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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER DOCUMENT	:	
	:	NO. 2693
	:	
	:	
Issued to: ROCKY MEL CONTRERAS	:	

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

By a Decision and Order (hereinafter "D&O") dated March 17, 2009, Walter Brudzinski, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard, at San Diego, CA, revoked the Merchant Mariner Document of Mr. Rocky Mel Contreras (hereinafter "Respondent") upon finding proved five counts of *misconduct.* The *misconduct* charges were that: Respondent refused to stand his lookout watch in the manner ordered by the Chief Mate on the M/V LIBERTY EAGLE; that Respondent, on three separate occasions, failed to obey the orders of the Master of the M/V LIBERTY EAGLE to report for master's logging and dismissal procedures; and, that Respondent failed to reveal a 2003 conviction for vandalism on an April 2005 official Coast Guard application (Form CG-719B). Through the same D&O, Judge Brudzinski found one additional count of *misconduct* not proved and dismissed, without prejudice, two counts

alleging *violation of law or regulation*. At all times during the proceeding Respondent appeared *pro se* and appeals *pro se*.

PROCEDURE & FACTS

At all times relevant to this proceeding, Respondent was the holder of a Coast Guard issued Merchant Mariner Document that authorized him to serve as an Able Seaman. [D&O at 12; Transcript of the Proceedings (hereinafter "Tr.") at 25, 27-28]

From December 19, 2006, through February 18, 2007, Respondent served on the M/V LIBERTY EAGLE, a U.S. flagged merchant vessel. [D&O at 12; Tr. at 77-79, Investigating Officer Exhibit (hereinafter "IO Ex.") 1] On February 14, 2007, Respondent was the Able Bodied Seaman on the 0400-0800 watch. [D&O at 12; IO Ex. 5] During that watch, Respondent refused to follow the orders of the Chief Mate to stand his lookout watch and stop being disruptive by questioning the Chief Mate's handling of a traffic situation and insisting that Captain Mahan, the master of the M/V LIBERTY EAGLE, be called to the bridge. [D&O at 12; Tr. at 79-80]

As a result of Respondent's refusal to follow the orders of the Chief Mate, Captain Mahan ordered Respondent to report to his office on February 15, 2007, for master's logging and dismissal procedures. [D&O at 13; Tr. at 82] Under 46 U.S.C. § 11501, when a seaman willfully disobeys a lawful command at sea the master may punish him in accordance with this statute. The master must also make an entry in the ship's logbook as well as provide specific notice to the offending seaman in accordance with 46 U.S.C. § 11502. Respondent refused to participate in the logging and dismissal procedures and walked out of Captain Mahan's office. [*Id.*] On February 16, 2007, the Master, Chief Engineer, and Bosun approached Respondent in his quarters and ordered

him to the Master's office for logging and dismissal procedures. [D&O at 13; Tr. at 83; IO Ex. 1 at 44; IO Ex. 5] Respondent again refused to participate in the logging and dismissal procedures. [D&O at 13; Tr. at 83] On February 17, 2007, Respondent was ordered again to appear before the Master for logging and dismissal proceedings. [D&O at 13; IO Ex. 1 at 44; Tr. at 83-84] Respondent still refused to participate. [*Id.*]

As a result of the Coast Guard's investigation into the allegations of *misconduct* against Respondent, it was discovered that Respondent had not listed all of his criminal convictions on an April 4, 2005, application for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement. While Respondent's application listed a 1988 conviction for burglary, a 1989 conviction for a dangerous weapon violation, and a 2003 conviction for battery, it failed to list a 2003 conviction for vandalism. [D&O at 13; IO Ex. 9]

The Coast Guard filed its original Complaint against Respondent's Merchant Mariner Document with the Coast Guard ALJ Docketing Center on March 29, 2007. [D&O at 3] Via the original Complaint, the Coast Guard alleged that Respondent committed three counts of *misconduct*. The first count alleged that Respondent failed to follow the orders of the mate on watch during his watch on January 30, 2007. The second count alleges that on February 14, 2007, Respondent failed to follow the orders of the Chief Mate. Count Three alleged that Respondent failed to follow the orders of the Master to report for logging and dismissal procedures on February 15, 2007.

