

**COAST GUARD ADMINISTRATIVE  
PROCEEDINGS IN DRUG CASES RESEMBLE THE  
CIVIL LAW TRADITION**

**By Walter J. Brudzinski\***

\*Administrative Law Judge, U.S. Coast Guard; BA University of Maryland; JD George Mason University (with distinction); Master of Judicial Studies (MJS) University of Nevada, Reno. The author submitted this article as part of a course requirement towards the Ph.D. degree in Judicial Studies at the University of Nevada in association with the National Judicial College. The views expressed herein are those of the author and are not to be construed as official or reflecting the views of the Commandant or of the U.S. Coast Guard.

## Table of Contents

<b>INTRODUCTION</b> .....	3
<b>OVERVIEW</b> .....	3
<b>THE UNIQUENESS OF FEDERAL ADMINISTRATIVE ADJUDICATION</b> .....	6
<b>COAST GUARD ADMINISTRATIVE ADJUDICATION</b> .....	12
<b>Marine Employers Must Test Employees</b> .....	13
<b>Suspension and Revocation Proceedings</b> .....	15
<b>Settlement Agreements</b> .....	17
<b>Hearing Procedure</b> .....	20
<b>TESTING THE HYPOTHESIS</b> .....	24
<b>CONCLUSION</b> .....	30
<b>BIBLIOGRAPHY</b> .....	32

## **INTRODUCTION**

This paper shows how Coast Guard administrative proceedings to revoke merchant mariner credentials for dangerous drug use resemble the civil law tradition. Following an overview we describe in detail the Coast Guard's administrative procedures for dangerous drug use. We then test our hypothesis against the writings of two prominent civil law scholars.<sup>1</sup> Finally, we conclude that applying the civil law tradition in administrative adjudication involving dangerous drug use is the best method to promote safety at sea.

## **OVERVIEW**

Civil law and common law comprise the two major legal traditions in the world. Each tradition contains wide variations but the former is more commonly associated with Europe and most countries of the world whereas the latter is more commonly associated with England, Australia, New Zealand, Canada (except Quebec) and the United States, among others.

Within the common law tradition of the United States there is also an administrative adjudicatory system in which federal and state agencies administer and adjudicate laws that Congress and state legislatures delegate to them to enforce, either externally through the courts or internally through administrative adjudication, and sometimes both. State and federal agencies within the executive branch as well as

---

<sup>1</sup> Mirjan R. Damaška, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS*, 16-29, Yale University Press, New Haven (1986); Richard Lempert, *Anglo-American and Continental Systems: Marsupials and Mammals of the Law*, *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE INTERNATIONAL CONTEXT*, 395-413, Hart Publishing, John Jackson, Maximo Langer, and Peter Tillers, eds., Oxford and Portland, Oregon (2008).

independent agencies function in a similar fashion as the three branches of state or federal governments: legislative (rulemaking), executive (enforcement), and judicial (administrative adjudication). “[W]hen one speaks of public law in the civil law systems, what is meant is often merely administrative law.”<sup>2</sup>

In both federal and state administrative adjudication systems, administrative procedure acts ensure that those who are subjected to an agency’s administrative enforcement process are accorded fundamental due process rights. After an Administrative Law Judge (ALJ) adjudicates a disputed matter, the agency may affirm, reverse, modify, set aside, or remand the ALJ’s decision for further proceedings. Upon final agency action and exhaustion of administrative remedies, the matter may be appealed to the courts.

Although the United States follows the common law tradition, administrative adjudication in general has more in common with the civil law tradition because agencies promulgate regulations setting forth the powers and duties of their Administrative Law Judges, thereby limiting the ALJ’s discretion and ensuring that law and agency policy are strictly followed. Administrative Law Judges must follow the agency’s rules and policies, and do not have the independent power of judicial review.<sup>3</sup> Article III federal judges and state judges of general jurisdiction, in most instances, have authority to declare a legislative act unconstitutional.<sup>4</sup> Therefore, just like the judge in the civil law tradition,

---

<sup>2</sup>MARY ANN GLENDON, PAOLO G. CAROZZA, and COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS*, 112, 3<sup>rd</sup> ed., Thompson/West, St. Paul, MN (2008).

<sup>3</sup> See, *ATTORNEY GENERAL’S MANUAL ON THE APA § 7(b)* (1947) (ALJs must comply with agency policies and procedures). This is not unlike legislative supremacy in the civil law tradition.

<sup>4</sup> ALJs derive their authority from their agencies and [t]he law has long been clear that agencies may not nullify statutes.” *Public Utilities Commission v. U.S.*, 355 U.S. 534, 539 (1958); *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Moore v. City of East Cleveland*, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting). That is exclusively within the purview of the Federal Courts.

an Administrative Law Judge's discretion and powers are more narrowly circumscribed compared to an Article III judge or a state judge of general jurisdiction.

In the civil law, there is a tradition of legislative supremacy. This is due, in part, to the "top down" theory of managing adjudication. When that tradition is coupled with history of judiciary distrust, it also results in the subordination of judge's role.<sup>5</sup> Likewise, in the administrative adjudicative system, there is agency supremacy in its legislative capacity which also results in subordinating the Administrative Law Judge's role. Congress passes a law authorizing a particular agency to make rules with which to enforce the law. The agency promulgates regulations prescribing how the law is going to be enforced, including civil, administrative adjudication. The courts give great deference to an agency's interpretation of the law.<sup>6</sup>

The common law tradition is exemplified by a "bottom up," decentralized system in which general principles are derived from litigated cases or controversies. Those principles are based on experience, thus forming rules for judges to follow. The "top down" civil law system is somewhat rigid and designed to yield certain results. This "top down" system also applies to administrative adjudication in which the agency circumscribes the ALJ's discretion so that legislative intent and agency policy are followed. In the common law tradition, there is judge made law, even when interpreting statutes. In the civil law tradition, there is little judge made law or *stare decisis* within the codes. Therefore, the civil law does not evolve, at least within the codes. In administrative adjudication, there is judge made law to the extent that the ALJ's decision

---

<sup>5</sup> *Supra*, note 2 at 105.

<sup>6</sup> *Chevron v. Natural Resources Defense Council*, 476 U.S. 837, 844 (1984).

and rationale is consistent with agency policy. By not reversing, modifying, or remanding the ALJ's decision, the agency may implicitly adopt it as law.<sup>7</sup>

In the civil law tradition, the judges are professional, permanent civil servants who have served as a judge ever since they finished law school, passed their exams and finished their apprenticeships. Common Law judges have had experience as practicing attorneys. They function on a horizontal plane whereas civil law judge function in a hierarchy. In the civil law tradition, the judicial opinions are written so that they can be reviewed. Common law judges may or may not prepare a written opinion, depending on the court's jurisdiction. Common law judge are more independent.

Civil law courts base their judgments on the provisions of codes and statutes, from which solutions in particular cases are derived. Therefore, they reason extensively on the basis of the technical, general principles of the codes to fill in the gaps not specifically addressed in the codes. In the common law tradition, cases are the primary source of law, supplemented by statutes. Common law judges apply community norms and have wide, inherent discretion. They can be creative. Civil law judges and Administrative Law Judges apply the technical standards of the codes and cannot be as creative.

