examination rather than the reason why the test was undertaken.

Appeal Decision 2633 (MERRILL) (2002), decided after the regulatory change, also recited 49 C.F.R. Part 40 as the third element of the *prima facie* case. Mr. Merrill was a mariner who had not reported to a vessel and was not scheduled to work aboard a vessel on the relevant day but submitted to a "post injury chemical test" by his employer following a minor injury. The drug test was not among the types of tests specifically authorized by 46 C.F.R. Part 16, but the evidence suggested that Mr. Merrill may have voluntarily submitted to the test. Although the evidence otherwise met the three elements prescribed in the decision for a *prima facie case* — Mr. Merrill contributed the specimen, the result was positive, and the test met the Part 40 requirements — the case was nevertheless remanded to the ALJ to determine whether Mr. Merrill's drug test was voluntary under the exception initially set out in Appeal Decision 2545 (JARDIN) (1992). The result in *Merrill* indicates that the reason for the test was relevant to what constitutes a *prima facie*

case. If it were irrelevant, as the Coast Guard suggests in the case before me, there would have been no occasion for remand.

In Appeal Decision 2697 (GREEN) (2011), the key issue raised by the *pro se* Mr. Green was whether his drug test was truly random in nature and thus complied with 46 C.F.R. Part 16. Notably, the *Green* decision identified compliance with 46 C.F.R. Part 16 as the third element of a *prima facie* case of drug use in these proceedings and, in remanding the case to offer Mr. Green the opportunity to demonstrate that the test was not random, listed the reason for the test in question as part of the *prima facie* case. In identifying compliance with 46 C.F.R. Part 16 as the third element of a *prima facie* case, the decision cites to three decisions adjudicated under the pre-2001 Part 16 which referred to Part 16 compliance as the third element. Nevertheless, 46 C.F.R. Part 16 was apposite and 49 C.F.R. Part 40 was inapposite in *Green*, because the case did not involve the reliability of a drug test but rather whether, as in this case, the drug test itself was properly ordered under the regulations.

According to 46 C.F.R. § 16.201(b), an individual will be presumed to be a user of dangerous drugs "[i]f an individual fails a chemical test for dangerous drugs under this part," and "this part" includes the reasons for testing in subpart B. Further, 46 C.F.R. § 16.201(a) specifies that "[c]hemical testing of personnel must be conducted as required by this subpart [subpart B] and in accordance with the procedures detailed in 49 CFR part 40." By incorporating by reference the procedures in 49 C.F.R. Part 40, 46 C.F.R. § 16.201(a) affords further protection to mariners by establishing mechanisms to ensure the accuracy and reliability of drug testing procedures, while reaffirming that compliance with both subpart B and Part 40 is required. Both aspects of the drug testing process, the "why" and the "how", as the Coast Guard refers to them, are therefore fundamental in the establishment of a case of drug use based on government-mandated drug testing. Thus, a government-mandated drug test must be both properly ordered (in accordance with 46 C.F.R. Part 16) and properly conducted (in accordance with 49 C.F.R. Part 40). If it is not, the test cannot form the basis for suspension and revocation proceedings.

Ignoring compliance with Part 16's prerequisites for testing would expose mariners to potentially unreasonable government action, through employers' testing practices apparently

pursuant to the Coast Guard regulatory regime, without any practical recourse. Unreasonable drug testing undertaken by employers under the umbrella of the Coast Guard regulatory regime also risks judicial invalidation of the entire drug testing regime, which would be inimical to marine safety, the core interest underlying the regime.

The Coast Guard argues that including the reason for testing in the *prima facie* case frustrates the purpose of suspension and revocation proceedings which is to promote safety at sea. 46 U.S.C. § 7701(a); 46 C.F.R. § 5.5. Commandant Decisions on Appeal readily recognize this critical interest, but the choice was made to include in the regulations that govern Coast Guard-mandated drug testing constraints on the manner in which they are administered, which I cannot ignore.

A revocation decision is subject to review under the Administrative Procedure Act, and will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The drug-testing regulatory regime imposed on maritime employers enumerates reasons for testing, and requires employer compliance with those reasons. We cannot divorce one part of the regime from another and satisfy the Fourth Amendment. We cannot disregard part of the regime and claim to act in accordance with law.

