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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD v. MERCHANT MARINER DOCUMENT Issued to: CHRISTOPHER JOSEPH CAMP	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2732

APPEARANCES

For the Government:
Lineka Quijano, Esq.
LT Mathew T. Schirle, USCG

For Respondent:
Christopher Joseph Camp, *pro se*

Administrative Law Judge: Brian J. Curley

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5 and 33 CFR Part 20.

On April 16, 2019, an Administrative Law Judge (ALJ) of the United States Coast Guard dismissed the Coast Guard's complaint against Respondent Christopher Joseph Camp, in a bench ruling. The complaint alleged two counts of misconduct, for refusing to submit to a drug test required by 46 CFR Part 16 and required by company policy. The Coast Guard appeals.

FACTUAL EVIDENCE[1] AND PROCEDURAL HISTORY

At all relevant times, Respondent was a holder of merchant mariner credentials issued by

[1] The ALJ did not make findings of fact and no findings of fact are made herein.

the United States Coast Guard. [Exhibit 1 and Tr. at 3.] On June 29, 2018, the Coast Guard filed a Complaint charging Respondent with two counts of misconduct. The first count charged Respondent with refusing to submit to a drug test required by 46 CFR Part 16 by failing to remain at the collection site until the testing process was complete. The second count charged Respondent with violation of his employer's company policy, requiring compliance with drug testing procedures, by failing to remain at the collection site until the testing process was complete. Both charges were based on an April 24, 2018, random drug test in Morgan City, Louisiana.

On the date of the drug test, Respondent reported to the collection site and provided a specimen for testing. [Exhibits 4, 5, 10, 11, and 13.] The collector determined that the specimen was outside the acceptable temperature range. [*Id.*] As a result, Respondent was required to submit to an observed collection of a specimen. [Exhibits 11 and 13.] During the first attempt at an observed collection, Respondent was unable to provide a specimen. [*Id.*] The failure to produce a specimen led to initiation of the shy bladder procedure at about 10:10 a.m. [*Id.*] Under that procedure, Respondent was informed that he could drink up to 40 ounces of water and was allowed up to three hours to provide a specimen to complete the testing process. [Exhibit 13.]

At about 10:24 a.m., Respondent attempted another observed collection, but again was unable to provide a specimen. [Exhibits 11 and 13.] At 10:48 a.m., Respondent told the collector he had to leave. [*Id.*] The collector informed Respondent that if he left the collection site, that could be considered a failure to test. [Exhibit 13.] Respondent then left the collection site without completing the testing process, in that he did not provide an acceptable specimen for testing and he did not successfully complete an observed collection. [Exhibit 13; Tr. at 35.]

By the time the hearing before the ALJ commenced, the Coast Guard faced an obstacle in presenting its case against Respondent: the collector who had conducted the collection process involving Respondent on April 24, 2018, no longer had any memory of what happened that day. [Tr. at 50.] As a result, the Coast Guard had to rely on hearsay evidence prepared by the collector before his memory loss: a letter written by the collector concerning what happened

when he tried to collect a specimen from Respondent on April 24, 2018; and two Drug Testing Custody and Control Forms relating to the same specimen collection attempts. [Exhibits 10, 11, and 13.]

The Coast Guard also presented, among other things, the testimony of two witnesses: the Designated Employer Representative (DER) for the company at which Respondent worked, and the collector's supervisor at Bourgeois Medical Clinic, who also happened to be the collector's wife. The DER testified about the employer's drug testing program, written policies, and her involvement with Respondent's April 24, 2018, random drug test.