Respondent filed an Answer to the Complaint on April 16, 2007, wherein he neither admitted nor denied the Complaint's jurisdictional and factual allegations but, instead, alleged as affirmative defenses: a labor dispute, an Equal Employment

Opportunity Commission claim, and a California civil action. [D&O at 3] In asserting these defenses, Respondent contended that he was subjected to discrimination and retaliation for filing a grievance against his marine employer.

On April 18, 2007, the matter was assigned to the Honorable Parlen L. McKenna for adjudication. Thereafter, Respondent engaged in an extensive motions practice filing over 100 motions while ALJ McKenna presided over the case. [D&O at 6] On May 23, 2007, Respondent filed a Motion for Change of Venue from Houston, Texas, to San Diego, California. Subsequently, on July 7, 2007, Respondent filed a Motion to Dismiss based on allegations that the Investigating Officer, Lieutenant Omar Vasquez, Coast Guard Sector San Diego, California, violated Respondent's due process rights. In support of his Motion to Dismiss, Respondent submitted tape recordings he made of conversations with Lieutenant Vasquez and ALJ McKenna. [D&O at 32; Respondent's Motion to Dismiss dated July 7, 2007]

On July 13, 2007, ALJ McKenna issued several orders including one granting the Motion for Change of Venue and denying the Motion to Dismiss based upon Respondent's allegation that Lieutenant Vasquez had violated his rights. [D&O at 32; Order Granting Motion to Change Venue; Order Denying Respondent's Motion to Dismiss Based on Retaliation by Liberty Maritime Corporation through the Seafarers International Union]

The Coast Guard amended its original Complaint on August 21, 2007. The Amended Complaint alleged the original three counts of *misconduct* plus an additional five counts. Counts Four and Five alleged that Respondent refused to follow the orders of the Master to report for logging and dismissal procedures on February 16 and 17,

2007. [D&O at 5-6] Count Six alleged that on April 4, 2005, Respondent applied for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement and failed to disclose a 1996 conviction for property damage. Counts Seven and Eight alleged that on or about June 25, 2007, Respondent violated California Penal Code, Title 15, Chapter 1.4 section 631, by willfully recording a telephonic conversation without the consent of the other party (Lieutenant Vasquez and ALJ McKenna). On September 5, 2007, Respondent filed his Answer to the Amended Complaint denying the jurisdictional and factual allegations. [D&O at 6; Respondent's Answer to Amended Complaint]

On July 24, 2007, Respondent filed a motion to recuse ALJ McKenna. Respondent renewed this motion on September 12, 2007. On December 4, 2007, during a prehearing conference Judge McKenna denied the motions for recusal based on "black letter law which holds a party cannot create the ground upon which disqualification of a judge is sought." (citations omitted) [Order Granting Motion for Recusal at 4] On December 8, 2007, Respondent filed ten separate motions calling for Judge McKenna's recusal. [*Id.* at 5] Upon further reflection and consideration, Judge McKenna granted Respondent's motion for recusal on December 18, 2007, stating "based on the unusual circumstances of this case, the public perception of a fair and impartial judicial system would be enhanced if the Motion for Recusal was granted, and the Amended Complaint was decided by another judge." [*Id.* at 6] The Coast Guard's Chief ALJ then reassigned the case to ALJ Brudzinski on January 8, 2008. [D&O at 6]

The hearing in the matter convened on August 19, 2008, at San Diego, California. At the opening of the hearing, the Coast Guard moved to amend the complaint. ALJ Brudzinski granted the Coast Guard's motion to amend Count Six of the Complaint to

reflect that Respondent failed to disclose a 2003 conviction for vandalism instead of a 1996 conviction for property damage. Judge Brudzinski denied the Coast Guard's motion to amend Counts Seven and Eight to reflect a violation of California Penal Code, Title 15, Chapter 1.4, section 632 (eavesdropping) vice section 631(wiretapping). [D&O at 9; Tr. at 16] ALJ Brudzinski then dismissed Counts Seven and Eight upon finding that even if he had granted the Government leave to amend those Counts, the recordings did not constitute a violation of Section 632 of the California Penal Code because the statute exempted judicial and administrative proceedings. [D&O at 11] ALJ Brudzinski thus considered the telephone calls to be pretrial conferences that were part of the administrative proceedings. [D&O at 11; Tr. at 19]