Therefore, the ALJ did not err in relying on 46 C.F.R. Part 16 as the third element of a *prima facie* case of drug use in this case, and the Coast Guard's first basis of appeal is rejected.

II.

Whether evidence that a drug test was administered in accordance with Part 16, Subpart B is a required element of the prima facie test for use of a dangerous drug

The Coast Guard next argues that regardless of whether the drug test at issue was among the categories of tests authorized by 46 C.F.R. Part 16, prior Commandant Decisions on Appeal allow the admission of any drug test to support a conclusion that a mariner is a user of dangerous drugs. Based on three prior Commandant Decisions on Appeal, Appeal Decisions 2542 (DEFORGE) (1992) (evidence from any source, not only a drug test carried out pursuant to part 16, may be used to establish drug use under 46 U.S.C. § 7704), 2560 (CLIFTON) (1995) (the mere

fact that a specimen collection was for a purpose other than one authorized by Coast Guard regulations is not reason to exclude evidence obtained through a test of the specimen), and 2633 (MERRILL) (2002) (drug tests not authorized by Part 16 may form the basis for suspension and revocation action if the drug test was voluntarily taken), the Coast Guard concludes that "'why' a drug test is ordered is irrelevant to the ultimate determination of whether or not a mariner is a user of dangerous drugs." Coast Guard Appeal Brief at 7. Stated another way, the Coast Guard contends that any otherwise reliable positive drug test linked to a mariner should suffice to prove drug use, regardless of the impetus or other circumstances of the test. I do not agree.

The Coast Guard cites *Merrill*, discussed *supra*, to support its assertion that *any* drug test may be used to support a conclusion that a mariner is a user of dangerous drugs. *Merrill* and also Appeal Decision 2635 (SINCLAIR) (2002) follow Appeal Decision 2545 (JARDIN) (1992) in holding that an ALJ can rely on drug tests that are not conducted in accordance with 46 C.F.R. Part 16 to support the revocation of a mariner's credentials if the drug test was voluntary in nature.

The Coast Guard reads these cases too broadly. What they demonstrate is that a drug test not complying with Part 16 may be used to establish drug use when the drug test is not compelled by the Coast Guard's drug testing regulations. In these circumstances, the employer is not acting as an instrument or agent of the government, the constitutional harms that Part 16 seeks to avoid are absent, and the Coast Guard may place in evidence facts that tend to show drug use in order to prove a charge in accordance with 46 C.F.R. § 5.35. *See, e.g.*, Appeal Decision 2675 (MILLS) (2008) (Part 16 testing requirements are the "minimum standards, procedures, and means to be used to test for the use of dangerous drugs," 46 C.F.R. § 16.101(b), and a marine employer may require further drug testing under its own rules).[1] Adducing evidence outside of Part 16 appears to negate the regulatory presumption of drug use, which would presumably necessitate modest additional evidence to prove that the presence of metabolite in a non-Part 16 test means that the mariner used dangerous drugs, absent evidence to the contrary, in addition to evidence linking the results to the mariner and proving the reliability of the test, for example by demonstrating compliance with the particulars of Part 40.

[1] A complaint based on an alleged employer-required test independent of Part 16 should be subjected to close scrutiny to ensure that Part 16 has not been circumvented.

The Coast Guard cites Appeal Decision 2542 (DEFORGE) (1992) in part to contend that the "why" of a test is wholly irrelevant. In doing so, the Coast Guard cites dictum that is not illuminated by the context. *Deforge* sustained revocation of a license based on a positive urine test for marijuana, despite flaws in the testing protocol, because the discrepancies were "minor and technical in nature," and that reason for the result was consistent with a number of other Commandant Decisions on Appeal. This holding on the "how" of a test says nothing about the "why" of a test. *Deforge* cannot bear the weight the Coast Guard places on it in this respect.

