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
vs.	:	
	:	ON APPEAL
MERCHANT MARINER DOCUMENT and	:	
LICENSE	:	NO. 2657
	:	
	:	
Issued to: JAY W. BARNETT	:	

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

By a Decision and Order (hereinafter "D&O") dated May 13, 2003, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, revoked Jay W. Barnett's (hereinafter "Respondent's") mariner credentials upon finding proved a charge of use of a dangerous drug. The charge was based on a single specification of use of, or addiction to the use of, dangerous drugs in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. The Complaint alleged that on September 17, 2002, Respondent submitted to a random drug test and provided a urine sample that tested positive for the presence of marijuana metabolites.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent's mariner credentials on October 23, 2002. [D&O at 2] On November 8, 2002, Respondent filed both his Answer to the Complaint, wherein he denied all jurisdictional and factual allegations, and a

Motion for Change of Venue and Continuance of the Hearing. [D&O at 2] On November 25, 2002, for good cause shown, Respondent's change of venue request was granted and the ALJ ordered that the hearing location originally suggested in the Complaint (Daphne, Alabama) be moved to Coast Guard Marine Safety Office New Orleans, Louisiana. [D&O at 2-3]

On January 28, 2003, Respondent filed a Verified Motion for Disqualification of the ALJ (hereinafter "Motion for Disqualification"). [D&O at 3] The Hearing convened the following day and Respondent was represented by counsel. [D&O at 3; Transcript (hereinafter "Tr.") at 6] When the hearing began, oral argument regarding Respondent's Motion for Disqualification was heard. [D&O at 3; Tr. at 14-23]. After considering the arguments presented, the ALJ denied Respondent's Motion for Disqualification and proceeded with the hearing. [D&O at 3; Tr. at 23]. Thereafter, the Coast Guard called three witnesses and introduced four exhibits into evidence while Respondent called one witness and introduced seven exhibits into evidence. [D&O at 3]

At the close of the hearing, the ALJ ordered the submission of post-hearing briefs and proposed findings of fact and conclusions of law by March 17, 2003. [D&O at 3] On February 21, 2003, rather than filing the post hearing documents ordered by the ALJ, Respondent filed a Second Verified Motion for Disqualification (hereinafter "2nd Motion for Disqualification"), alleging both bias and that the ALJ improperly entertained *ex parte* communications at the hearing. [D&O at 3; 2nd Motion for Disqualification at 2-3] The Coast Guard filed a post-hearing brief and an opposition to Respondent's 2nd Motion for Disqualification on March 14, 2003. [D&O at 3] The ALJ issued an Order Denying

Respondent's 2nd Motion for Disqualification on April 4, 2004. [D&O at 4] The ALJ issued his D&O on May 13, 2003. [D&O at 16]

On May 19, 2003, Respondent filed his Notice of Appeal. Respondent perfected his appeal by filing his appellate brief on May 28, 2003. Therefore, this appeal is properly before me.

APPEARANCES: Mac Morgan, Esq., Post Office Box 24501, 879 Robert E. Lee Boulevard, New Orleans, Louisiana, 70124, for Respondent. The Coast Guard was represented by MST1 Ray S. Robertson, USCG, Marine Safety Office Mobile, Alabama.

FACTS

At all relevant times, Respondent was a holder of merchant mariner credentials issued by the United States Coast Guard. [D&O at 4; Tr. at 9-10] On September 17, 2002, pursuant to customary procedure, Respondent was selected for random drug testing. [D&O at 4] As a result of the random selection, Ms. Tabitha Straughter, a certified medial assistant/drug screen collector and employee of Marine Medical Unit collected a urine sample from Respondent. [D&O at 4-5] The sample was collected, secured, and identified in accordance with applicable Department of Transportation (DOT) drug testing procedure. [D&O at 5-6; Tr. at 94-95; Investigating Officer (hereinafter "IO") Exhibit 3] Following collection, Respondent's sample was sent via courier to Quest Diagnostics' laboratory in Atlanta, Georgia, where it was to undergo customary drug testing. [D&O at 6; Tr. at 96-97; IO Exhibit 3]

At Quest Diagnostics' laboratory, Respondent's sample was subjected to initial screening for the presence of prohibited substances on September 18, 2002. [D&O at 6-7; Tr. at 40-42; 49; IO Exhibit 1] Because the initial screening showed that Respondent's

sample was positive for the presence of marijuana metabolites; it was subjected to a gas chromatography mass spectrometry confirmation (GCMS) process to verify the positive test result. [D&O at 7; Tr. at 41-42, 49; IO Exhibit 1] A medical doctor reviewed the GCMS results and confirmed that Respondent's sample was, in fact, positive for the presence of marijuana metabolites. [D&O at 7; Tr. at 42, 46-48; IO Exhibit 2]

BASES OF APPEAL

This appeal is taken from the ALJ's D&O finding proved the charge of use of, or addiction to the use of, dangerous drugs. Respondent raises the bases of appeal summarized below:

I. *The Coast Guard failed to establish a prima facie case of drug use and, as a result, the ALJ erred in finding the Coast Guard's case proved.*

II. *The ALJ erred in admitting the telephone testimony of the Coast Guard's witnesses;*

III. *The ALJ erred in admitting the testimony of the Coast Guard's witnesses and the Coast Guard's exhibits;*

IV. *The ALJ erred in his denial of Respondent's motions for disqualification; and,*

V. *Commandant Decision on Appeal No. 2535 (Sweeney), was an abuse of discretion, arbitrary and capricious, and improper rule making which deprived Respondent of the ability to raise the statutory defense of cure as provided for in 46 U.S.C. § 7704(c).*

OPINION

I.

The Coast Guard failed to establish a prima facie case of drug use and, as a result, the ALJ erred in finding the Coast Guard's case proved.

A mariner credential issued by the Coast Guard must be revoked if it is shown that the holder has been a user of dangerous drugs. 46 U.S.C. § 7704(c). Pursuant to

Coast Guard regulation, if a mariner fails a drug test, he is presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b); Appeal Decisions 2584 (SHAKESPEARE) and 2529 (WILLIAMS). To prove use of a dangerous drug, the Coast Guard must establish a *prima facie* case of drug use by the mariner. *See* Appeal Decisions 2592 (MASON), 2589 (MEYER), 2584 (SHAKESPEARE), 2583 (WRIGHT), 2282 (LITTLEFIELD), 2379 (DRUM) and 2529 (WILLIAMS).