### **THE UNIQUENESS OF FEDERAL ADMINISTRATIVE ADJUDICATION**

Prior to discussing the Coast Guard's administrative adjudication system for dangerous drug use, it is necessary to provide an overview of administrative law and

---

<sup>7</sup> This is especially true in commercial fisheries enforcement by the National Oceanic and Atmospheric Administration (NOAA). Once the ALJ issues a decision, the Respondent may appeal to the Administrator. The Administrator may refuse to hear to appeal if the ALJ's decision is consistent with agency policy. The ALJ's decision then becomes final agency action and may be appealed to the local U.S. District Court who will decide whether the agency's decision as rendered by the ALJ is correct. The district judge bases the decision only on evidence in the record, not additional evidence. See, 5 U.S.C. § 706 (2006).

adjudication in the United States. Administrative law encompasses that branch of law governing the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public. It consists of: (1) the statutes endowing agencies with powers and establishing rules of substantive law relating to those powers; (2) the body of agency-made law, consisting of administrative rules, regulations, reports, opinions containing findings of fact, and orders; and (3) the legal principles governing the acts of public agents when those acts conflict with private rights. Black's Law Dictionary, 8<sup>th</sup> ed. (2004). It "includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government's participation is in furnishing an impartial tribunal with the power of enforcement." Richard J. Pierce, Jr., *Administrative Law Treatise*, 5<sup>th</sup> ed. Vol. I, p. 1, Wolters Kluwer, New York (2010) (Quoting Friendly, "New Trends in Administrative Law," 6 Md. Bar J., No. 3, p. 9 (1974)).

Within the various agencies there are Federal Administrative Law Judges who preside at formal, trial-type hearings to resolve certain disputes between government agencies and persons affected by an agency's decisions. Those disputes include imposing civil penalties for violations of the agency's regulations, suspension and revocation of licenses or permits issued by the agency, and disability benefits, among other things. As the initial trier of fact, the Administrative Law Judge (ALJ) is "functionally comparable" to a trial judge.<sup>8</sup> As such, ALJs are authorized to administer oaths and affirmations, issue

---

<sup>8</sup> *Butz v. Economou*, 438 U.S. 478, 514 (1978); *Federal Maritime Commission v. South Carolina State Port Authority*, 535 U.S. 743, 756 (2002).

subpoenas, rule on offers of proof, receive relevant evidence, and take other actions authorized by agency rules in accordance with the Administrative Procedure Act (APA).<sup>9</sup>

The U.S. Office of Personnel Management (OPM) administers the selection and employment of ALJs and each agency appoints as many as necessary to hold hearings required to be conducted in accordance with the APA.<sup>10</sup> OPM also administers the selection and employment of ALJs.<sup>11</sup> Agencies interview and appoint from OPM's register as many ALJs as necessary to hold hearings required to be conducted in accordance with the APA.<sup>12</sup> With the approval of OPM, ALJs from one agency may be assigned to hear cases temporarily for other agencies when caseloads warrant.<sup>13</sup> To further ensure ALJs' independence from their agencies, OPM also sets their pay.<sup>14</sup> Agencies may not rate an ALJ's job performance or grant any monetary, honorary, or incentive pay.<sup>15</sup> Most importantly, agencies may remove an ALJ "only for good cause established and determined by the Merit System Protection Board on the record after opportunity for hearing before the Board."<sup>16</sup>

There are approximately 1,430 Administrative Law Judges assigned to 29 Federal agencies.<sup>17</sup> The agency employing the largest number of ALJs, approximately 1,115, is the Social Security Administration.<sup>18</sup> Two other agencies with large numbers of Administrative Law Judges include the U.S. Department of Labor, with approximately

---

<sup>9</sup> 5 U.S.C. §§ 551 – 559; 556(c); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 550-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

<sup>10</sup> 5 U.S.C. § 3105 (2006); 5 C.F.R. pts. 930 and 337 (2010).

<sup>11</sup> 5 C.F.R. pts. 337 and 930 (2010).

<sup>12</sup> 5 U.S.C. § 3105 (2006).

<sup>13</sup> 5 U.S.C. § 3344 (2006); 5 C.F.R. § 930.208 (2010).

<sup>14</sup> 5 C.F.R. § 930.205 (2010).

<sup>15</sup> 5 C.F.R. § 930.206 (2010).

<sup>16</sup> 5 U.S.C. § 7521 (2006); 5 C.F.R. §§ 1201.121 to 1201.148 (2010).

<sup>17</sup> OPM figures as of June 2009.

<sup>18</sup> *Id.*



40, the Office of Medicare Hearings and Appeals with approximately 70, and the National Labor Relations Board, with 44.<sup>19</sup> The remaining Administrative Law Judges are employed in agencies with 1 to 19 judges.

Administrative Law Judges adjudicate three broad categories of cases: regulatory, entitlement, and enforcement. Regulatory cases, such as those of the Federal Energy Regulatory Commission, involve economic regulation of rates and services provided by industries vital to the U.S. economy.<sup>20</sup> Also included under regulatory as well as enforcement cases are merchant mariner license suspension and revocation cases heard by Coast Guard Administrative Law Judges.<sup>21</sup> Entitlement cases involve adjudication of claims initiated by citizens for benefits provided by law such as disability under the Social Security Act<sup>22</sup> and worker's compensation benefits under the Longshoremen and Harbor Workers Compensation Act.<sup>23</sup> The enforcement category involves adjudication of cases brought by various Federal agencies against individuals or companies to enforce Federal laws and regulations. Examples of enforcement are mine safety cases heard by Judges of the Mine Safety and Health Review Commission,<sup>24</sup> workplace safety cases heard by Judges of the Occupational Safety and Health Review Commission,<sup>25</sup> aviation safety cases heard by Judges of the National Transportation Safety Board,<sup>26</sup> commercial fishery regulation cases brought by the National Oceanic and Atmospheric

---

<sup>19</sup> *Id.*

<sup>20</sup> 18 C.F.R. pt. 185 (2010).

<sup>21</sup> 33 C.F.R. pt. 20 (2010) and 46 C.F.R. pt. 5 (2010).

<sup>22</sup> 20 C.F.R. pt. 404 (2010).

<sup>23</sup> 20 C.F.R. pt. 702 (2010).

<sup>24</sup> 29 C.F.R. pt. 2700 (2010).

<sup>25</sup> 29 C.F.R. pt. 2200 (2010).

<sup>26</sup> 49 C.F.R. pt. 821 (2010).

Administration,<sup>27</sup> and aviation safety and security civil penalty cases brought by the Transportation Security Administration against the aviation industry and its passengers.<sup>28</sup>

At the conclusion of hearings, the parties may submit proposed findings of fact and conclusions of law.<sup>29</sup> The ALJ then prepares and issues the initial or recommended decision that includes factual findings and legal conclusions that are matters of public record.<sup>30</sup> Initial decisions become the agency's final decisions unless appealed to the head of the agency or commission. The head of the agency or commission, can affirm, reverse, modify, set aside, or remand for further proceedings.<sup>31</sup> Appeals from final agency action are to United States District Courts or to Circuit Courts of Appeal, depending on the Agency. This system is very similar to what Prof. Damaška refers to as the hierarchical ideal which he associates with the European civil law system.<sup>32</sup> In administrative adjudication, it creates the appearance of being biased because the hierarchy is within the agency. "[The fact that the ALJ works for the agency] has cast a shadow on the hearing examiner/employee relationship."<sup>33</sup> Put another way,

[T]he agency is allowed to act as police officer, prosecutor, and judge, with the hearing process a mere rubber stamp for the agency staff's decisions. Because a court will overturn the decision of the agency only upon a showing that there was no substantial evidence in the record to support the agency's decision, the proponents [of central

---

<sup>27</sup> 15 C.F.R. pt. 904 (2010).

<sup>28</sup> 49 C.F.R. pt. 1503 (2010).

<sup>29</sup> 5 U.S.C. § 557(c) (1) (2010).