The DER testified in part as follows: That the employer uses the services of DISA Global Solutions (DISA) to meet its drug testing requirements. [Tr. at 27.] That in this case DISA selected two individuals for quarterly random drug testing, and one of the individuals selected was Respondent. [*Id.* at 30-32.] That on April 24, 2018, Respondent was notified by the employer that he needed to report to the office to pick up some paperwork and then go to the Bourgeois Medical Clinic for drug testing. [*Id.* at 32.] That Respondent did pick up the paperwork from the office, and that the DER later received a telephone call from the collector to advise her that Respondent's first specimen was out of temperature range, that a specimen by direct observation was required, and that Respondent could not stay to complete the collection process. [*Id.* at 33.] That she instructed the collector that Respondent needed to stay and finish the collection process. [*Id.*] That ten or fifteen minutes later she received a second telephone call from the collector to inform her that Respondent had left the clinic. [*Id.*] That at about 11 a.m., Respondent returned to the office, and there was a discussion about what happened at the collection site. [*Id.* at 34-35.] That the DER explained to Respondent that even though he provided a specimen, it was out of temperature range and he was required to give a second specimen. [*Id.* at 35.] That she explained his leaving the collection site without completing the process would be considered a refusal to test, and was the equivalent of a positive drug test. [*Id.*] That the employer responded to the situation by terminating Respondent's employment, and that she had no further contact with Respondent after April 24, 2018. [*Id.* at 35-36.]

The collector's supervisor testified, among other things, to the fact that she recognized

the collector's writing and signature on the Drug Testing Custody and Control Forms, and on the collector's letter regarding Respondent's collection process on April 24, 2018. [Tr. at 57, 59-60.]

At the conclusion of the Coast Guard's case, the ALJ explained to Respondent that he could move to dismiss because the Coast Guard did not present a *prima facie* case. [Tr. at 75.] Respondent stated that he would like the ALJ to consider dismissing the case. [*Id.*] The Government counsel presented argument opposing the motion. Respondent did not make an argument. After deliberating, the ALJ ruled that the Government had failed to present a *prima facie* case, and that the charges were not proved. [*Id.* at 86.] He dismissed the case with prejudice. [*Id.*] After discussing applicable law, the ALJ explained his decision to dismiss the charges as follows:

> So, for a drug test to be conducted correctly, the collector must collect the urine sample in the manner described in 49 CFR Part 40. Title 49 CFR Part 40 contains numerous requirements a collector must follow when administering a drug test. These requirements include but are not limited to a specific number, a specific manner for obtaining the identification of the person taking the test, explaining the testing procedures, determining the temperature of the urine sample collecting, conducting a direct observation test and documenting the urine test.
>
> Here the Coast Guard failed to introduce evidence regarding many required elements of the collection process. Through no fault of the Coast Guard [the collector] was not able to testify because he had a stroke which resulted in memory loss. The Coast Guard did offer a statement from the collector at Exhibit 13, however, I gave this document no weight because it was not authenticated by the person who allegedly wrote it, it is not signed under oath and the penalty of perjury. And the Respondent had no opportunity to cross-examine the collector regarding his statement.
>
> Further, even if this piece of evidence was credible it fails to address many of requirements a collector must follow when administering a urine test. As does the remainder of the evidence submitted by the Coast Guard including the testimony of [the collector's supervisor] who trained . . . the collector and processed the paperwork for the Respondent's current test, but, was not present at the collection at issue and could not testify regarding what actually took place.
>
> For example, there is no evidence in the record to establish the method by which [the collector] determined Respondent's sample was outside the appropriate temperature range. Further, the record does not establish that [the collector] checked the temperature of the specimen within four minutes after Respondent gave it as required by 49 CFR § 40.65. The proper implementation of this procedure is critical to this case since