On March 17, 2009, ALJ Brudzinski issued his D&O in the matter which included a discussion of preliminary matters including Respondent's allegations of a labor dispute, his numerous motions, and the hearing. On April 16, 2009, Respondent filed a motion for appeal. In light of the fact that Respondent is acting *pro se*, I will treat Respondent's motion as both the Notice of Appeal required by 33 C.F.R. § 20.1001, and the Appellate Brief required by 33 C.F.R. § 20.1003. The Coast Guard filed a timely Reply Brief on May 19, 2009. Therefore, this appeal is properly before me.

APPEARANCES: Respondent appeared *pro se*. The Coast Guard was represented by Investigating Officers Lieutenant Ann McSpadden and Chief Warrant Officer James R. Mints of Coast Guard Sector San Diego, California.

BASES OF APPEAL

This appeal is taken from Judge Brudzinski's D&O which found proved five counts of *misconduct* and ordered the revocation of Respondent's Merchant Mariner Document. On appeal, Respondent raises the arguments summarized below:

I. *The ALJ erred in failing to grant the Respondent's Motions to Dismiss based on Respondent's allegations that the Investigating Officer acted improperly.*

II. *The ALJ erred in failing to grant Respondent's Motion for Recusal of Judge Brudzinski due to bias; and*

III. *The transcript is not an accurate record of the proceedings.*

Opinion

Standard of Review

On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. *See* 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001. "Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence." Appeal Decision 2685 (MATT). "The ALJ is the arbiter of facts" and it is "his duty to evaluate the testimony and evidence presented at the hearing." Appeal Decision 2610 (BENNETT). Under governing precedent, "the findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." Appeal Decision 2610 (BENNETT) *citing* Appeal Decisions 2557 (FRANCIS), 2452 (MORGANDE) and 2332 (LORENZ). The "[f]indings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient

material exists in the record to justify the finding." Appeal Decision 2639 (HAUCK) *citing* Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2506 (SYVERTSEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD), and 2614 (WALLENSTEIN).

I.

The ALJ erred in failing to grant the Respondent's Motions to Dismiss based on Respondent's allegations that the original Investigating Officer acted improperly.

On July 7, 2007, Respondent filed a motion to dismiss the case based upon an allegation of misconduct by the Investigating Officer, Lieutenant Vasquez. Respondent stated in his motion that "this officer was recorded in his attempt to interfere and/or coerce me and in doing so violated my Constitutional Right to due process being pre trial conference hearings with the Administrative Law Judge being present." He further accuses Lieutenant Vasquez of "unprofessional, unlawful behavior and dishonorable tactics." [D&O at 32] He also claims that Lieutenant Vasquez "did attempt to prevent the three of us from ever meeting together for any and all telephonic pre'trial [sic] conferences." [Respondent's Motion to Dismiss, due to Prejudice based on the untenable evidence against Investigating Officer: LT Omar Vasquez at 1] In support of his motion, Respondent referenced a tape recorded conversation he had with Lieutenant Vasquez that was the subject of Counts Seven and Eight of the Complaint. The transcript of the conversation is contained in the record.

Prior to his recusal, on July 13, 2007, ALJ McKenna denied Respondent's motion to dismiss based on Lieutenant Vasquez's alleged misconduct describing the motion as "frivolous" and warning that further frivolous motions would result in sanctions. [D&O at 33; Order Denying Respondent's Motion to Dismiss Based on Improper Conduct by

LT. Omar Vasquez at 1] On July 23, 2007, Respondent filed another motion to dismiss based upon the alleged misconduct of Lieutenant Vasquez. [Respondent's Continued Motion to Dismiss based upon the USCG and/or its LT Omar Vasquez having violated Respondent's right to Due Process of Law] ALJ McKenna denied this Motion by Order dated July 24, 2007. Respondent repeats this claim on appeal, asserting that the Investigating Officer attempted to deny Respondent an opportunity for a pretrial conference.