<sup>30</sup> For example, under NOAA regulations, an initial decision becomes effective as the final administrative decision of the Agency 60 days after service unless otherwise provided by statute or regulations, the Judge grants a petition for reconsideration, or a petition for discretionary review is filed. 15 C.F.R. § 904.271(d).

<sup>31</sup> The Coast Guard line of appeal is from the ALJ to the Commandant, thence to the National Transportation Safety Board, and thence to the appropriate Circuit Court of Appeals. See 33 C.F.R. Subpart J and 49 C.F.R. pt. 825 (2010).

<sup>32</sup> *Supra*, note 1, Damaška at 20-21.

<sup>33</sup> John W. Hardwicke, *The Central Panel Movement*, 53 ADMIN. L. REV. 419, 423 (2001).

panels of ALJ adjudication] argue that allowing the agency to control the fact-finding portion of the proceedings gives the agency an unbeatable hand and leads to abuses of the agency's power over regulated individuals and businesses.<sup>34</sup>

“[U]nder the APA, both its federal and state incarnations, the agency alone [has been] granted the authority to make the decisions on the law and facts of a dispute before the agency.”<sup>35</sup>

As far as independence is concerned, an ALJ has “decisional independence,” not “independence in the sense of “separation of powers.”<sup>36</sup> Like judges in the civil law tradition, ALJs cannot rule on the constitutionality of issues or challenges to the validity of regulations promulgated by an agency.<sup>37</sup> Under the APA, there is a “firewall” that separates the ALJ from the investigatory and prosecutorial functions of the agency.<sup>38</sup>

But, as shown below, the perception of non-independence persists:

[E]ven if the use of agency employees as hearing officers [ALJs] does not result in actual unfairness, the use of those employees results in apparent unfairness with consequent loss of public trust in the process. Under this argument, a member of the public who appears before a hearing officer [ALJ] is presumed to anticipate receiving something akin to a trial conducted by a judicial branch judge. Upon discovering that the hearing officer [ALJ] is an agency employee, the person instinctively assumes that a fair hearing will not be forthcoming.<sup>39</sup>

---

<sup>34</sup> David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Panel for Contested Case Proceedings* 36 WILLAMETTE L. REV. 219, 224 (2000).

<sup>35</sup> *Id.*

<sup>36</sup> James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1211 (Winter 2006).

<sup>37</sup> *See, e.g.*, 15 C.F.R. § 904.200(b) (2010). The exception in the civil law system is judges on constitutional courts.

<sup>38</sup> 5 U.S.C. § 554 (d) (2) (2006) provides that the presiding agency employee (ALJ) making the decision shall not be subject to the supervision of the investigative and prosecution functions for the agency.

<sup>39</sup> Heynderickx, *supra* note 38 at 225-26 (footnotes omitted). On judicial independence, Martin Shapiro asks the rhetorical question, “shouldn’t the court-like agencies be independent too, an independent fourth branch [of government] not answerable to either Congress or president?” MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION, 112, The University of Georgia Press, Athens, Georgia (1988).

## COAST GUARD ADMINISTRATIVE ADJUDICATION

The U.S. Coast Guard is charged with, among other things, promulgating and enforcing regulations for the promotion of safety of life and property in the maritime domain.<sup>40</sup> It also exercises general regulatory authority over the Merchant Marine, its vessels, and its personnel.<sup>41</sup> That authority includes establishing and classifying Merchant Marine personnel credentials as well as establishing professional and medical qualifications for those seeking to obtain credentials.<sup>42</sup> It also includes authority to require holders of Merchant Mariner Credentials (MMCs) to be tested for alcohol and dangerous drugs.<sup>43</sup> To that extent, the Coast Guard may deny an MMC to any person who has been convicted of a dangerous drug law of the United States or a state within 10 years of application, or has ever been a user of or addicted to a dangerous drug.<sup>44</sup>

Once an Administrative Law Judge (ALJ) finds that the MMC holder is, or has been, a user of or addicted to dangerous drugs, the law requires that the MMC be revoked.<sup>45</sup> Unless the ALJ finds the allegation not proved, the ALJ is not permitted to

---

<sup>40</sup> 14 U.S.C. § 2 (2006).

<sup>41</sup> 46 U.S.C. § 2103 (2006).

<sup>42</sup> 46 U.S.C. § 7101 (2006). Merchant mariner licenses, documents, and certificates of registry are now consolidated into what is now referred to as the Merchant Mariner's Credential (MMC). The term "credential" can include license, certificate of registry, MMC, or STCW Endorsement (Standards for Training, Certification and Watchkeeping). 74 Fed. Reg. 11,216 (March 16, 2009) (codified throughout Title 46 C.F.R.).

<sup>43</sup> 46 U.S.C. § 7702(c) (2) (2006). "The testing may include pre-employment (with respect to dangerous drugs only), periodic, random, and reasonable cause testing, and shall include post-accident testing."

<sup>44</sup> 46 U.S.C. § 7503 (2006).

<sup>45</sup> 46 U.S.C. § 7704(c) (2006). The authority for the Coast Guard to conduct administrative proceedings against the credentials of merchant marine personnel is found at 46 U.S.C. §§ 7701-7705 (2006). Administrative proceedings to suspend or revoke merchant mariner credentials are initiated and conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551-599 and the Coast Guard's substantive and procedural rules at 46 C.F.R. pt. 5 (2010) and 33 C.F.R. pt 20 (2010). ALJ Decisions and Orders may be appealed to the Commandant of the Coast Guard under 33 C.F.R. §§ 20.1001-20.1004 (2010). Decisions of the Commandant are appealed to the National Transportation Safety Board (NTSB) under 49 C.F.R. §§ 825.1 - 825.40 (2010). Final Orders of the NTSB are appealed to the appropriate U.S. Circuit Court of Appeals (49 U.S.C. § 1153 (2006)) , thence to the Supreme Court of the United States (28 U.S.C. § 1254 (2006)). Coast Guard ALJ Decisions and Orders are found at

impose a sanction less than revocation. Further, if an ALJ finds that the MMC holder has been convicted of violating a dangerous drug law of the United States or a state within a 10 year period before the beginning of the administrative proceedings, the ALJ must either suspend or revoke the holder's MMC.<sup>46</sup> It is clear that Congress intends to exclude drug users and violators of drug statutes from serving on U.S. vessels.

### **Marine Employers Must Test Employees**

To discourage the illegal use of controlled substances, the Coast Guard requires all marine employers to test their employees for dangerous drugs.<sup>47</sup> Those dangerous drugs are: marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines.<sup>48</sup> Marine employers are not permitted to employ anyone to serve as a crewmember unless the individual passes a chemical test for dangerous drugs.<sup>49</sup> Marine employers must conduct pre-employment,<sup>50</sup> periodic,<sup>51</sup> random,<sup>52</sup> serious marine incident,<sup>53</sup> and

---

<http://homeport.uscg.mil/mycg/portal/ep/programView.do?channelId=-27093&programId=73628&programPage=%2Fep%2Fprogram%2Feditorial>. That website also contains links to Commandant Appeal Decisions and NTSB Decisions.

<sup>46</sup> 46 U.S.C. § 7704(b) (2010).

<sup>47</sup> See generally, 46 C.F.R. pt. 16. In its Notice of Proposed Rulemaking requiring employers to test mariners for dangerous drugs and alcohol, the Coast Guard stated, "through chemical testing, the Coast Guard expects to discourage drug and alcohol use by merchant marine personnel, an activity which adversely impacts the users, their shipmates, the marine industry, and the public in general." 53 Fed. Reg. 25926 (July 8, 1988). "*Dangerous drug* means a narcotic drug, a controlled substance, or a controlled - substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))." 46 C.F.R. § 16.105 (2010).