> Respondent's alleged refusal is based on his initial sample being tested outside the acceptable temperature range.
>
> Moreover, once [the collector] determined the initial sample was outside the appropriate temperature range, there's no credible evidence regarding whether he properly instructed Respondent regarding the direct observation procedures. Then, once Respondent was unable to provide an additional urine sample under direct observation, there is no credible evidence [the collector] properly followed Part 40 shy bladder procedures. Further, there's no credible evidence establishing how [the collector] determined Respondent was unable to provide a sufficient sample during the two attempts to provide a sample under direct observation or if [the collector] even accompanied the Respondent to the bathroom during his last attempt to provide a urine specimen.
>
> [The collector's] proper implementation of these procedures is critical to this case, because Respondent's alleged refusal took place when he left the testing facility after he made multiple attempts to provide a urine sample.
>
> Thus, even when viewing the evidence presented by the Coast Guard in the light most favorable to the Agency, the Coast Guard failed to provide any evidence that many of the aspects of the drug test at issue were properly conducted and therefore failed to prove a prima facie case for refusal.
>
> As in appeal decision 2603 Hackstaff [1998 WL 34073115], elementary notions of due process and fair play require that I must dismiss this case. Thus I find that count one and count two were not proved, and I dismiss the case with prejudice.

[*Id.* at 84-86.]

The Coast Guard has perfected its appeal, and this appeal is now properly before me. I affirm the ALJ's decision.

BASES OF APPEAL

The Coast Guard appeals from the ALJ's ruling that it failed to present a *prima facie* case on the charges against Respondent, and from the ALJ's dismissal of the case with prejudice. The Coast Guard raises the following bases of appeal:

I. *The ALJ erred in dismissing the case based on his finding that the Coast Guard failed to present evidence supporting a* prima facie *case that Respondent refused a test.*

II. *The ALJ improperly applied 33 CFR § 20.808 (governing "written testimony") to the collector's unsworn written statement regarding the collection procedure.*

III. The ALJ erred by failing to consider the public policy implications of granting the motion to dismiss.

IV. The ALJ erred in dismissing the case when Respondent presented no argument or evidence in support of his motion to dismiss.

OPINION

As noted at the outset of this opinion, Respondent was charged with both refusing a drug test required by 46 CFR Part 16 and violating his employer's drug testing policy, by failing to remain at the collection site until the testing process was complete. It is clear from the record that the employer's drug-testing policy fulfilled the employer's obligations under 46 CFR Part 16. Since the charge for violating the employer's policy relates directly to failure to complete a Coast Guard-mandated drug test, it is not a different or separate offense from the charge for refusing a drug test required by 46 CFR Part 16. Moreover, company drug-testing policy that merely implements 46 CFR Part 16 requirements is assessed upon 46 CFR Part 16 standards. Of course, company drug-testing policy that includes requirements in addition to those of 46 Part 16 could be the basis for a separate charge.

I.
The ALJ erred in dismissing the case based on his finding that the Coast Guard failed to present evidence supporting a prima facie *case that Respondent refused a test.*

The Coast Guard argues that some evidence was presented on each element of the offenses charged, and any evidence presented in support of an element, regardless of its weight, is sufficient to establish a *prima facie* case and withstand a motion to dismiss.

The ALJ in this case observed, "A government mandated chemical test must be both properly ordered in accordance with 46 CFR § 16 and properly conducted in accordance with 49 CFR § 40 to form a basis for a suspension and revocation proceeding. (Appeal decision 2710 Hopper [2015 WL 6777337], appeal decision 2672 Marshall, Jr. [2007 WL 4924695], and appeal decision 2704 Franks [2014 WL 4062506].)" [Tr. at 83.] This statement generally applies to both charges of use of or addiction to dangerous drugs based on a chemical test and charges of refusal to test. In short, compliance with 46 CFR Part 16 and 49 CFR Part 40 is an element required to prove a charge of failure to test; to establish a *prima facie* case, the Coast Guard is

required to present evidence of such compliance. *Appeal Decision 2710 (HOPPER)* at 6, 2015 WL 6777337 at 4 (citing *Appeal Decision 2704 (FRANKS)* at 9, 2014 WL 4062506 at 7).[2]