In a drug case based solely upon urinalysis test results, a *prima facie* case of use of a dangerous drug is shown when three elements are proved: (1) that a party is tested for use of a dangerous drug; (2) that test results show that the party tested positive for the presence of a dangerous drug; and (3) that the drug test is conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. Appeal Decisions 3632 (WHITE), 2603 (HACKSTAFF), 2598 (CATTON), 2592 (MASON), 2589 (MEYER), 2584 (SHAKESPEARE), and 2583 (WRIGHT). In considering the proof of these elements, it must be kept in mind that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decisions 2575 (WILLIAMS), 2522 (JENKINS), 2537 (CHATHAM); 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994), 2546 (SWEENEY), *aff'd sub nom* NTSB Order No. EM-176 (1994). Furthermore, if Respondent produces no evidence in rebuttal to proof of the three elements, "the ALJ may find the charge proved on the basis of the presumption [of drug use] alone." Appeal Decision 2603 (HACKSTAFF); *see* 33 C.F.R. § 20.703 (a presumption in a Coast Guard administrative hearing imposes on the party against whom it lies the burden of going

forward with evidence to rebut or meet the presumption, but does "not shift the burden of proof in the sense of the risk of non-persuasion").

On appeal, Respondent contends that the Coast Guard failed to prove any of the required elements of a *prima facie* case and, as a result, that the ALJ erred in finding the Coast Guard's drug use charge proved. With respect to the first element of a *prima facie* case—that Respondent was tested for use of a dangerous drug—Respondent contends that because the witness the Coast Guard presented to provide evidence of the element (Ms. Tabitha Straughter) could not remember either how she identified Respondent at the time of collection or where the collection took place, "competent evidence does not exist for the ALJ's conclusion that the Coast Guard carried its burden of establishing…that the respondent was the person who was tested." [Brief of Appellant at 9] With respect to the second element—that test results show that Respondent tested positive for presence of dangerous drugs—Respondent contends that the ALJ erred in admitting the Coast Guard's copy of the Drug Testing Custody and Control Form (hereinafter "DTCCF") into evidence because the document was not properly certified and was authenticated solely by hearsay testimony. As a result, Respondent concludes that the ALJ's finding that the Coast Guard proved this element of its *prima facie* case "was not based on competent evidence and the ALJ's decision to the contrary must be reversed." [Brief of Appellant at 7] Finally, with respect to the third element of the Coast Guard's *prima facie* case—that drug testing was conducted in accordance with 40 C.F.R. Part 40—Respondent contends that the testimony offered by the Coast Guard to prove this element, specifically testimony concerning the sufficiency of medical review, was insufficient because it was not provided by the Medical Review Officer of record in Respondent's case, was based

solely on hearsay and, as a result, did not provide "competent evidence…to support the ALJ's conclusion that the Coast Guard established the medical review prong of its *prima facie* case." After a thorough review of the record, I do not find Respondent's first basis of appeal to be persuasive.

A.

To establish the first element of its *prima facie* case—that Respondent was tested for dangerous drugs—the Coast Guard entered both the testimony of Ms. Tabitha Straughter and the DTCCF into evidence. [Tr. at 85-115; IO Exhibit 1] Ms. Straughter testified that she is a "certified medical assistant and certified drug screen collector" who has made numerous sample collections under DOT guidelines. [Tr. at 89-90] More importantly, Ms. Straughter testified that Respondent—who she positively identified through either his driver's license or merchant mariner document—provided a urine sample to her for drug screening on September 17, 2002. [Tr. at 90] In describing the collection process, she testified that after Respondent provided a urine sample, that sample was split into two bottles which Respondent sealed with tamper-resistant materials and initialed in her presence. [Tr. at 94-95] Finally, Ms. Straughter testified that she observed Respondent sign the DTCCF and, in so doing, certify: 1) that he provided his specimen to the collector; 2) that he did not adulterate the specimen; 3) that each specimen was sealed in his presence; and, 4) that the information that he provided during the completion of the DTCCF and on the seals affixed to the sample bottles was correct. [Tr. at 95-96] Over Respondent's objection, the DTCCF was admitted into evidence as IO Exhibit 1[1]. [Tr. at 43-44]

[1] The admissibility of the DTCCF is discussed in Part B, below.

At the hearing, Respondent's counsel attacked Ms. Straughter's credibility through vigorous cross-examination. [Tr. at 98-111] In so doing, Respondent argued that it was improbable that Ms. Straughter had an actual recollection of Respondent's collection because she, herself, testified that she had taken "[g]reater than 100" urine samples since taking Respondent's and admitted that she could not remember either the name of the vessel that the collection took place on or whether she verified Respondent's identity with his driver's license or merchant mariner credential. [Tr. at 98-111]

In his D&O, the ALJ found that "[t]he Coast Guard demonstrated that the Respondent was tested for marijuana metabolites." [D&O at 10] In addition, the ALJ specifically addressed Ms. Straughter's testimony in footnote 5 of his D&O as follows:

> In this case, Ms. Straughter could not remember whether she verified Respondent's identity with his driver's license or merchant mariner's document. Moreover, she was unable to recall the name of the vessel she boarded to obtain the specimen sample. However, she did recall this particular collection because one of the two vessels, which were docked side-by-side, sank. Ms. Straughter recalled collecting a specimen from the Respondent who was not on the vessel which sank. Ms. Straughter stated, "I was on the right vessel at the right time." [citations omitted]

[D&O at 5, n. 5]

On appeal, Respondent asserts that the ALJ erred in finding that there was "competent evidence" to support a conclusion that Respondent was tested for dangerous drug use. He bases this conclusion on his unsupported assertion that:

> When a witness' recollection comes from looking at the custody and control form, and the witness cannot remember the name of the vessel or how she identified the donor, other than making an assumption that she followed normal practice in that regard, competent evidence does not exist for the ALJ's conclusion that the Coast Guard carried its burden of establishing the final prong of its *prima facie* case, that is, that the respondent was the person who was tested.

[Brief of Appellant at 9] After a thorough review of the record, I do not find Respondent's assertion in this regard to be persuasive.

It is the sole purview of the ALJ to determine the weight of the evidence and to make credibility determinations. Appeal Decision 2156 (EDWARDS), Appeal Decision 2116 (BAGGETT), Appeal Decision 2472 (GARDNER). In this case, although Respondent's counsel questioned the veracity of Ms. Straughter's statement that she had an independent recollection of Respondent's sample collection, the ALJ found her testimony to be credible. I do not find that the ALJ erred in so determining. In addition, as I mentioned above, the record contains a copy of the DTCCF which shows that Respondent, himself, certified that he provided Ms. Straughter with the urine sample that ultimately tested positive for the presence of marijuana metabolites. [IO Exhibits 1] A review of the record shows that Respondent did not deny either providing a urine sample for testing to Ms. Straughter or certifying that he had done so on the DTCCF on September 17, 2002. Therefore, I do not find the ALJ's determination that the Coast Guard established the first element of its *prima facie* case—that respondent was tested for drug use—to be arbitrary, capricious, or an abuse of his discretion. The ALJ's finding in that regard was supported by evidence in the record and will not be disturbed.