<sup>48</sup> 46 C.F.R. § 16.113 (2010); 49 C.F.R. § 40.85 (2010).

<sup>49</sup> 46 C.F.R. § 16.210 (a) (2010). "Crewmember" includes those engaged or employed on board a vessel owned in the U.S. that is required by law or regulation to engage, employ, or be operated by an individual holding a merchant mariner credential or acting under the authority of that credential. 46 C.F.R. § 16.105.

<sup>50</sup> 46 C.F.R. § 16.210 (2010)

<sup>51</sup> 46 C.F.R. § 16.220 (2010).

<sup>52</sup> 46 C.F.R. § 16.230 (2010).

<sup>53</sup> 46 C.F.R. § 16.240 (2010); 46 C.F.R. § 4.03-2 (2010) definition of serious marine incident); 46 C.F.R. § 4.06-1 (2010) testing shall include tests for evidence of drug as well as alcohol use).

reasonable cause tests for dangerous drugs.<sup>54</sup> The Supreme Court of the United States has upheld workplace drug testing, provided it is reasonable.<sup>55</sup>

All testing must comply with the procedures in 46 C.F.R. pt. 40<sup>56</sup> and drug testing laboratories must be certified by the U.S. Department of Health and Human Services under the National Laboratory Certification Program (now called the Substance Abuse and Mental Health Services Administration (SAMHSA)).<sup>57</sup> To ensure compliance, employers who violate the mandatory drug testing regulations are subject to civil penalties.<sup>58</sup>

The Coast Guard also requires employers to establish an Employee Assistance Program for education and training on drug use.<sup>59</sup> Each program must include the effects and consequences of drug and alcohol use on personal health, safety, and work environment as well as the manifestations and behavioral cues that may indicate drug and alcohol use and abuse.<sup>60</sup>

---

<sup>54</sup> 46 C.F.R. § 16.250 (2010) (Reasonable cause also includes alcohol testing).

<sup>55</sup> See, Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) (warrant not required; safety sensitive positions); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing must be reasonable).

<sup>56</sup> 46 C.F.R. § 16.113 (2010).

<sup>57</sup> 49 C.F.R. § 40.81 (2010). Marine employers must use laboratories on the list of accredited labs published by Substance Abuse and Mental Health Services Administration (HHS/SAMHSA, formerly HHS/NLCP). A notice listing all currently certified laboratories is published in the Federal Register during the first week of each month. For the most current list of SAMHSA approved labs see, 75 Fed. Reg. 5,088-89 (Feb. 1, 2010). SAMHSA labs ensure that mistakes in testing are extremely rare. This is another reason why the regulations do not allow the ALJ to dismiss a drug case unless that lab makes a material mistake in the 49 C.F.R. pt. 40 procedures.

<sup>58</sup> 46 U.S.C. § 2115 (2006); 46 C.F.R. § 16.115 (2010).

<sup>59</sup> 46 C.F.R. § 16.401 (2010).

<sup>60</sup> *Id.*

When a mariner tests positive for dangerous drugs, there is an established suspension and revocation procedure that not only promotes safety at sea but also protects mariners' rights.<sup>61</sup>

### **Suspension and Revocation Proceedings**

The purpose of suspension and revocation proceedings is to promote safety at sea.<sup>62</sup> Suspension and revocation proceedings are remedial and not penal in nature and are intended to help maintain standards for competence and conduct essential to promoting of safety at sea.<sup>63</sup> Hearings must be conducted in accordance with the APA and the Coast Guard's substantive and procedural regulations found at 46 C.F.R. pt. 5 and 33 C.F.R. pt. 20.<sup>64</sup>

The parties to suspension and revocation proceedings are the Respondent, the Investigating Officer, and the Administrative Law Judge. The Respondent is the merchant mariner who holds an MMC and has tested positive for dangerous drugs. The Investigating Officer (IO) is the Coast Guard official designated by appropriate authority for the purpose of conducting investigations of marine casualties or matters pertaining to the conduct of credentialed merchant mariners.<sup>65</sup> The ALJ is the person appointed under the Administrative Procedure Act at 5 U.S.C. § 3305 whom the Commandant of the

---

<sup>61</sup> See, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON COAST GUARD: ADMINISTRATIVE LAW JUDGE PROGRAM CONTAINS ELEMENTS DESIGNED TO FOSTER JUDGES' INDEPENDENCE AND MARINER PROTECTIONS ARE BEING FOLLOWED, GAO-09-489, June 12, 2009.

<sup>62</sup> 46 U.S.C. § 7701 (a) (2006).

<sup>63</sup> 46 C.F.R. § 5.5 (2010).

<sup>64</sup> 46 U.S.C. § 7702(a) (2006); Administrative Procedure Act, (originally enacted as Pub. L. No. 79-404, 60 Stat. 237 June 11, 1946), repealed, recodified, and further amended at 5 U.S.C. §§ 550-559, 701-706, 706, 1305, 3105, 3305, 3344, 4301, 5335, 5372, and 7521); see also, 46 U.S.C. § 7701 (2006), General Provisions for Merchant Mariner Suspension and Revocation Proceedings; 46 U.S.C. § 7702 (2006), Administrative Procedure for Suspension and Revocation; 46 U.S.C. § 7703(2006), Bases for Suspension and Revocation; and 46 U.S.C. § 7704 (2006), Dangerous Drugs as Grounds for Revocation.

<sup>65</sup> 46 C.F.R. § 5.15 (2010). The Investigating Officer may also be an attorney but it is not required. In more serious cases, the Coast Guard will also assign an attorney.

Coast Guard designates pursuant to § 556(b) of that Act for the purpose of conducting hearings under 46 U.S.C. §§ 7703 or 7704.<sup>66</sup> Besides testing positive for dangerous drugs or being convicted of violating a dangerous drug law, mariners are also subject to suspension and revocation proceedings for acts of misconduct, negligence, or incompetence.<sup>67</sup>

If an MMC holder fails a chemical test for dangerous drugs, the holder's employer must report the test results in writing to the nearest Coast Guard Officer-in-Charge, Marine Inspection.<sup>68</sup> The IO conducts the requisite investigation and prepares a Complaint to be served on the Respondent with a copy to the ALJ Docketing Center. The Chief Administrative Law Judge then assigns the case to the ALJ next in rotation.<sup>69</sup> The assigned ALJ has all the powers necessary to conduct a fair, fast, and impartial hearing.<sup>70</sup>

In suspension and revocation proceedings resulting from a positive test for dangerous drugs, IOs must propose that the ALJ revoke Respondent's credential.<sup>71</sup> However, the IO has the discretion to offer Respondents a settlement agreement to provide Respondent an opportunity to prove he or she is cured of dangerous drug use.<sup>72</sup>

---

<sup>66</sup> 33 C.F.R. § 20.102 (2010); 46 C.F.R. § 5.19(a) (2010). Section (b) states that the Commandant delegates to ALJs the authority to admonish, suspend with or without probation or revoke a merchant mariner credential.

<sup>67</sup> See, 46 C.F.R. §§ 5.27, 5.29, and 5.31 (2010).

<sup>68</sup> 46 C.F.R. § 16.201(c) (2010). The credential holder must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation. *Id.* Under 16 C.F.R. § 16.201(d), if an individual who is not a credential holder fails a chemical test for dangerous drugs, that individual shall also be denied employment as a crewmember or removed from duties which directly affect the safe operation of the vessel as soon as possible.

<sup>69</sup> 33 C.F.R. § 20.201 (2010).

<sup>70</sup> 33 C.F.R. § 20.202 (2010).