Appeal Decision 2675 (MILLS) at 12, 2008 WL 918525, states that "in order to show that Respondent refused to submit to a drug test, the Coast Guard must establish that the Respondent refused a drug test within the meaning of 49 CFR § 40.191, as specifically incorporated by 46 CFR § 16.105.[3] The regulations describe several scenarios which may constitute a refusal. 49 CFR § 40.191." In *MILLS*, the ALJ found that the Coast Guard did not prove a failure to test. The mariner remained at the test site for three hours after not providing a sufficient amount of urine for testing. *Id.* at 13. There was conflicting testimony about whether the mariner was given proper instructions about the protocol for providing a sample after he did not provide a sufficient sample, and the mariner was not instructed to seek a medical evaluation regarding his inability to provide a sample. *Id.* at 13-14. The *MILLS* decision concludes: "Given the broad inconsistencies in the record regarding whether Respondent was actually informed of his rights in the drug testing process as required in the regulations and discussed *supra*, it was reasonable for the ALJ to conclude that Respondent did not refuse a drug test as prescribed in 49 CFR § 40.191, thus not constituting misconduct." *Id.* at 15.

There are twelve different ways to refuse to test listed in 49 CFR § 40.191(a) & (b), including failing to appear for the drug test at all, failing to remain at the testing site until the testing process is complete, and other failures in between. The necessary evidence of compliance with the regulation depends on which of those ways the mariner is charged with as a refusal to test. For example, in *Appeal Decision 2625 (ROBERTSON)*, 2002 WL 32061801, a refusal to test was based on the submission of an adulterated sample. The mariner alleged that there were several inconsistencies in the collection process, including the collector's failure to mark on the custody and control sheet that the temperature of the specimen had been taken. *Id.* at 17-18, 2002 WL 32061801 at 10. The laboratory forensic toxicologist indicated that the

---

[2] *HOPPER* and *FRANKS* both involved a charge of use of or addiction to a dangerous drug rather than failure to test.
[3] Although the test in *MILLS* was not a government-mandated test, 49 CFR Part 40 procedures were applied. It is surely true that a company that conducts drug tests not mandated by the government as well as government-mandated tests will use the government procedures for all drug tests rather than establishing separate procedures for the non-government-mandated tests.

collector's failure to mark whether the temperature had been taken would "have no bearing" on the laboratory's analysis. *Id.* at 10, 2002 WL 32061801 at 5. The decision in that case concurred with the ALJ's determination that such technical infractions of the regulations did not vitiate the case, which was affirmed. *Id.* at 18, 2002 WL 32061801 at 7.

In *Appeal Decision 2652 (MOORE)*, 2005 WL 4052559, a mariner who failed to appear for a drug test asserted that proof that he was notified that failure to report for testing constitutes a refusal to test is an indispensable element of the refusal to test charge. That decision held that the notice requirement in 49 CFR § 40.61(a) is not an element of the offense of refusal to test as described in 49 CFR § 40.191(a)(1) (failure to appear for a test). *Id.* at 11, 2005 WL 4052559 at 6 (citing *Duchek v. Nat'l Transp. Safety Bd.*, 364 F.3d 311, 313 (D.C. Cir. 2004)).

Thus, the element of compliance with 49 CFR Part 40 requirements does not extend to proof that the process was entirely free of technical infractions.

In this case, the ALJ noted four deficiencies in the evidence concerning compliance with 49 CFR Part 40 requirements:

> For example, there is no evidence in the record to establish the method by which [the collector] determined Respondent's sample was outside the appropriate temperature range. Further, the record does not establish that [the collector] checked the temperature of the specimen within four minutes after Respondent gave it as required by 49 CFR § 40.65. The proper implementation of this procedure is critical to this case since Respondent's alleged refusal is based on his initial sample being tested outside the acceptable temperature range.
>
> Moreover, once [the collector] determined the initial sample was outside the appropriate temperature range, there's no credible evidence regarding whether he properly instructed Respondent regarding the direct observation procedures. Then, once Respondent was unable to provide an additional urine sample under direct observation, there is no credible evidence [the collector] properly followed Part 40 shy bladder procedures. Further, there's no credible evidence establishing how [the collector] determined Respondent was unable to provide a sufficient sample during the two attempts to provide a sample under direct observation or if [the collector] even accompanied the Respondent to the bathroom during his last attempt to provide a urine specimen.