B.

Respondent next contends that the ALJ erred in finding sufficient evidence in the record to support a conclusion that the Coast Guard proved the second element of its *prima facie* case—that test results show that the Respondent tested positive for dangerous drugs. As proof of this element, the Coast Guard offered a copy of the DTCCF, which showed that urine identified as Respondent's tested positive for the presence of marijuana

metabolites and the Chain of Custody Form for Respondent's sample. [IO Exhibits 1 and 2] At the hearing, the Coast Guard called Mr. Edward Azary, Laboratory Director of Quest Diagnostics (the laboratory that conducted testing of Respondent's sample) to authenticate the DTCCF. [Tr. at 33-52] As I have already noted, over Respondent's objection, the ALJ admitted the DTCCF into evidence as IO Exhibit 1. [Tr. at 43-44] Upon consideration of evidence contained in the DTCCF, the ALJ found that "[t]he Coast Guard demonstrated that Respondent was tested for marijuana metabolites." [D&O at 10]

On appeal, Respondent challenges the admissibility of IO Exhibit 1 and asserts, in effect, that because the DTCCF was improperly admitted, the ALJ erred in finding the second element of the Coast Guard's *prima facie* case proved. To that end, Respondent contends that the ALJ erred in admitting IO Exhibit 1 into the record because the document did not state on its face that it was "Copy 1" and because the document, itself, was not "properly certified or authenticated." [Brief of Respondent at 3-7] After a thorough review of the record, I do not find Respondent's assertions, in this regard, to be persuasive.

In Coast Guard suspension and revocation proceedings, the ALJ has broad authority to admit any evidence that he deems relevant or which makes the existence of a material fact more or less probable. 33 C.F.R. § 20.802; Gallagher v. National Transp. Safety Bd., 953 F.2d 1214, 1218 (10th Cir. 1992). In addition, the Coast Guard's procedural rules require that the ALJ "regulate and conduct the hearing so as to bring out all relevant and material facts and to ensure a fair and impartial hearing." 46 C.F.R. § 5.501. Relevant evidence is defined as "evidence tending to make the existence of any

material fact more probable or less probable than it would be without the evidence." 33 C.F.R. § 20.802. As a result, Coast Guard regulations make expressly clear that "[t]he ALJ may admit any relevant oral, documentary, or demonstrative evidence, unless privileged." 33 C.F.R. § 20.802.

It is well-settled that I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). In this case, there can be no question that IO Exhibit 1 was relevant; it provided evidence to show—among other things—that Respondent provided a urine sample that was tested for the presence of illegal drugs and that Respondent's urine sample tested positive for the presence of marijuana metabolites. Since strict adherence to the rules of evidence observed in courts is not required in Coast Guard suspension and revocation proceedings and, as I have already stated, all relevant and material evidence may be received into evidence, I do not find that the ALJ erred in admitting IO Exhibit 1 into the record. Accordingly, I find sufficient evidence in the record to support the ALJ's conclusion that the Coast Guard established the second element of its *prima facie* case—that test results show that Respondent tested positive for dangerous drugs.

C.

Finally, Respondent contends that the ALJ erred in finding that the Coast Guard presented sufficient evidence to establish the third element of its *prima facie* case—that Respondent's drug test was conducted in accordance with the procedures set forth in

49 C.F.R. Part 40 (the Department of Transportation's regulations establishing the "Procedures for Transportation Workplace Drug and Alcohol Testing Programs"). 49 C.F.R. Part 40 requires, in addition to many other things, that a Medical Review Officer review drug test results to ensure that all regulatory procedures are followed during the sample collection and testing processes and that individuals whose samples have tested positive for the presence of illegal drugs do not have legitimate medical reasons for their confirmed positive test results.

On appeal, Respondent focuses on what he calls the "medical review" prong of the Coast Guard's *prima facie* case and asserts that although "[t]he ALJ knew that the witness who needed to be called by the Coast Guard on the medical review prong of its *prima facie* case was the actual Medical Review Officer and not someone who is 'not qualified as a medical review officer and…not a medical doctor'," the Coast Guard failed to elicit the Medical Review Officer's testimony and, as a result, the record does not contain "competent evidence…to support the ALJ's conclusion that the Coast Guard established the medical review prong of its *prima facie* case." [Brief of Appellant at 8] I disagree.

In Coast Guard suspension and revocation proceedings, it is the duty of the ALJ to evaluate the evidence presented at the hearing and to make ultimate findings of fact pertaining to each specification. Appeal Decisions 2472 (GARDNER), 2395 (LAMBERT), 2156 (EDWARDS), and 2116 (BAGGETT). As I have already noted, I may only reverse the ALJ's findings when they are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2581 (DRIGGERS), 2570 (HARRIS), *aff'd* NTSB Order No. EM-

182 (1996), 2390 (PURSER), 2363 (MANN), 2474 (CARMIENKE), 2344 (KOHAJDA), and 2333 (AYALA). In addition, the findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. Appeal Decisions 2492 (RATH), 2395 (LAMBERT) and 2282 (LITTLEFIELD).

While Appellant is correct that the Medical Review Officer responsible for the handling of his case did not testify at the hearing, he fails to acknowledge that the record contains other evidence to support the ALJ's conclusion that Respondent's drug test was conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. First and foremost, the record contains the testimony of Dr. Edward Azary, Laboratory Director of Quest Diagnostics (the laboratory that conducted testing of Respondent's sample) and Mr. George M. Ellis, Jr., President of Greystone Health Sciences (the company responsible for conducting the medical review of the administration of Respondent's case). At the hearing, Dr. Azary described the testing procedures followed by his laboratory while Mr. Ellis explained the events that transpired after Respondent's sample was initially found to be positive for the presence of marijuana metabolites (including the medical review that occurred in Respondent's case). [Tr. at 42-70] With respect to the latter, Mr. Ellis concluded as follows at the hearing:

> Based on my review of the document that has just been discussed, specifically Copy 2, medical review officer copy of the custody and control form, as well as Copy 1, laboratory copy of the custody and control form, all those documents appear to have been complete and completed in accordance with all of the requirements of 49 C.F.R. Part 40 and absent additional evidence, these documents, in my professional opinion and experience, document a verified positive test in the case of Mr. Barnett [Respondent].