<sup>71</sup> 46 U.S.C. § 7704(c) (2006); 46 C.F.R. § 5.59, and Table 5.569 (2010).

<sup>72</sup> 33 C.F.R. § 20.502 (2010). Coast Guard Marine Safety Manual (COMDTINST M16000.10A), Volume V, Section E.4.a., available at [http://www.uscg.mil/directives/cim/16000-16999/CIM\\_16000\\_10A](http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_10A). IOs may offer cure settlement agreements to mariners who have not previously tested positive, or in some cases, to those who have tested positive more than three (3) years prior whom the Medical Review Officer still considers to be good candidates for cure. However, the IO may not offer a cure settlement agreement if a serious marine incident triggered the drug test.



The authority to offer a settlement agreement in a drug case is derived in part from the pertinent language in 46 U.S.C. § 7704(c) which reads as follows:

If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the [credential] shall be revoked unless the holder provides satisfactory proof that the holder is **cured**. (Emphasis added).

46 U.S.C. § 7704(c) (2006)

### **Settlement Agreements**

Settlement agreements provide Respondents an opportunity to prove that they are cured from using dangerous drugs and thereby avoid having their MMCs permanently revoked. As stated in the Coast Guard Marine Safety Manual, Volume V, Part C, Chapter 4, Section E.4.a., the standard settlement agreement provides that the Respondent admit to all jurisdictional and factual allegations in the Complaint. That means Respondent must acknowledge being a holder of an MMC and that his/her sample tested positive for the particular dangerous drug in question. Further, the settlement agreement must provide that the Respondent's MMC is revoked but that the revocation is "stayed" pending satisfactory completion of all terms in the agreement; and, that the Respondent enroll in an approved drug rehabilitation program which takes approximately 60 days.

Upon successful completion of the drug rehabilitation program, the Respondent must agree to demonstrate complete non-association with dangerous drugs by submitting to a minimum of 12 random, unannounced drug tests to be administered during the following 12 months. The drug tests are to be conducted in accordance with Department of Transportation testing procedures at 49 C.F.R. pt. 40. During that 12 month period, the Respondent is also to attend a substance abuse monitoring program of at least 2 meetings per month.

Upon completing the above requirements, the Respondent is to provide proof thereof to the designated Medical Review Officer (MRO) who shall review the evidence and issue a letter attesting that the mariner is drug-free and that the risk of subsequent drug use is sufficiently low to justify the mariner's return to work.<sup>73</sup> Settlement agreements must also provide that upon return to work, the Respondent may also be subject to additional testing up to 60 months for a minimum of 6 tests during the first year if the MRO deems it necessary.<sup>74</sup> Finally, the ALJ must approve the settlement agreement.<sup>75</sup> The settlement agreement must strictly conform to the above requirements; otherwise the ALJ must disapprove it. There is no discretion on the part IO and the ALJ.

The entire program must be completed by a date certain which is usually 13-15 months after entering into the settlement agreement. If Respondent fails to complete the program, the IO shall file a notice of failure to complete which provides that the Respondent has a right to a hearing before an ALJ solely on the issue of whether he/she has failed to fulfill the terms of the settlement agreement.<sup>76</sup> The ALJ's decision on whether the Respondent has fulfilled the terms of the settlement agreement may not be appealed. During the period the Revocation is "stayed," the Respondent deposits his/her MMC with the IO.<sup>77</sup> Upon successful completion of the settlement agreement, the IO returns the MMC to the Respondent.<sup>78</sup>

---

<sup>73</sup> A Medical Review Officer (MRO) must be a licensed M.D. or D.O. who has met the experience and training requirements in accordance with 49 C.F.R. § 40.121 (2010). The MRO functions in accordance with 49 C.F.R. §§ 40.122 - 40.169 (2010).

<sup>74</sup> 46 C.F.R. § 16.201(f) (2010).

<sup>75</sup> 33 C.F.R. § 20.502 (2010).

<sup>76</sup> Respondents may not be able to complete the cure program due to circumstances beyond their control. In those cases, the parties may agree to extend the Settlement Agreement up to 90 days. The ALJ must approve extensions beyond 90 days.

<sup>77</sup> 46 C.F.R. § 5.201 (2010).

<sup>78</sup> 33 C.F.R. § 20.502 (2010).

Settlement agreements must prescribe that Respondents may not be employed in any capacity which requires a Coast Guard issued MMC. On more than one occasion, Respondents undergoing cure (without having entered into a settlement agreement) had petitioned the ALJ to allow them to work under the authority of their merchant mariner credentials prior to completing cure. On both occasions, the ALJ allowed the Respondents to work, but on appeal by the IO, the Commandant of the Coast Guard overruled the ALJ. In Appeal Decision 2634 (BARRETTA) (2002 WL 32061809 (CGCDA)), the Commandant held:

The ALJ is not authorized to permit a mariner to sail under the authority of the mariner's credential until all the requirements of cure have been met. The ALJ can only find that cure has been established after the mariner has successfully completed a bona fide drug rehabilitation program, demonstrated a complete non-association with drugs for one year following completion of the drug rehabilitation program, and the MRO has made a determination in accordance with 46 CFR 16.201(f) that the mariner is drug-free and his risk of illegal drug use again is sufficiently low. During the period of cure, the ALJ may stay the order of revocation and continue the hearing to allow cure, but the ALJ cannot allow the mariner to work under the authority of the mariner's credential.

Similarly, in Appeal Decision 2638 (PASQUARELLA) (2003 WL 1891872 (CGCDA)), the Commandant held, "[u]nder BARRETTA . . . the ALJ may not allow the mariner to work under the authority of the mariner's credentials prior to completion of cure. This is accomplished by the Coast Guard retaining possession of the document."

This proscriptive language narrowly circumscribes the ALJ's role in suspension and revocation cases involving dangerous drug use. It precludes the ALJ from fashioning a sanction to suit the individual mariner's needs and instead treats all mariners equally

who have tested positive for dangerous drugs. It is a valid exercise of the agency's authority to ensure that federally credentialed merchant mariners are drug free. No exceptions. Allowing merchant mariners undergoing cure to work under the authority of their credentials creates an element of risk to safety at sea. Therefore, a Respondent must not only successfully complete the drug rehabilitation program and remain drug free for one year thereafter, but also the MRO must certify that the Respondent is drug free and that the risk of subsequent dangerous drug use is sufficiently low to justify the mariner's return to work. This policy promotes safety at sea and provides mariners with an opportunity to cure themselves of using dangerous drugs without having their MMCs permanently revoked.

### **Hearing Procedure**

The IO will not offer a cure settlement agreement if the Respondent had previously completed such an agreement within the last three years, or if the positive drug test was triggered as the result of a serious marine incident.<sup>79</sup> In the absence of a cure settlement agreement, a Respondent who has tested positive for dangerous drugs has two choices: 1) defend against the allegations at hearing; or 2) voluntarily surrender his/her merchant mariner credential to avoid hearing.<sup>80</sup> If Respondent chooses the latter, the Coast Guard will take no further administrative action with the result being that Respondent permanently gives up all rights to the credential.<sup>81</sup> To further protect the

---

<sup>79</sup>Coast Guard Marine Safety Manual (COMDTINST M16000.10A), Volume V, Section E.4.a., available at [http://www.uscg.mil/directives/cim/16000-16999/CIM\\_16000\\_10A](http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_10A).

<sup>80</sup> 46 C.F.R. § 5.203 (2010).

<sup>81</sup> 46 C.F.R. § 5.203(b) (2) (2010).