Coast Guard Suspension and Revocation "actions are administrative proceedings that are remedial, not penal in nature, fix neither criminal nor civil liability, and are 'intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.'" Appeal Decision 2689 (SHINE) *quoting* 46 C.F.R. § 5.5. The Coast Guard has enacted regulations to protect the due process rights of individuals during the administration of their cases and those regulations are to "be construed so as to obtain a just, speedy, and economical determination of the issues presented." Appeal Decision 2689 (SHINE) *quoting* 46 C.F.R. § 5.51. "[T]hose rights normally afforded to trials do not apply to administrative hearings." Appeal Decision 2689 (SHINE), *citing* Appeal Decisions 2049 (OWEN) and 1405 (POWELL). Suspension and revocation proceedings are governed by the regulations promulgated in 33 C.F.R. Part 20 and 46 C.F.R. Part 5. Any party may request a conference by motion. 33 C.F.R. § 20.501(a). Motions must be in writing. 33 C.F.R. § 20.309(c).

After a review of the transcript of the telephone conversation between Lieutenant Vasquez and Respondent, I agree with ALJ McKenna's assessment that the motion to dismiss was frivolous and warranted denial. Nothing in the transcript could remotely be

considered to be unprofessional, unlawful or dishonorable. Nor does the transcript contain evidence that Lieutenant Vasquez attempted to coerce Respondent into entering a settlement agreement. Further, it does not, as Respondent claims, indicate an attempt to prevent Respondent from having a pretrial hearing before ALJ McKenna.

Despite filing hundreds of motions in this case, Respondent does not point to a single motion filed in accordance with 33 C.F.R. § 20.501(a) requesting a conference with the ALJ, nor does Respondent point to a request for conference, that was denied by the ALJ. Respondent was, in fact, able to participate in pretrial conferences on June 30, 2007, September 26, 2007, and December 4, 2007. Moreover, Respondent presents no evidence of any motion he filed requesting a pretrial conference in accordance with 33 C.F.R. § 20.501(a) that Lieutenant Vasquez interfered with. Accordingly, Respondent's first basis for appeal is not persuasive.

II.

The ALJ erred in failing to grant Respondent's Motion for Recusal.

Respondent alleges that ALJ Brudzinski committed reversible error by not granting Respondent's motions for ALJ Brudzinski's recusal. [D&O 9] The record shows that Respondent filed motions for recusal of ALJ Brudzinski on May 21, 2007, and May 26, 2007. [D&O at 39, Respondent's Motion for a transcribed pre-trial deposition to discuss the recusal of the ALJ; Respondent's Motion for Recusal] ALJ Brudzinski denied these requests via an Order issued on June 3, 2008. [D&O at 39, Order Denying Discovery Request and Motion for Recusal] Thereafter, on June 5, 2008, Respondent filed another motion seeking recusal of ALJ Brudzinski. [D&O at 39, Respondent's follow-up Motion for recusal] This motion was denied via an Order issued on June 25,

2008. [D&O at 39-40, Order Denying Motion for Recusal] The Order noted that the regulations require that an affidavit, with facts supporting evidence of personal bias or other valid reason, be filed along with any request for recusal. [D&O 39-40, Order Denying Motion for Recusal at 3] Respondent filed further motions for recusal of ALJ Brudzinski on July 7, 2008, July 10, 2008, July 15, 2008, July 16, 2008, and July 21, 2008. [D&O at 40-42, Respondent's Motions for Recusal] These were denied via an Order dated August 11, 2008, based on Respondent's failure to comply with 33 C.F.R. § 20.204(b) (he did not file the mandated affidavit). ALJ Brudzinski further determined that Respondent's Motions for Recusal were dilatory, repetitive, or frivolous. [D&O at 43, Order Denying Motions for Recusal] Respondent repeated his request for recusal at the hearing citing his prior motions. This motion, too, was denied at the hearing. [Tr. at 29-31]