[Tr. at 69]

The testimony of Dr. Azary and Mr. Ellis was supported by the admission of IO Exhibits 1, 2, 3 and 4. [Tr. at 44; 61] IO Exhibit 1, discussed at length above, is the DTCCF. Most importantly, the DTCCF identifies the procedures followed by a laboratory during the sample testing process and contains information regarding a sample's chain of custody and primary specimen and split specimen test results. [IO Exhibit 1] IO Exhibit 2 is the final laboratory report that summarized Respondent's test results and validated Respondent's positive result of 83 nanograms of THC per milliliter of urine. [IO Exhibit 2] IO Exhibit 3 is the Medical Review Officer's copy of the Chain of Custody Form for Respondent's sample which shows, in a block identified as "Step 6," that the Medical Review Officer, Dr. Thomas Dosumu-Johnson, conducted a medical review of Respondent's case package and concluded that the testing of Respondent's sample and a subsequent interview of Respondent showed not only that Respondent's test was conducted in accordance with applicable regulation, but also that Respondent had not presented a valid medical explanation for his positive test result. The Medical Review Officer certified that Respondent had tested "positive" for illegal drugs by signing his name on this Form. [IO Exhibit 3] Finally, IO Exhibit 4, a letter written by Mr. Ellis to the Coast Guard, shows both that Respondent tested positive for the presence of marijuana metabolites and that a medical review of Respondent's case showed that all testing was conducted "under the policy guidelines established by the Department of Transportation and the U.S. Coast Guard." [IO Exhibit 4]

Therefore, because the record contains competent, reliable evidence to support the ALJ's conclusion that Respondent's "drug test was conducted in accordance with Department of Transportation Guidelines in 49 CFR Part 40," I do not find that the ALJ

erred in so finding. As a result, I find sufficient evidence in the record to support the ALJ's conclusion that the Coast Guard established the final element of its *prima facie* case of drug use and I will not overturn the ALJ's findings in that regard.

II.

The ALJ erred in admitting the telephone testimony of the Coast Guard's witnesses.

On appeal, Respondent challenges the use of telephone testimony on three grounds. First, citing 33 C.F.R. § 20.707(a), Respondent contends that the Coast Guard "failed to follow its own regulation" in eliciting the telephone testimony of its witnesses because the Coast Guard did not file "a motion for permission to present testimony by telephone." [Respondent's Appeal Brief at 10] Next, Respondent contends, citing Administrative Law Judges Internal Practices and Procedures Policy No. 16722.4, that in failing to file a motion for permission to present telephone testimony, both the Coast Guard and the ALJ erred in failing "to follow…[their]…own policy." [D&O at 11] Finally, Respondent contends—under the premise that "a federal regulation cannot trump an Act of Congress"—that because neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure allow the telephone testimony of witnesses, "it was error for the ALJ to permit it over…[Respondent's]…objection." [Respondent's Appeal Brief at 12] In the same vein, Respondent further asserts that the use of telephone testimony at his hearing violated "his fundamental constitutional and regulatory rights to a fair hearing" because the telephone testimony "deprived…[him]…of meaningful cross-examination because he did not have the benefit of being able to personally confront the Coast Guard's witnesses." [Respondent's Appeal Brief at 12; 14] As a result, Respondent concludes that the telephone testimony should be stricken from the record and the ALJ's

D&O dismissed with prejudice. For the reasons set forth below, I do not find Respondent's assertions in this regard to be persuasive.

A.

Respondent first contends that the ALJ erred in allowing the telephone testimony of Coast Guard witnesses because the Coast Guard failed to file a pre-hearing motion requesting telephone testimony. Respondent contends that such a motion is required pursuant to 33 C.F.R. § 20.707(a).

33 C.F.R. § 20.707(a) states that:

> The ALJ may order the taking of the testimony of a witness by telephonic conference call. A person presenting evidence may by motion ask for the taking of testimony by this means. The arrangement of the call must let each participant listen to and speak to each other within the hearing of the ALJ, who will ensure the full identification of each so the reporter can create a proper record.

While I agree with Respondent that 33 C.F.R. § 20.707(a) requires that a "person presenting evidence" make a motion requesting that such evidence be presented by telephone testimony, I do not agree that the procedural rules require that such motions be made in writing prior to the commencement of the hearing.

The rule governing general motion practice in Coast Guard suspension and revocation proceedings is found at 33 C.F.R. § 20.309. While I acknowledge that the regulation primarily focuses on the filing of written motions, I do not believe that it requires either that all procedural motions be filed before a hearing commences or that all motions be in writing. Indeed, the regulation states that "[e]ach motion must be in writing; except that one made at a hearing will be sufficient if stated orally upon the record, unless the ALJ directs that it be reduced to writing." *See* 33 C.F.R. § 20.309(c). Therefore, a party may, contrary to Respondent's assertion, comply with the applicable

procedural regulations by either filing a written motion for telephone testimony in advance of the hearing or by orally requesting the use of telephone testimony at the hearing.

In this case, the record shows that the Coast Guard did not file a written motion for telephone testimony prior to the hearing. However, the IO made a request to the ALJ for telephone testimony at the hearing prior to calling his first witness. Respondent strongly objected. [Tr. at 28-32] Thereafter, the following discussion took place:

> THE COURT:
> Do you need additional time to prepare your defense, Mr. Morgan?
>
> MR. MORGAN:
> I don't know, Judge…They've announced that they're ready. They've announced, just less than five minutes ago that they're ready.
>
> Now, if they haven't complied, it shouldn't be at my client's detriment because he's ready to go.
>
> They haven't filed the necessary motions. They haven't complied with the disclosure rules in a timely manner. And then when they did attempt to comply, it wasn't complete.
>
> I'd ask the ALJ to follow the regulations and exclude the testimony. We've made our record and we're waiting for a ruling.
>
> THE COURT:
> I'm not going to exclude the testimony. If you want additional time, I will grant it to you.
>
> You want additional time?
>
> MR. MORGAN:
> Judge, I've made my objections. You've made your ruling.
>
> THE COURT:
> All right. Go ahead with your case, Mr. Investigating Officer.

[Tr. at 31-32] Respondent reasserted his objection to the use of telephone testimony before the Coast Guard called its second witness, a witness who was also set to testify via

telephone conference call. [Tr. at 52; 54-55] Thereafter, the ALJ again offered Respondent "additional time" to prepare his defense and Respondent refused, electing to continue on with the hearing. [Tr. at 55]

Regardless of how the Coast Guard made its request for telephone testimony, the record shows that the ALJ offered Respondent additional time to prepare, thus, preventing the perceived procedural defect from causing any harm to Respondent. Respondent failed to avail himself of such cure. Since the ALJ has a duty to construe the applicable procedural rules "so as to secure a just, speedy, and inexpensive determination" in these proceedings and given Respondent's election to continue on with the hearing after being offered additional time to prepare, I do not find that the ALJ erred in allowing the use of telephone testimony in this case. *See* 33 C.F.R. § 20.103(a).