Respondent's rights, the IO must be convinced that the Respondent fully understands the effects of a voluntary surrender.<sup>82</sup>

Respondents choosing to defend against the allegations at hearing may appear with or without counsel and are entitled to the procedural due process protections accorded by the APA and the regulations at 33 C.F.R. pt 20 and 46 C.F.R. pt. 5.<sup>83</sup> The procedural aspects of the hearing closely follow a civil trial in federal court without a jury and the standard of proof in Coast Guard hearings is a preponderance of the evidence.<sup>84</sup>

Central to suspension and revocation proceedings resulting from a positive test for dangerous drugs is "[i]f an individual fails a chemical test for dangerous drugs . . . the individual will be presumed to be a user of dangerous drugs."<sup>85</sup> To trigger this presumption,

the Coast Guard must prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16 [now Part 40]. Proof of those three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone.<sup>86</sup> (Emphasis added).

---

<sup>82</sup> 46 C.F.R. § 5.203(c) (2010). The Investigating Officer will have Respondent sign a written statement indicating that he/she understands the legal effect of voluntarily surrendering the credential.

<sup>83</sup> Those rights include discovery, having witnesses, records, or other evidence subpoenaed, the right to examine and cross-examine witness, the right to introduce relevant evidence into the record, and the right to testify to facts or relevant information on his/her own behalf, among other things. 33 C.F.R. pt. 20, and 46 C.F.R. pt 5. Unlike the civil law tradition, the hearings are oral and open to the public.

<sup>84</sup> 33 C.F.R. § 20.701 (2010). Unlike the civil law tradition, the hearings are oral and open to the public.

<sup>85</sup> 46 C.F.R. § 16.201(b) (2010).

<sup>86</sup> Appeal Decision 2603 (HACKSTAFF) (1998 WL 34073115 (CGCDA)). 49 C.F.R. pt 40 (2010) has since replaced the procedures referred to in 46 C.F.R. pt. 16 at the time of the HACKSTAFF Appeal Decision. 46 C.F.R. § 16.201 (2010) now states that "[c]hemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40."

The IO proves these elements by introducing the Drug Custody and Control form and then proves the chain of custody to the certified laboratory. The IO also introduces documents and reports from the laboratory showing the handling and testing of Respondent's specimen. The IO accomplishes this process through testimony of the laboratory director. Finally, the IO introduces testimony and documentation through the Medical Review Officer (MRO) who certifies the particular lab result and testifies to notifying the Respondent and to any statements Respondent might have made during the interview with the MRO. "Only if there is proof - substantial, reliable, and probative evidence - of all these elements has the foundation been laid for the presumption of drug use in 46 C.F.R. § 16.201(b)."<sup>87</sup>

Within that context, there is some judicial discretion in finding whether one or more of those elements have been proved. There is also some judicial discretion in finding whether a respondent's proffer to rebut the presumption of dangerous drug use is sufficient. However, the Coast Guard Investigating Officer may appeal the ALJ's decision to the Commandant who may find that the ALJ's decision was not based on substantial, reliable, and probative evidence.<sup>88</sup> The respondent may appeal the Commandant's decision to the National Transportation Safety Board (NTSB).<sup>89</sup> Both the Commandant and the NTSB review carefully the administrative record and the ALJ's reasoning to ensure compliance with the law, regulations, and applicable standard of proof. After the NTSB's decision, the respondent or the Coast Guard may appeal to the

---

<sup>87</sup> Appeal Decision 2603 (HACKSTAF) (1998 WL 34073115 (CGCDA)). For a detailed analysis of the steps involved in defending a mariner accused of drug abuse in Coast Guard suspension and revocation proceedings see Patricia R. Spivey, *Representing the Mariner Accused of Drug Abuse: A Step-By-Step Guide*, and 21 TULANE. MAR. L J. 445 (1997).

<sup>88</sup> This appellate process also ensures that the agency is treated fairly and that the ALJ is following the law.

<sup>89</sup> 49 C.F.R. pt. 825 (2010).

U.S. Circuit Court of Appeals sitting in the circuit where the case was tried or the District of Columbia Circuit.

Under the SAMHSA Certification Program, laboratories must meet strict standards to conduct drug and specimen validity tests on urine specimens for federal agencies. To become certified, a laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.<sup>90</sup>

In view of the foregoing, suspension and revocation proceedings to revoke a merchant mariners' credentials provide little discretion for the judge. While it is always possible to discover mistakes, the SAMHSA Certification Program greatly minimizes mistakes in the drug testing process. The judge has some discretion in determining whether the collection process was performed properly; whether the chain of custody was properly maintained; whether the specimen was properly handled and shipped to the testing facility; and, whether the testing laboratory is SAMHSA qualified. However, it is extremely rare that the judge finds any shortfalls in those areas. If the above elements are proved, there is a presumption that the Respondent is a user of dangerous drugs. That shifts the burden to the Respondent to prove the opposite. This is very difficult for the mariner/Respondent to do because the presumption must be rebutted by the preponderance reliable, probative, and credible evidence. This is very different from criminal proceedings in which there is no presumption and all the defendant has to do is raise reasonable doubt on any of the elements described above in order to be found not

---

<sup>90</sup> "Supplementary Information," HHS/ SAMHSA Current List of Laboratories Which Meet Minimum Standards to Engage in Urine Drug Testing for Federal Agencies, 75 Fed. Reg. 5,088 (Feb. 1, 2010).

guilty. It is also very different from criminal proceedings because the IO or prosecution may appeal, just as in a civil case. That serves as a check on an ALJ. Finally, if the test is positive and the mariner has not rebutted the presumption of dangerous drug use, the judge has no choice but to revoke the mariner's credential.

### **TESTING THE HYPOTHESIS**

Despite differences between the civil law and common law traditions, they achieve the same ends, only a little differently. In his article entitled, *Anglo-American and Continental Systems: Marsupials and Mammals of the Law*, Richard Lempert, compares the Anglo-American common law tradition and the Continental civil law tradition as being profoundly different yet remarkably similar in that they adapted in similar ways and shared characteristics most necessary to survive.<sup>91</sup> For example, they are similar in that both traditions function as instruments of adjudication with unbiased decision makers solving disputes in which the norms that are brought to bear are known in advance. In the civil law tradition in Europe, the norms are found in codes. In the Anglo-American tradition they are found in codes and case law precedent.<sup>92</sup>

A second similarity is that both traditions are concerned with judicial competence and unbiasedness. In the Anglo-American tradition, professional legal training, experience as a lawyer and modes of judicial selection are seen as guarantors of judicial competence.<sup>93</sup> The Continental civil law tradition achieves judicial competence through

---

<sup>91</sup> *Supra*, note 1, Lempert, 395-413.

<sup>92</sup> *Id.* at 400.

<sup>93</sup> This applies to judges of general jurisdiction and special jurisdiction, including the administrative judiciary.



extended professional training designed explicitly to produce judges, by the structure of judging as a professional career, and by multi-judge and mixed professional/lay courts.<sup>94</sup>

The American tradition promotes unbiasedness primarily by separating the judiciary from the legislative and executive branches of government. This is the separation of powers concept. Our judges may also be recused and our jurors stricken for cause or peremptorily. Federal administrative adjudication promotes unbiasedness by insulating the ALJ from the agency's investigating and prosecuting function and providing protections in hiring, pay, and firing. The civil law tradition subscribes to the notion that judges separated from a background of private lawyering plus professional judicial training, best promotes judicial neutrality and competence. To that extent, both systems ensure impartiality and competence as much as practicable. However, it is all to no avail if the people in both systems perceive the courts as unfair. "If the people believe the courts are fair and competent, the judicial resolution of disputes will be presumed legitimate, allowing courts and the law to play the integrative role that state and society require."<sup>95</sup> Administrative adjudication is often perceived to be fundamentally unfair because the ALJs are employees of the agency.<sup>96</sup>

A third similarity is that in both traditions court decisions must be based on the rational evaluation of reliable evidence.<sup>97</sup> Regardless of which legal tradition it is, how judges reach their decisions is critical in ensuring the legitimacy of the court's verdict. In REASON IN LAW, Professors Leif Carter and Tom Burke describe the structure of legal

---

<sup>94</sup> *Supra*, note 1, Lempert, at 401.