[Tr. at 85-86.]

The method for determining the sample's temperature is prescribed by 49 CFR § 40.65(b)(2). It may be that the method is a technical requirement, compliance with which is not essential in the absence of an issue concerning the method's accuracy.

Whether the sample is checked within four minutes, on the other hand, would not be a mere technical requirement if the temperature is below the required range of 90 – 100 degrees F., as specified in 49 CFR § 40.65(b)(1), or if the temperature is above the range when the ambient temperature at the collection site is or might be above 100 degrees. In this case, the sample's temperature was above the required range. [Exhibit 10.]

As for whether Respondent was properly instructed regarding direct observation procedures, if the evidence indicates that Respondent acted in compliance with the required procedures, the exact instructions he was given may be a technical matter, evidence of which would not be required.

Moreover, the statement from the collector asserts, "All procedures were followed for DOT Collection." [Exhibit 13.] This constitutes some evidence that all of the requirements identified by the ALJ were met. Accordingly, it cannot be said that there was a complete lack of evidence supporting a *prima facie* case.

The Coast Guard argues that it was error for the ALJ to weigh the evidence on a motion to dismiss. The ALJ did weigh the evidence—he stated, concerning Exhibit 13, "I gave this document no weight." [Tr. at 84.] But any error was harmless, because, had the ALJ rejected Respondent's motion to dismiss, and proceeded to evaluate the case on its merits, when the proper time came to weigh the evidence, given the same evidence, the result would have been the same: the ALJ would not have been convinced that the charges were proved.[4]

[4] The Coast Guard did not have a right to whatever benefit might have accrued from Respondent putting on his case. *See Appeal Decision 2603 (HACKSTAFF)* at 6, 1998 WL 34073115 (citing *Commandant v. Gayneaux*, 4 NTSB 2013, NTSB Order No. EM-113 (1984), 1984 WL 62095). In *HACKSTAFF*, a finding of use of a dangerous drug based on a drug test was reversed. The deficiency was essentially a failure to authenticate the drug testing custody and control form that was offered in evidence, and a concomitant failure to identify the respondent as the person

II.

The ALJ improperly applied 33 CFR § 20.808 (governing "written testimony") to the collector's unsworn written statement regarding the collection procedure.

In this case, because the person who collected Respondent's urine sample was unavailable, the Coast Guard relied on various hearsay statements to show compliance with required drug testing procedures and that Respondent failed to test by leaving the testing site before the collection process was completed. The ALJ gave no weight to Exhibit 13, a letter written by the collector to supplement the Custody and Control Forms he had completed, and the ALJ concluded that "the Coast Guard failed to provide any evidence that many of the aspects of the drug test at issue were properly conducted and therefore failed to prove a prima facie case for refusal." [Tr. at 86.]

33 CFR Part 20, Subpart H, provides evidence rules for Suspension and Revocation proceedings. There is no rule excluding hearsay; in fact, 33 CFR § 20.803 makes hearsay evidence admissible, while explicitly acknowledging that the ALJ may consider that it is hearsay in determining its probative value. 33 CFR § 20.808 provides for the use of written, sworn testimony of a witness, if the witness is or was available for cross-examination. It can be inferred that such written testimony should be given essentially the same value as live testimony, rather than the lesser value that might be accorded to other hearsay.

The Coast Guard offered Exhibit 13 into evidence on account of the unavailability of the collector to testify. The ALJ reserved ruling on it, and later entertained argument. During that argument by the Coast Guard, the ALJ expressed his concern "under" 33 CFR § 20.808, and stated, "I am not worried about the statement that it is sworn or affirmed under penalty of perjury. It's that availability for oral cross-examination . . . ." [Tr. at 72-73.] He did admit Exhibit 13, but, as already noted, "gave [Exhibit 13] no weight because it was not authenticated by the person who allegedly wrote it, it is not signed under oath and the penalty of perjury. And the Respondent had no opportunity to cross-examine the collector regarding his statement." [Tr.