B.

Respondent next contends that in failing to file a motion for telephone testimony, the Coast Guard "failed to follow its own policy and the failure of the ALJ to enforce that policy…requires that the testimony of Mr. Azary and Mr. Ellis, as well as the exhibits in connection with their testimony, be stricken from the record." Respondent supports his assertion, in this regard, by citing Administrative Law Judges Internal Practices and Procedures Document ALJIPP 16722.4, 04 March 1986. Respondent's reliance on ALJIPP 16722.4 is misplaced.

A careful reading of ALJIPP 16722.4 shows that the document is intended only to serve as guidance for ALJs regarding the issue of telephone testimony. On its face, the ALJIPP states that it seeks to "establish maximum flexibility" for ALJs with respect to

telephone testimony and, in so doing, promulgated "no fixed rules" on the subject. Accordingly, an ALJ cannot contravene Coast Guard policy by failing to follow the ALJIPP. Moreover, the ALJIPP, itself, must be viewed in the proper historical context. The ALJIPP was promulgated in 1986, when the use of telephone testimony in Coast Guard suspension and revocation proceedings was first being explored. While it is customary to utilize telephone testimony in suspension and revocation proceedings today, that was not the case in the early to mid 1980s, even though the then existing regulations expressly allowed for the use of telephone testimony in certain circumstances, such as the taking of depositions.[2] It was within this background that the ALJIPP was promulgated, to offer guidance to Coast Guard ALJs regarding the use of a burgeoning technology. Since the issuance of the ALJIPP, the use of telephone testimony has been addressed in numerous Commandant Decisions on Appeal and has, in most circumstances, been upheld as a mechanism necessary to ensure that neither the government nor Respondents are unnecessarily burdened by being required to secure the in-person testimony of witnesses whose primary residence or place of business is far removed from the hearing location. *See e.g.,* Appeal Decisions 2492 (RATH) and 2476 (BLAKE) (both cases, from the late 1980s, affirm ALJ decisions allowing the use of telephone testimony because its use is consistent with both the principles of due process and notions of judicial economy). Viewed in this context, Respondent's reliance on ALJIPP 16722.4 is misplaced.

C.

Respondent's final contention with respect to telephone testimony is two-fold. First, Respondent contends that the Coast Guard's regulation allowing the telephone

[2] The predecessor to the current "telephone testimony" regulation, 33 C.F.R. § 20.707, was found at 46 C.F.R. § 5.535(f).

testimony of witnesses, 33 C.F.R. § 20.707, is not in accord with two Acts of Congress—the Federal Rules of Evidence and the Federal Rules of Civil Procedure (hereinafter "Federal Rules" or "Rules")—which do not allow the testimony of witnesses by telephone. As a result, Respondent contends that because the Federal Rules "take precedence over inconsistent or unconstitutional Coast Guard regulations," the ALJ erred in allowing the telephone testimony of the Coast Guard's witnesses over Respondent's objection. [Respondent's Appeal Brief at 12] Second, Respondent contends that the ALJ violated his due process rights by allowing Coast Guard witnesses to testify by telephone at the hearing because, in so doing, the ALJ deprived Respondent "of meaningful cross-examination because he did not have the benefit of being able to personally confront the Coast Guard's witnesses." [*Id.*] I do not find either of Respondent's assertions persuasive.

First, contrary to Respondent's assertion, the Federal Rules are not applicable to all proceedings; rather, their applicability is determined by the Rules, themselves. A review of the Rules shows that although they govern procedures in numerous courts of the United States, they are not expressly made applicable to either administrative proceedings, in general, or Coast Guard suspension and revocation proceedings in particular. *See* Fed. R. Evid. 101; Fed. R. Evid. 1101; Fed. R. Civ. P. 1; Fed. R. Civ. P. 81. As a result, administrative agencies, like the Coast Guard in this case, "are not bound by the strict rules of evidence governing jury trials." *See, e.g.,* Sorenson v. National Transp. Safety Bd., 684 F. 2d 683, 686 (10th Cir. 1992). Therefore, because strict adherence to the Federal Rules is not required in these proceedings, there is no conflict

between the Coast Guard's regulation that allows the use of telephone testimony and the Federal Rules which prohibit such testimony.

Respondent's second assertion—that the use of telephone testimony deprived him of the right to "personal confrontation" and "destroyed…his fundamental constitutional and regulatory rights to a fair hearing"—similarly fails. [Respondent's Appeal Brief at 13-14]

In addition to the fact that 33 C.F.R. § 20.707 expressly authorizes an ALJ to hear the testimony of a witness by telephone, it is worth noting that personal confrontation is not a right of the Respondent at a suspension and revocation hearing. Appeal Decisions 2538 (SMALLWOOD) and 2476 (BLAKE). As a result, past Commandant decisions have held that the taking of telephonic testimony is consistent with the constitutional concept of due process and is sufficient to protect the legitimate interests of the Respondent. Appeal Decisions 2538 (SMALLWOOD), 2476 (BLAKE), *aff'd sub nom.*, Commandant v. Blake, NTSB Order EM-156 (1989), 2252 (BOYCE); *See also* Brown v. Gamage, 377 F.2d 154 (D.C. Cir. 1967) (stating that there is no right to personally confront a witness in a purely administrative hearing where procedural due process safeguards are in place).

The Coast Guard regulation permitting telephone testimony provides for an orderly, dignified, and credible procedure, ensuring proper identification of all parties and reliable cross-examination. Appeal Decisions 2492 (RATH) and 2476 (BLAKE). The regulation is designed to expedite the hearing and quell costs when long distances must be traveled by prospective witness. Appeal Decisions 2538 (SMALLWOOD) and 2476 (BLAKE). In this case, the hearing was convened in New Orleans, Louisiana, and the

witnesses were testifying from various cities around the United States—Dr. Azary testified from Atlanta, Georgia, while Mr. Ellis testified from La Mesa, California. Under such circumstances, the taking of telephone testimony from those witnesses was more convenient and judicially efficient than requiring each witness to travel to New Orleans, Louisiana, for the hearing. In addition, the record shows that the procedures used by the ALJ to take the telephone testimony complied with Coast Guard regulations. The record shows that, pursuant to 33 C.F.R. § 20.706, each witness was sworn in under oath and, in accordance with 33 C.F.R. § 20.707, the witnesses were fully identified for the record and subject to direct and cross-examination. Therefore, Respondent's argument with respect to his ability to personally confront the Coast Guard's witnesses during cross-examination fails.

III.

The ALJ erred in admitting the testimony of the Coast Guard's witnesses and the Coast Guard's exhibits.