<sup>95</sup> *Id.*

<sup>96</sup> There have been no empirical studies attesting to this perception but it is an issue that respondents often raise in their motions to disqualify the ALJ. The federal Administrative Procedure Act at § 554 (d) prescribes that the ALJ be separated from the investigative and prosecutorial functions of the agency.

<sup>97</sup> *Supra* note 1, Lempert at 401.

reasoning as follows: 1) the case facts established in the trial and preserved in the record of evidence produced at trial; 2) the facts, events, and other conditions that we observe in the world, quite apart from the case at hand, which we call social background facts; 3) what the rules of law; that is, the official legal texts created by the state, say about cases like this; and 4) widely shared moral values and social principles.<sup>98</sup>

In summary, Lemert states that pure versions of the ideal Continental and Anglo-American systems are nowhere to be found is to be expected. But, they do not have to be. What they need are generally accepted ways of deciding cases based on rational and unbiased evaluation of reliable evidence.<sup>99</sup>

In *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS*, Mirjan R. Damaška contrasts the Continental (civil law) and Anglo-American systems from the standpoint of two structures of judicial authority: the hierarchical ideal and the coordinate ideal.<sup>100</sup> He associates the former with the Continental civil law system which exemplifies classical bureaucracy characterized by a professional corps of officials organized into a hierarchy making decisions according to technical standards. The latter he associates with the Anglo-American common law system characterized by a body of nonprofessional decision makers organized into a single level of authority which makes decisions by applying differentiated community standards. He claims, among other things, that the American system, although professionalized and centralized, continues to be more deeply permeated by features

---

<sup>98</sup> LEIF H. CARTER AND THOMAS F. BURKE, *REASON IN LAW*, 9, 10, 7<sup>th</sup> ed., Pearson Education, Inc., New York (2007).

<sup>99</sup> *Supra*, note 1, Lempert at 410.

<sup>100</sup> *Supra*, note 1, Damaška, 16-29.

embodied in the coordinate ideal than are judicial administrations of any other industrial state in the West.<sup>101</sup>

According to Damaška, a judge's long term in office under the Hierarchical or Continental system creates routinization that when combined with specialization tends to influence the judge's viewpoint that routine matters appearing before them do not demand individualized justice and allows for emotional disengagement.<sup>102</sup> That concept can also be applied to Coast Guard administrative proceedings to revoke merchant mariners' credentials for dangerous drug use because the ALJ may not fashion a sanction to suit the individual needs of the respondent. Instead, the ALJ must revoke the respondent's credential if the allegation is found proved.<sup>103</sup> As noted above, the ALJ can consider a respondent's individualized evidence to rebut the presumption of dangerous drug use but rebutting the presumption is much more difficult than simply raising reasonable doubt as is done in a criminal case. The idea behind habitualization and specialization in the civil law tradition is to separate the decision maker's personal and professional reactions, thus promoting institutional thinking.<sup>104</sup> When applied to the administrative law judiciary it promotes the requirement that Administrative Law Judges must comply with agency policies and procedures, thus promoting institutional thinking.<sup>105</sup>

---

<sup>101</sup> *Id.* at 18.

<sup>102</sup> *Id.* at 19.

<sup>103</sup> It is possible that upon finding the allegation proved, the ALJ could revoke the respondent's credential and then "stay" the revocation for a reasonable period of time (15 months) to allow the respondent to demonstrate that he or she is cured of dangerous drug use.

<sup>104</sup> *Supra*, note 1, Damaška at 19. ALJs must follow their agency's legislative rules. *See also*, Moliterno, *supra*, note 36 at 1199.

<sup>105</sup> ATTORNEY GENERAL'S MANUAL ON THE APA § 7(b) (1947).

In the hierarchical structure as Damaška describes, superior reviewers face prepackaged facts and issues where the individual destinies of the parties below are less visible and equities can be easily disregarded.<sup>106</sup> The advantage of this insensitivity to individual circumstances is that superior reviewers are free to concern themselves with correcting inconsistencies in low-level decisions and with cultivation of broad ordering schemes for decision making.<sup>107</sup> Damaška's description of the hierarchical structure closely resembles the Coast Guard administrative appellate system, wherein the respondent or the Coast Guard investigating Officer appeals the ALJ's decision based on specific objections in the record. Designated staff attorneys in the Commandant's Office of Maritime and International Law prepare the appellate decision for the Commandant's signature. Once the Commandant issues a decision, the respondent may appeal that decision to the National Transportation Safety Board. This procedure allows independent agency officials to ensure that Coast Guard administrative adjudication follows the law and policy before the matter goes to the courts.<sup>108</sup>

Damaška discusses two basic approaches to technical decision making: 1) officials assess the consequences of alternative decisions and then choose the one that seems most attractive in terms of a posited organizational goal; and, 2) the legalistic approach in which officials are expected to make a particular decision when facts are found that are specified under a normative standard.<sup>109</sup> The decision's propriety is evaluated in terms of fidelity to the applicable standard. In administrative adjudication, an

---

<sup>106</sup> In Coast Guard drug cases, the ALJ may consider a respondent's personal situation in the context of his or her attempt to rebut the presumption of dangerous drug use after finding the test positive. For example, a respondent may proffer that someone put marijuana in his brownies on the day prior to the drug test or that he was riding in a vehicle with all of its windows rolled up and everyone was smoking marijuana, except him.

<sup>107</sup> *Supra*, note 1, Damaška at 20.

<sup>108</sup> *Id.* See also, 33 C.F.R. § 20.1001(2010); 49 C.F.R. § 825.15 (2010)

<sup>109</sup> *Supra*, note 1, Damaška at 21.

example of fidelity to the applicable standard is shown by Commandant Appeal Decisions in PASQUARELLA and BARETTA, above. A point can be reached where adhering to a standard can frustrate achieving desired results but nevertheless the standard must be applied, even if it produces negative results.<sup>110</sup>

Damaška discusses two variations of legalism: pragmatic and logical.<sup>111</sup> The pragmatic variation views social life as being so complex and fluid that decisional standards are targeted to narrow areas, referring to concrete sets of facts. In the logical variation, dominant views are formed at the top and percolate down to lower officials; otherwise they would be more vulnerable to the layman's call for individualized justice. It is normal in a hierarchically structured organization for the logically legalistic attitude of high authority to set the tone.<sup>112</sup> This vertical ordering of professional officials with logical rather than pragmatic legalism works best and this is what federal ALJs experience.

In discussing the Coordinate ideal, Damaška refers to the Anglo-American system as “vested in amateurs . . . leaving little opportunity for the spirit of exclusivity to develop.”<sup>113</sup> The Coordinate ideal does not allow enough time for the judge to separate personal and official attitudes as is the case with career officials.<sup>114</sup>

He says that the major difficulty in such an organization of temporary officials is how to develop a reliable memory and how to handle complex problems and functions

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 22.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 23.