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

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

The record shows that ALJ Brudzinski pointed out to Respondent that his motions did not meet the procedural requirements set out in the regulations and, on that basis, informed Respondent that he would consider the motions for recusal once Respondent complied with the requirements of 33 C.F.R. § 20.204(b). [Tr. at 31; Order Denying Motion for Recusal dated June 25, 2008, at 3] Respondent never filed the required affidavit. The failure to comply with regulatory requirements for motions for recusal was addressed in Appeal Decision 2657 (BARNETT). *Barnett* stated as follows:

> Past Commandant Decisions on Appeal have stated that the regulatory requirements for disqualification are not "mere technicalities to be waived by the Commandant." *See* Commandant Decisions on Appeal 2495 (ZELVIC) and 2232 (MILLER). Accordingly, I will not waive those requirements here and because the affidavit supporting Respondent's 2nd Motion for Disqualification was not timely filed, the ALJ did not err in denying that motion. As a result, further consideration of the underlying substantive issues is inappropriate here. (Footnote omitted)

In *Barnett*, the Respondent was represented by counsel and the failure to follow 33 C.F.R. § 20.204(b) precluded addressing the issue of recusal on appeal. In the present case, Respondent is acting *pro se*. Nevertheless, ALJ Brudzinski informed Respondent of the legal requirements for recusal on more than one occasion, and he was bound to observe the regulatory requirement. Even had he met the regulatory requirement, meriting my further consideration of this basis for appeal, Respondent has failed to demonstrate any factual basis for relief.

Respondent alleges organizational bias and a due process violation because the ALJ is an employee of the Coast Guard. Respondent argues that the ALJ should have recused himself under the belief that there is a right to have a "non government independent judge" to decide the case. Respondent cites to NTSB Order EM-195 as applying the standard of 28 U.S.C. § 455 to Coast Guard Administrative Law Judges. Under 28 U.S.C. § 455 (a) "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." NTSB Order EM-195 is distinguishable in that it applied a standard based on an internal Coast Guard Administrative Law Judge policy instruction, which stated that administrative law judges are held to the same standard as members of the federal judiciary, and that they "must strive to avoid even an appearance that he or she is in any way partial to the position of either party to a proceeding." While the NTSB applied the

28 U.S.C. § 455 standards to that decision, it did not find that the administrative law judge in that case created an appearance of impropriety simply because he was employed by the Coast Guard as Respondent attempts to assert here, nor did it find an actual impropriety occurred. Rather NTSB cited to a "possible impact of the law judge's son's connection to this matter" as an attorney representing a manufacturer in a related products liability suit. Although Respondent repeatedly asserts bias, he has provided no evidence other than an organizational relationship between the ALJ and the Coast Guard as grounds for this assertion.

The fact that the ALJ is a Coast Guard administrative law judge is not grounds for recusal in this matter, nor does it constitute a violation of due process. "To state a due process claim for such probable unfairness, a plaintiff must sufficiently allege facts supporting a conclusion that the 'risk of unfairness is intolerably high' under the circumstances of the particular case." *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) *citing Withrow v. Larkin* 421 U.S. 35, 58 (1975). "The Supreme Court has held that circumstances presenting a greater risk of bias than agency employment of ALJs do not violate due process. In *Withrow*, the Court held there was no violation where adjudicators presided over hearings on charges they themselves investigated." *Id.* at 1205. *See also Bunnell v. Barnhart*, 336 F3.d 1112, 1114-1115 (9th Cir. 2003) and *Greenberg v. Bd of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 166-67 (2nd Cir. 1992). Therefore, I find the Respondent's organizational bias claim and due process violation claim against the ALJ to be without merit.