On appeal, Respondent asserts that the ALJ erred in admitting the testimony of the Coast Guard's witnesses and exhibits because the Coast Guard did not—in accordance with its own discovery procedures—submit a witness and exhibit list 15 or more days before the hearing. Respondent contends, absent any support, that similar "[r]egulatory violations in S&R hearings by the Coast Guard have become too common" and, as a result, requests that I "send…a message that these violations will not be tolerated" by dismissing the Coast Guard's complaint against Respondent with prejudice. [Brief of Appellant at 15-16]

33 C.F.R. § 601(c)(2) states that "[u]nless the ALJ orders otherwise, the parties shall exchange witness lists and exhibits 15 days or more before the hearing." While the

record shows that Respondent complied with this requirement when he submitted his witness and exhibit list on January 13, 2003, by filing its witness and exhibit list on January 17, 2003, the Coast Guard did not do so. Irrespective of this error, the ALJ admitted the testimony of the Coast Guard's witnesses and the Coast Guard's exhibits into the record over Respondent's objection. The ALJ explained his decision to do so in his "Order Denying Respondent's Second Motion for Disqualification," dated April 4, 2003, as follows:

> Although the document was transmitted on different days, the same exhibit and witness list was forwarded to the Respondent on January 17, 2003, in accordance with 33 CFR 20.601(a)(1) and (2). The Respondent had adequate time to respond to the exhibit and witness list and prepare for the hearing. On five occasions during the hearing, the undersigned ALJ offered to grant Respondent's attorney, Mr. Morgan, additional time to prepare for the hearing and Mr. Morgan declined all offers. The Respondent has failed to demonstrate how receipt of the witness and exhibit list 12 days before the hearing and declining five offers of continuance by this ALJ resulted in prejudice to the Respondent.

[citations omitted] [Order Denying Respondent's Second Motion for Disqualification at 6-7] After a thorough review of the record, I do not believe that the ALJ erred in so concluding.

Coast Guard suspension and revocation actions are administrative proceedings that are remedial, not penal in nature and are "intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. While the Coast Guard has enacted regulations to protect the due process rights of individuals during the administration of their cases, those regulations are to "be construed so as to obtain a just, speedy, and economical determination of the issues presented." 46 C.F.R. § 5.51.

The Coast Guard's general discovery rules, at 33 C.F.R. § 20.601, *et seq.*, are of particular import here. A review of the Interim Rule through which 33 C.F.R. § 20.601 was promulgated shows that the regulation was not intended to impose "criminal-style" procedural hurdles on either Respondents or the Government; instead, the regulation was promulgated to afford ALJs a tool to ensure that Coast Guard S&R hearings did not become "trials by ambush." *See* Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard, 64 Fed. Reg. 28,054-01 (May 24, 1999).

In determining whether the ALJ erred in allowing the testimony of the Coast Guard's witnesses and presentation of its exhibits even though the discovery violation occurred, I am reminded that in these proceedings, the ALJ is afforded broad authority to admit any evidence that he deems relevant. 33 C.F.R. § 20.802. As a result, I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE).

In this case, there is simply no evidence to indicate that Respondent was prejudiced by the Coast Guard's failure to comply with the general discovery requirements. Although the record shows that the Coast Guard provided its witness and exhibit list to Respondent three days late, Respondent has not provided any evidence to indicate that the abbreviated time frame did him some actual harm. Most notably, although the ALJ five times offered Respondent additional time to prepare during the hearing, Respondent declined all such offers and indicated—irrespective of the abbreviated time frame—that he was prepared to proceed with the presentation of his

case. [Tr. at 30-32, 37, 55] Under these circumstances, even if the ALJ's actions were error, it would not be reversible error. Accordingly, I am not persuaded by Respondent's third assignment of error.

IV.

The ALJ erred in his denial of Respondent's motions for disqualification.

While his case was before the ALJ, Respondent filed two verified motions for disqualification. In his first motion, Respondent sought disqualification of the ALJ due to the Coast Guard's disclosure to the ALJ of Respondent's prior disciplinary record before the hearing convened. In his second motion, Respondent sought disqualification of the ALJ due to *ex parte* communications between the ALJ and the Coast Guard—prior to and during the hearing—and because he observed the ALJ being chauffeured to and from the Hearing by uniformed Coast Guard Personnel. The ALJ denied both motions. On appeal, Respondent contends that the combination of these occurrences shows not only that the ALJ pre-determined how he would rule on critical issues to the case, such as the allowance of witness testimony and the presentation of evidence, but also calls the ALJ's impartiality into question.

A.

I will begin by addressing Respondent's first "Verified Motion for Disqualification." The record shows that on January 15, 2003, before the hearing convened, the Coast Guard filed a Motion to Withdraw (hereinafter "Motion to Withdraw") a settlement agreement offered to Respondent on November 7, 2002. The Motion to Withdraw was premised on the fact that, at the time that the Coast Guard offered to enter into a settlement agreement with Respondent, the Coast Guard was

unaware that Respondent had a prior record of similar violations with the Coast Guard. The Coast Guard provided information concerning Respondent's prior record—a copy of a Consent Order issued by the presiding ALJ against Respondent in September, 1996, for drug use—to support its Motion to Withdraw. Due to the disclosure of Respondent's prior record in this manner, on January 28, 2003, Respondent filed his first "Verified Motion for Disqualification" of the ALJ. Since the hearing convened the following day, the ALJ allowed Respondent to argue his motion orally at the hearing. After hearing Respondent's argument, the ALJ denied Respondent's motion for disqualification. Respondent cites Commandant Decision on Review 15 (SOILEAU), to support his conclusion that when a Respondent's prior disciplinary record is disclosed to an ALJ before the hearing, the ALJ is "precluded from imposing a valid sanction" and must disqualify himself. I am not persuaded by Respondent's assertion in this regard.

Respondent's reliance on Commandant Decision on Review 15 (SOLIEU) is misplaced. Although Respondent's analysis of the holding in *Solieu*—that an ALJ who is made aware of a Respondent's prior disciplinary record is precluded from imposing a valid sanction in the case—is correct, that analysis fails to acknowledge that the regulations effecting the disclosure of a Respondent's prior disciplinary record have changed substantially since the *Solieu* decision was issued in 1981.

In 1999, the Coast Guard initiated a regulatory project that revised the Rules of Practice, Procedure and Evidence applicable to Coast Guard administrative proceedings. The regulatory project included several changes to the regulations governing the admissibility and consideration of the prior record of a Respondent during the suspension and revocation process. To that end, while the predecessor regulation, 46 C.F.R.