---

from whom the positive sample had been taken. *Id.* at 5. Thus, there was a lack of proof that the respondent was the person who was tested for dangerous drugs, a necessary element.

at 84.] From his previous statement, it is clear that the lack of cross-examination was his true concern.

It bears repeating: in accordance with 33 CFR § 20.803, hearsay evidence is admissible in a Suspension and Revocation proceeding. However, as with all evidence, it is up to the ALJ to decide what probative value to give to such evidence and the ALJ may consider that it is hearsay in doing so. This describes what the ALJ did in this case. He admitted Exhibit 13, but gave it no weight. His reference to 33 CFR § 20.808 was not an improper application of that regulation but an explanation of why he did not give Exhibit 13 greater value.

"It is the sole purview of the ALJ to determine the weight of the evidence and to make credibility determinations. *Appeal Decision 2156 (EDWARDS)* [1979 WL 197818], *Appeal Decision 2116 (BAGGETT)* [1978 WL 198999], *Appeal Decision 2472 (GARDNER)* [1988 WL 1024604]." *Appeal Decision 2657 (BARNETT)* at 4, 2006 WL 1519583. *BARNETT* demonstrates that hearsay evidence has been relied upon by the Coast Guard and ALJs to prove a *prima facie* case against a mariner, and such reliance was upheld on appeal. In *BARNETT*, the mariner was found to have used a dangerous drug based on a drug test. On appeal, the mariner asserted that the Coast Guard had failed to prove any of the three elements required to prove use of a dangerous drug based solely on a drug test. *Id.* at 6. The ALJ found that the elements were proved by the Coast Guard. This conclusion relied on hearsay evidence, in the form of Drug Testing Custody and Control Forms, to support and fill in gaps in testimony from the urine sample collector, the drug testing laboratory Director, and the President of the company that employed the medical review officer who concluded the test was positive for use of a dangerous drug. *Id.* at 14. The findings were affirmed.

In this refusal-to-test case, however, there are more relevant details than in a use of dangerous drug case based upon a positive drug test, details that are not captured on a Drug Testing Custody and Control Form. In discounting the collector's written statement, the ALJ focused on lack of cross-examination, as noted above. Through cross-examination, the timing and method of determining the temperature of the sample could have been probed, likewise the specifics of the direct observation and shy bladder procedures, all of which the ALJ called

attention to in his ruling. [Tr. at 85]. For the ALJ to doubt the credibility of Exhibit 13 in the absence of such probing was within his purview and entirely reasonable.

III.

The ALJ erred by failing to consider the public policy implications of granting the motion to dismiss

33 CFR § 20.1001(b) provides that an appeal may be based upon, among other things, "(2) Whether each conclusion of law accords with applicable law, precedent, and public policy." The Coast Guard asserts that the purpose of drug testing is to "minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment." [Appeal Brief at 18 (quoting 46 CFR § 16.101).] The Coast Guard also cites *Appeal Decision 2710 (HOPPER)*, 2015 WL 6777337, to warn against interpreting the drug-testing regulations in a manner that "would tend to defeat the ability of the Coast Guard to promote a drug-free and safe work environment for mariners and the public".[5] [*Id.* at 19 (quoting *HOPPER* at 11, 2015 WL 6777337 at 8).] The Coast Guard goes on to argue, "Effective remedial action . . . cannot be dependent on the specific availability of one witness. . . . Creating a *de facto* 'no collector, no case' requirement is in direct contravention to the stated purpose" of the drug testing regulations. [*Id.* at 21.]

There is nothing extraordinary about a legal system in which one witness might be indispensable to a case. Furthermore, the notion that the high purpose of the regulations justifies acceptance of lower standards of evidence in enforcement proceedings is inimical to the rule of law. Indeed, every law and every regulation arguably has a high purpose. The idea that unavailability of a witness justifies relaxation of the preponderance of the evidence standard deserves no consideration.