The Coast Guard also cites Appeal Decision 2560 (CLIFTON) (1995). In the *Clifton* case, the respondent was subjected to an initial random drug test that became the basis for suspension and revocation action. Two days later, the respondent was subjected to a subsequent drug test for reasons outside the scope of 46 C.F.R. Part 16, which also yielded a positive test result. The second test was not a government-ordered test and, therefore, had no constitutional implications. At the hearing, evidence of the subsequent drug test result was entered into the record for impeachment purposes. Although the latter test was ordered for reasons outside the scope of 46 C.F.R. Part 16, the ALJ found that it could properly be entered into evidence in the proceeding as it lent strong inference and added further credibility to the initial drug test upon which the Coast Guard's case was predicated. The case does not support the Coast Guard's argument in this case, where the test on which the proceeding is based was purportedly ordered under 46 C.F.R. Part 16.

In this case, an apparently Part 16-mandated (government-ordered) test formed the basis for suspension and revocation action and the drug test was not voluntary or an otherwise admissible non-Part 16 test. Because the Coast Guard failed to show that the relevant drug test was properly ordered under 46 C.F.R. Part 16, it failed to establish the third element of its *prima facie* case and the ALJ was correct to dismiss the matter.

III.

Whether, even if Part 16 applies to cases involving use of a dangerous drug, exclusion of reliable and positive drug test results is the proper remedy

The Coast Guard's final argument is that the ALJ's decision to dismiss this case despite

reliable and positive drug test results represents an improper application of the Exclusionary Rule. The Coast Guard notes that in his D&O, the ALJ stated that an "absence of proof" regarding the reason for the drug test "presents Fourth Amendment concerns." Based on this statement, the Coast Guard asserts that the ALJ incorrectly implied that a drug test conducted outside the scope of 46 C.F.R. Part 16 would constitute an illegal search requiring exclusion of any evidence obtained as a result. The Coast Guard's argument is not persuasive.

The Exclusionary Rule prevents the government from using, in criminal proceedings, certain evidence gathered in violation of the Constitution. It applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Coast Guard case law precedent holds that the Exclusionary Rule does not apply to Suspension and Revocation proceedings. *See* Appeal Decisions 2625 (ROBERTSON) (2002), 2297 (FOEDISCH) (1983) and 2135 (FOSSANI) (1978). Therefore, even if drug test results are obtained improperly, the Exclusionary Rule is not applied to bar their admission in these proceedings.

In stating that the absence of proof that Respondent's drug test was periodic in nature presents Fourth Amendment concerns, the ALJ did not, in my view, invoke the Exclusionary Rule but, rather, simply acknowledged the Constitutional issues underlying the regulations. His statement does not support the Coast Guard's argument that he erred by applying the Exclusionary Rule. As previously stated, a *prima facie* case of drug use is established when (1) the respondent was the person who was tested for dangerous drugs, (2) the respondent failed the test, and (3) the test was conducted in accordance with 46 C.F.R. Part 16 (with the proviso that 46 C.F.R. Part 16 incorporates by reference the regulations in 49 C.F.R. Part 40). Under this rule, when the test was ordered pursuant to the regulations but the justification for it is not consonant with the regulations, or the test is not conducted in accordance with 49 C.F.R. Part 40 and is therefore unreliable, there is no *prima facie* case proved.[2]

Since this case was brought under Part 16, the ALJ found one element of the *prima facie*

[2] In the absence of the presumption and the associated *prima facie* elements, as noted in section II of this opinion, it is still possible to prove the use of dangerous drugs, but any drug test used in such a case must be a non-Part 16 test.

case, evidence showing the test was conducted as a periodic test, was missing. No exclusionary rule operated here. Once found not proved, the ALJ was required to dismiss, and had the discretion to dismiss with or without prejudice to refile. 46 C.F.R. § 5.567(a). The ALJ's decision to dismiss with prejudice was within his discretion and I see no reason to disturb it.

CONCLUSION

The ALJ's findings and decisions are lawful, based on the correct interpretation of the law, and supported by the evidence. The hearing was conducted in accordance with the law.

ORDER

The ALJ's Decision and Order dated November 16, 2011, is AFFIRMED.

Peter V. Neffenger
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 30th day of June, 2014.