§ 5.565(a), stated that "the prior record of the respondent may not be disclosed to the Administrative Law Judge until after conclusions have been made as to each charge and specification, and then only if at least one charge has been found proved," no such provision was included in the subsequently promulgated regulations. *See* 33 C.F.R. § 20.1315. The Interim Rule explained the omission by stating that:

> This section's [33 C.F.R. § 20.1315] predecessor [46 CFR § 5.565(a)] contained a general prohibition of disclosure of prior records before the ALJ makes his findings (made on the facts of the case). We believe that we should not totally prohibit the disclosure of prior records.

[64 Fed. Reg. 28,054-01, "Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard," May 24, 1999.] In light of these regulatory changes, *Solieu's* conclusion that the disclosure of a Respondent's prior disciplinary record precludes the ALJ "from imposing a valid sanction in the case," is inapplicable to Respondent's case.

Having determined that the holding in *Solieu* has no bearing on Respondent's case, I must now determine whether Respondent's ancillary argument—that the disclosure of Respondent's prior record could have allowed the ALJ to prejudge Respondent's case and required that ALJ's disqualification—has merit. Respondent correctly notes that Coast Guard regulations allow the admission of Respondent's prior record in limited circumstances; evidence of the Respondent's prior record may be presented at any time by Respondent or used by the Coast Guard for impeachment and rebuttal purposes during the hearing. See 33 C.F.R §§ 20.1309 and 20.1315. In this case, the record shows the evidence of Respondent's prior record was submitted to the ALJ by the Coast Guard before the hearing convened. As such, it was not "admitted into evidence," but was, most certainly, available for consideration by the ALJ before it

should have been. That factor, alone, is not sufficient to justify the disqualification of the ALJ.

Pursuant to regulation, a respondent may request that the ALJ withdraw from the proceedings on the grounds of personal bias or other disqualification. 33 C.F.R. § 20.204(b). After making such a request, the party seeking disqualification carries the burden of proof. Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665 (1982). The courts have long stated that there is a rebuttable presumption that hearing officers are unbiased and that bias is required to be of a personal nature before it can be held to taint proceedings. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). Prejudgment also serves as a basis for disqualification. As a result, a proceeding is subject to challenge if it appears that the action has been prejudged. Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). In order to establish a disqualifying prejudgment, a respondent must demonstrate that the mind of the ALJ is "irrevocably closed" on the particular issue being decided. FTC v. Cement Institute, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Accordingly, a hearing officer should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matter critical to the disposition of the proceeding. Association of National Advertisers v. FTC, 617 F.2d. 1151 (D.C. Cir. 1979).

In this case, Respondent does not contend that the disclosure of his prior record caused the ALJ, in any way, to prejudge the matter; rather, Respondent contends simply that the ALJ's knowledge of Respondent's prior record, per se, requires that the ALJ disqualify himself. Irrespective of whether the Coast Guard properly submitted evidence of Respondent's prior record to the ALJ, Respondent's assertion in this regard is

untenable. The ALJ who presided over this case also presided over the case that gave rise to the prior record, the disclosure of which Respondent now contests. In Appeal Decision 1554 (McMURCHIE), a case involving the denial of a Respondent's motion for disqualification, the issue of an ALJ hearing several cases involving the same mariner was discussed as follows:

> If the mere fact that an ALJ had knowledge of a prior action against a respondent, without a showing of actual bias or prejudice, were enough to require disqualification of the Examiner, the machinery of these remedial hearings could often be caused to come to an administrative impasse. There are just so many ports; there are just so many Examiners; and seamen often ship from and to the same port or area for years at a stretch. The realities of shipping are such that an often offending seaman may well end up for hearing in the same port for each offense. Surely, it is inconceivable that an offender could be heard to claim that his case could not be heard merely because he had chosen to commit offenses triable in the same jurisdiction. The true test, the only realistic test, then is actual prejudice or bias.

See also Commandant Decision on Appeal 2158 (McDONALD). A similar view, no doubt, applies to this case. On appeal, Respondent has made no showing of actual bias on the part of the ALJ. Instead, his assertion is that knowledge of the prior action is sufficient ground for disqualification of the ALJ. I do not agree. Absent a clear showing of prejudice or bias—a showing not made here—a motion for disqualification in these proceedings must fail. Accordingly, the ALJ did not err in denying Respondent's first Motion to Withdraw.

B.

I will now address the ALJ's denial of Respondent's "2nd Verified Motion for Disqualification." In his "2nd Motion for Disqualification," Respondent sought

disqualification of the ALJ based on his assertion that the ALJ and the IO engaged in *ex parte* communications and because he believed that the ALJ's conduct during a recess of the hearing—the ALJ was driven from the hearing location by uniformed members of the Coast Guard—could call the ALJ's impartiality into question. In his April 4, 2003, "Order Denying Respondent's 2nd Motion for Disqualification," the ALJ thoroughly addressed both the alleged *ex parte* communications and Respondent's allegation of bias on the part of the ALJ; however, he ultimately found that "Respondent's motion for disqualification filed 23 days after the hearing is untimely and is subject to denial on…[that]…basis alone." [Order Denying Respondent's 2nd Motion for Disqualification at 3] On appeal, Respondent cites 33 C.F.R. § 20.204(b) to support his assertion that a motion for disqualification is timely as long as it is filed before the issuance of the ALJ's decision in the case. I do not agree.

33 C.F.R. § 20.204(b) states as follows:

> Until the filing of the ALJ's decision, either party may move that the ALJ disqualify herself or himself for personal bias or other valid cause. The party shall file with the ALJ, promptly upon discovery of the facts or other reasons allegedly constituting cause, an affidavit setting forth in detail the reasons.

Respondent's argument on appeal shows that he has misread the regulation. While Respondent is correct that a motion for disqualification may be filed at any time prior to the issuance of the ALJ's decision, he fails to acknowledge that 33 C.F.R. § 20.204(b) specifically requires that a party "promptly upon discovery of the facts or other reasons allegedly constituting cause…[file]…an affidavit setting forth in detail the reasons" supporting disqualification. A review of Respondent's 2nd Motion for Disqualification shows that Respondent learned of the alleged *ex parte* communications and the actions

giving rise to his claim of bias during the course of the hearing. As a result, he made an oral motion at the hearing, to disqualify the ALJ. Under the requirements set forth in 33 C.F.R. § 20.204(b), he was required to file an affidavit in support of his motion promptly thereafter. However, as the ALJ noted in his "Order Denying Respondent's 2nd Motion for Disqualification," Respondent did not file the requisite affidavit supporting that motion until 23 days later.