<sup>114</sup> *Id.* at 24. This broad, sweeping, factual conclusion is not shown to be based on any empirical evidence. It makes no difference to the individual litigants and society how a judge is trained and selected so long as the judge's decision is based on the rational evaluation of reliable evidence. *See*, Lempert's third similarity between the civil law and common law traditions – that court decisions must be based on the rational evaluation of reliable evidence.

continuously rather than periodically. Thus, it is inefficient and frustrating to consistency and predictability of decision making.<sup>115</sup> A legislative fix can help make decision making uniform but it does not do much good if judges are free to disobey or nullify the regulation's mandate.<sup>116</sup> As shown above, Coast Guard ALJs adjudicating drug cases are not free from superior controls and their discretion is limited to finding facts and applying the law within the strict confines of agency policy.

Strict hierarchical, top down control applies to administrative adjudication in general and Coast Guard administrative adjudications involving dangerous drugs in particular. As Professor James E. Moliterno states in *The Administrative Judiciary's Independence Myth*,

. . . administrative [law] judges must follow the agency's legislative rules, but, perhaps more controversially with some administrative [law] judges, they must also follow other statements or indicators of agency policy. They are, after all, agents of the agency and have no independent authority to divine policy. The only true source of their authority is the agency itself, and their judgment must be informed by the agency's [judgment] and not their own sense of good policy. This aspect is an important distinction between administrative [law] judges and Article III judges and their state court counterparts.<sup>117</sup>

## CONCLUSION

In view of the foregoing, Coast Guard administrative proceedings to revoke merchant mariners' credentials for dangerous drug use resemble proceedings in the civil law tradition.

Applying Lempert's views, the strict norms are found in codes as expressed in laws, regulations, and Commandant Appeal Decisions. Judicial competence and

---

<sup>115</sup> *Supra*, note 1, Damaška at 25.

<sup>116</sup> *Id.*

<sup>117</sup> *Supra*, note 36 at 1199. (Footnotes omitted).

guarantees of unbiasedness are guaranteed by separating ALJs from the investigative and prosecutorial functions of the agency. The fairness of the decision and its fidelity to the norms are based on the ALJ's rational evaluation of reliable evidence.

Applying Damaška's points, Coast Guard administrative proceedings to revoke merchant mariners' credentials for dangerous drug use follow the civil law's hierarchical structure. Further, Coast Guard ALJ's make decisions according to technical standards and are insensitive to individual circumstances. Finally, a vertical ordering of professional officials applying logical rather than pragmatic legalism evaluates the ALJ's decision in terms of fidelity to technical standards designed to maintain competence and conduct essential to the promotion of safety at sea.<sup>118</sup>

---

<sup>118</sup> 46 C.F.R. § 5.5 (2010).

## BIBLIOGRAPHY

### Cases:

Appeal Decision 2638 (PASQUARELLA) (2003 WL 1891872 (CGCDA)).

Appeal Decision 2634 (BARRETTA) (2002 WL 32061809 (CGCDA)).

Appeal Decision 2603 (HACKSTAFF) (1998 WL 34073115 (CGCDA)).

Butz v. Economou, 438 U.S. 478 (1978).

Chevron v. Natural Resources Defense Council, 476 U.S. 837 (1984).

Federal Maritime Commission v. South Carolina State Port Authority, 535 U.S. 743 (2002).

Johnson v. Robinson, 415 U.S. 361 (1974).

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

Oestereich v. Selective Service Board, 393 U.S. 233 (1968).

Moore v. City of East Cleveland, 431 U.S. 494 (1977).

Public Utilities Commission v. United States, 355 U.S. 534 (1958).

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

Weinberger v. Salfi, 422 U.S. 749 (1975).

### Books:

LEIF H. CARTER AND THOMAS F. BURKE, REASON IN LAW, 8, 9, 7<sup>th</sup> ed. Pearson Education, Inc., New York (2007).

MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, 16-29 and 71-96, Yale University Press, New Haven (1986).

MARY ANN GLENDON, PAOLO G. CAROZZA, and COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS, 3<sup>rd</sup> ed., Thompson/West, St. Paul, MN (2008).

MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION, 112, The University of Georgia Press, Athens, Georgia (1988).



**Shorter Works in a Collection:**

Richard Lempert, *Anglo-American and Continental Systems: Marsupials and Mammals of the Law*, CRIME, PROCEDURE, AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT, ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA, John Jackson, Maximo Langer, and Peter Tillers, eds., Hart Publishing, Oxford and Portland, Oregon (2008).

**Periodical Materials:**

John W. Hardwicke, *The Central Panel Movement*, 53 ADMIN. L. REV. 419, 423 (2001).

David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Panel for Contested Case Proceedings* 36 WILLAMETTE L. REV. 219, 224 (2000).

Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L 617, 618-619 (2007).

James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1211 (Winter 2006).

Patricia R. Spivey, *Representing the Mariner Accused of Drug Abuse: A Step-By-Step Guide*, 21 TULANE MAR. L J. 445 (1997).

**Government Materials:**

ATTORNEY GENERAL'S MANUAL ON THE APA (1947).

COAST GUARD MARINE SAFETY MANUAL (COMDTINST M16000.10A), Volume V, Section E.4.a., available at [http://www.uscg.mil/directives/cim/16000-16999/CIM\\_16000\\_10A](http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_10A).

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON COAST GUARD: ADMINISTRATIVE LAW JUDGE PROGRAM CONTAINS ELEMENTS DESIGNED TO FOSTER JUDGES' INDEPENDENCE AND MARINER PROTECTIONS ARE BEING FOLLOWED, GAO-09-489, June 12, 2009.

**Statutes:**

Administrative Procedure Act, (originally enacted as Pub. L. No. 79-404, 60 Stat. 237 June 11, 1946), repealed, recodified, and further amended at 5 U.S.C. §§ 550-559, 701-706, 1305, 3105, 3305, 3344, 4301, 5335, 5372, and 7521) (2006).

**Treatises:**

RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, 5<sup>th</sup> ed. Wolters Kluwer, New York (2010).

**Code of Federal Regulations:**

- 5 C.F.R. pt. 337 (2010) OMB Examining System (ALJs)
- 5 C.F.R. pt. 930 (2010) Subpart B, OMB Administrative Law Judge Program
- 5 C.F.R. pt. 1201 (2010) Practices and Procedures, Subpart D, Procedures for Original Jurisdiction Cases
- 15 C.F.R. pt. 904 (2010) National Oceanic and Atmospheric Administration, Department of Commerce, Civil Procedures
- 20 C.F.R. pt. 404 (2010) Federal Old Age, Survivors and Disability
- 20 C.F.R. pt. 702 (2010) Longshoremen's and Harbor Workers' Compensation Acts and Related Statutes
- 29 C.F.R. pt. 2200 (2020) Occupational Safety and Health Review Commission
- 29 C.F.R. pt. 2700 (2010) Federal Mine Safety and Health Review Commission
- 33 C.F.R. pt. 20 (2010) Coast Guard Rules of Practice, Procedure, and Evidence for formal Administrative Proceedings of the Coast Guard
- 46 C.F.R. pt. 5 (2010) USCG Marine Investigation Regulations – Personnel Action
- 49 C.F.R. pt. 40 (2010) Procedures for Transportation Workplace Drug and Alcohol Testing Programs
- 49 C.F.R. pt. 821 (2010) National Transportation Safety Board – Rules of Practice in Air Safety Proceedings
- 49 C.F.R. pt. 825 (2010) National Transportation Safety Board – Rules of Procedure for Merchant Marine Appeals from decisions of the Commandant, U.S. Coast Guard
- 49 C.F.R. pt. 1503 (2010) Transportation Security Administration

**Federal Register:**

- 53 Fed. Reg. 25926 (July 8, 1988)
- 74 Fed. Reg. 11,216 (March 16, 2009).
- 75 Fed. Reg. 5,088 (Feb. 1, 2010).