This case does not mean that the unavailability of a collector is fatal to every drug case,

[5] The Coast Guard's argument stretches *HOPPER* to an unrecognizable shape. That decision addresses the interpretation of "scientifically valid method" for randomly selecting persons to be tested for drugs. The full quotation from *HOPPER* reads: "A too restrictive interpretation of words like 'random,' 'scientifically valid,' and 'equal chance,' in 46 CFR § 16.230, would tend to defeat the ability of the Coast Guard to promote a drug-free and safe work environment for mariners and the public." *HOPPER* at 11, 2015 WL 6777337 at 8. In this case, the ALJ does not appear to have made any interpretation of the drug testing regulations at 46 CFR Part 16 or 49 CFR Part 40, and the principle articulated by *HOPPER* does not apply.

or even to every refusal-to-test case. The circumstances of a case will determine what witnesses, if any, are indispensable. However, it cannot be assumed that the collector's testimony will be unnecessary.

IV.

The ALJ erred in dismissing the case when Respondent presented no argument or evidence in support of his motion to dismiss.

The Coast Guard contends that the ALJ should not have granted Respondent's motion to dismiss because he did not carry the burden placed upon him by 33 CFR § 20.702(b), in that he did not "state 'clearly and concisely' the basis for his motion and the relief sought," as required by 33 CFR § 20.309(a), and did not "demonstrate that he had a 'right to relief based upon the facts or law,'" as required by 33 CFR § 20.311(d). [Appeal Brief at 22-23.] At a minimum, the Coast Guard asserts, Respondent was required to set forth an argument, which he did not do. [*Id.* at 23.] I disagree. The Coast Guard has misread or misunderstood the regulations cited.

33 CFR § 20.702(b) provides, "Except as otherwise provided by statute or rule, the proponent of a motion, request, or order bears the burden of proof." The motion to dismiss involved a question of law; no proof was involved, hence Respondent had no burden of proof.

33 CFR § 20.309(a) provides, in pertinent part:

> Each motion must state clearly and concisely—
>
> (1) Its purpose, and the relief sought;
> (2) Any statutory or regulatory authority; and
> (3) The facts constituting the grounds for the relief sought.

This regulation is a tool to ensure that a motion can be addressed cogently. An ALJ has discretion in enforcing the regulation. In this case, the Coast Guard did not seek clarification before arguing against the motion, waiving any issue on appeal, and evidently the ALJ understood the motion and was able to rule on it.

33 CFR § 20.311(d) provides, in pertinent part:

> (d) Any respondent may move to dismiss a complaint, . . . or any party may lodge a request for relief, for failure of another party to—

(1) Comply with the requirements of this part or with any order of the ALJ;
(2) Show a right to relief based upon the facts or law

This regulation provides for motions to dismiss; Respondent's motion to dismiss can be said to fall within § 20.311(d)(2), as a failure to prove every element of the offense charged would be a failure by the Coast Guard to show a right to relief. The standard articulated by § 20.311(d)(2) does not, however, pertain to the movant. (The standard applicable to the movant, in a motion to dismiss, is found in 33 CFR § 20.309(a), already discussed.) The Coast Guard did argue against Respondent's motion to dismiss at the hearing [Tr. at 77-79.]; if the Coast Guard had cited this regulation and used its language, arguing that Respondent had failed to show a right to the relief of dismissal, it would have made no difference.

The ALJ did not abuse his discretion by proceeding to consider the motion to dismiss without further argument by Respondent.

CONCLUSION

The ALJ's rulings and findings were neither erroneous nor an abuse of discretion. He exercised his lawful discretion in assessing the credibility of the evidence presented.

ORDER

The ALJ's Decision of April 16, 2019, is AFFIRMED.

ADM, USCG

Signed at Washington, D.C., this 10 day of NOV, 2020.