The word "prompt" is not an ambiguous term. It has a commonly known definition: "To act immediately, responding on the instant." Black's Law Dictionary 1214 (6th ed. 1990). In this case, Respondent waited 23 days to file the requisite affidavit. In so doing, he did not act immediately and, as a result, failed to comply with the requirements of 33 C.F.R. § 20.204. Past Commandant Decisions on Appeal have stated that the regulatory requirements for disqualification are not "mere technicalities to be waived by the Commandant." *See* Commandant Decisions on Appeal 2495 (ZELVIC) and 2232 (MILLER)[3]. Accordingly, I will not waive those requirements here and because the affidavit supporting Respondent's 2nd Motion for Disqualification was not timely filed, the ALJ did not err in denying that motion. As a result, further consideration of the underlying substantive issues is inappropriate here.

V.

The Decision of the Vice Commandant on Appeal No.2535 (Sweeney) was an abuse of discretion, arbitrary and capricious and improper rulemaking which deprived

[3] These appeal decisions discuss disqualification of the ALJ under the regulation that preceded 33 C.F.R. § 20.204. While the predecessor regulation, 46 C.F.R. § 5.507, was repealed through a Coast Guard regulatory project to revise the Rules of Practice, Procedure and Evidence applicable to Coast Guard administrative proceedings, the regulation that replaced it, 33 C.F.R. § 20.204, retained many of the requirements set forth in the original regulation, including the requirement that a party seeking the disqualification of the ALJ file a complete and timely affidavit to support the request. Accordingly, it is proper for me to rely on these decisions in this case.

respondent of the ability to raise the statutory defense of cure as provided for in 46 USC §7704(c).

Respondent's final assertion of error centers on the issue of cure. In his D&O, the ALJ addressed the issue, in relevant part, as follows:

> In this case, the fact that the Respondent previously participated in the cure program after testing positive for dangerous drugs on or about May 28, 1996, precludes an order less than revocation from being issued. Even if the Respondent did not have a prior record of drug use, a continuance for the limited purpose of showing cure would still not be appropriate because the Respondent has failed to show substantial involvement in the cure process by proof of enrollment in an accepted drug rehabilitation program. Testimony of Respondent's expert witness, Kurt Schenker, that Respondent's participation in Alcoholics Anonymous…meetings is considered a "step" in the cure process, is rejected.

[Citations omitted] [D&O at 14-15]. Respondent contends that the Coast Guard's definition of the term "cure" which was initially adopted via Appeal Decision 2535 (SWEENEY)[4] and includes a requirement that mariners prove a one-year non-association with drugs before becoming eligible for the re-issuance of their mariner credentials, was the result of an improper rulemaking. Respondent supports his assertion, in this regard, by noting that Appeal Decision 2535 (SWEENEY) was reversed by the National Transportation Safety Board (hereinafter "NTSB") on appeal. Based on this assertion, Respondent contends that the ALJ erred in ruling that he was "bound by *Sweeney*…[to refuse]…to allow…[Respondent]…an opportunity to perform" the six-month cure program recommended by Respondent's expert witness. [Respondent's Appellate Brief at 27-28]

[4] In *Sweeney*, the elements of cure were defined as: 1) successful completion of a drug abuse rehabilitation program; and, 2) complete non-association with drugs for a minimum of one year following completion of a drug abuse rehabilitation program.

First and foremost, when the NTSB reversed Appeal Decision 2535 (SWEENEY), it did not find that the Commandant engaged in an improper rulemaking by developing a definition of "cure" in that case. To the contrary, while the NTSB acknowledged that "rulemaking though adjudication is an acceptable method of interpreting legislation," it merely stated that it was improper for the question of cure to be addressed in that *particular* case because "the meaning of the statute was not litigated by the parties…[and] was neither a point of controversy at the hearing nor fairly raised by the appellant's objections to the law judge's decision." A review of subsequent NTSB decisions shows that the NTSB has expressly affirmed the use of the "so-called Sweeney standard" to determine whether a mariner has submitted adequate evidence of cure. *See* Loy v. Wright, NTSB Order No. Em-186 (1999) at 7. Accordingly, the ALJ did not err in relying on *Sweeney* to support his conclusion that "a continuance…[in Respondent's case]…for the limited purpose of showing cure would…not be appropriate because the Respondent has failed to show substantial involvement in the cure process by proof of enrollment in an accepted drug rehabilitation program." [D&O at 15]

On appeal, Respondent further contends that the definition of "cure" found at 46 C.F.R. § 5.205(b), which requires only a six-month non-association with drugs, is the definition that should apply to Respondent's case. At the hearing, Respondent presented the testimony of a board certified substance abuse counselor, Mr. Kurt Schenker. Mr. Schenker testified that a 12 month non-association was counter-productive to cure and that 6 months was a reasonable time-period before a license holder should be able to apply to the Medical Review Officer for a return to duty letter. [Tr. at 121-145] Respondent's assertion, in this regard, lacks legal merit.

While Respondent is correct that 46 C.F.R. § 5.205 allows mariners to request the return of their credentials after, among other things, a six-month non-association with drugs, the regulation does not apply to Respondent in this case. 46 C.F.R. § 5.205 sets forth the requirements for cure when a mariner "voluntarily surrenders" his credential. In this case, Respondent did not do so; rather, an ALJ ordered the revocation of Respondent's mariner credentials. As a result, the ALJ was correct to require the one-year non-association period set forth in 46 C.F.R. § 5.901(d),which expressly applies to persons whose mariner credentials have been revoked for wrongful use of drugs.

That said, the record shows that the ALJ's decision to deny a continuance in Respondent's case for the purposes of showing cure did not center on the duration of Respondent's involvement in a drug abuse rehabilitation program; rather, the ALJ based his decision on the fact that the drug abuse rehabilitation program in which Respondent participated, Alcoholics Anonymous, did not qualify as a "bona fide drug abuse rehabilitation program" under *Sweeney*. On this point, the ALJ stated as follows:

> A "bona fide drug abuse rehabilitation program" is defined as a program designed to eliminate physical and psychological dependence on drugs, which is certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO). AA [Alcoholics Anonymous] on the other hand is a support group for men and women seeking to maintain sobriety from alcohol…AA does not keep membership records or case histories, make medical or psychiatric prognosis, or provide letters of reference to agencies or employers. Therefore, AA is not a bona fide drug abuse rehabilitation program contemplated by Sweeney. [Citations Omitted]

[D&O at 15] As I have already stated, I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order

No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). In this case, the ALJ found that Alcoholics Anonymous did not meet the definition of a bona find drug abuse rehabilitation program. I agree and, as a result, I do not find that the ALJ erred in finding that Respondent had not proved cure and in, thereafter, ordering the revocation of Respondent's mariner credentials. Accordingly, Respondent's final basis of appeal is denied.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision was not arbitrary, capricious, or clearly erroneous. Competent, reliable, probative, and substantial evidence existed to support the findings and order of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

The Decision and Order of the Administrative Law Judge is AFFIRMED.

TERRY M. CROSS
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 17th day of May, 2006.