Respondent also alleges personal bias on the part of ALJ Brudzinski. The rules regarding bias on the part of the ALJ are laid out in Appeal Decision 2658 (ELSIK):

> Parties to suspension and revocation proceedings may request that an ALJ withdraw from the proceedings on the grounds of personal bias or other disqualification. 33 C.F.R. § 20.204(b). After making such a request, the party seeking disqualification carries the burden of proof. *Schweiker v. McClure*, 456 U.S. 188, 102 S.Ct. 1665 (1982). The courts have long stated that there is a rebuttable presumption that the officers presiding over hearings are unbiased and that bias is required to be of a personal nature before it can be held to taint proceedings. *Roberts v. Morton*, 549 F.2d 158 (10th Cir. 1977).

Respondent has failed to meet his required burden of proof. Respondent alleges four examples of bias within his appellate brief. They are: that ALJ Brudzinski ruled against the Respondent's motion for recusal; that an accurate transcript would show that the ALJ was biased[1]; that the ALJ indicated that he was not entitled to a transcript; and that the ALJ was biased because he told respondent "that the [R]espondent has no respect for authority." The respondent provides no additional support for these allegations of personal bias. I have carefully reviewed the record in this case and find no support for Respondent's allegations.

With regard to Respondent's first assertion, in effect that the ALJ was biased because he failed to recuse himself from the proceedings, it has been held that "consistent adverse rulings, even if done in a derogatory manner, are not sufficient to justify withdrawal or disqualification." Appeal Decision 2689 (SHINE) *quoting* Appeal Decision 2658 (ELSIK). Absent some showing of personal bias, the mere fact that an ALJ failed to recuse himself, does not necessitate reversal. Appeal Decision 2689 (SHINE) *citing Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1977). Respondent has failed to offer any evidence of personal bias regarding the ALJ's decision not to recuse

[1] Respondent's allegation with regard to the content of the transcript is fully discussed in part III of this decision, therefore, it will not be addressed within this portion of the decision.

himself other than simply ruling against the Respondent's request. Therefore, I reject the Respondent's argument on this allegation for failure to meet his burden of proof.

Respondent's further contention, that the ALJ was biased because he informed Respondent that he was not entitled to a transcript of the proceedings, is similarly unpersuasive. A careful review of the transcript shows that Respondent misconstrued the ALJ's statement with regard to the transcript. The ALJ did not say that Respondent would not receive a copy of the transcript, rather, the ALJ simply stated that he did not know whether or not Respondent would get a copy of the transcript because that issue "remains to be seen because there is no provision for that." [Tr. at 175-176] The ALJ does not control whether the Respondent receives a copy of the transcript. The ALJ merely restated the existing guidance of 33 C.F.R § 20.903(b) which allows a person to obtain a copy of any part of the record "after payment of reasonable costs for duplicating it in accordance with 49 CFR part 7." Respondent's allegation of bias here is without merit.

Finally, Respondent contends that the ALJ was biased because he stated that Respondent had "no respect for authority." In so asserting, Respondent misquotes the ALJ:

> You've invoked your Fifth Amendment right, but I don't know that you can stick to it because you do like to talk. And I see that there's a problem listening. And what I've seen here in this short hearing, that seems to be what this problem has been. There's too much talking. There's very little, if any, listening. You're free to go ahead and sue everybody you want to. And so far you are doing just that.
>
> And I don't know what your problem is. Maybe you have a problem with authority. I don't know. I'm just here to determine whether or not the charges that the Coast Guard has brought whether or not they are proved. And the evidence either proves them or they don't. And if you –

> You're alleging these union grievances. You're alleging discrimination. You're alleging all these things. All these things are – they don't show that – at least so far, they don't disprove that you refused to follow orders of the mate on watch. They don't disprove the entries that are in the logbook.

[Tr. at 55] Respondent has failed to demonstrate that the ALJ's mind was irrevocably closed. Accordingly, even had he observed the regulatory requirement that apply to a motion for recusal, he has offered no factual basis that would have met his burden of proof with regard to the bias allegation.

III.

The transcript is not an accurate record of the proceedings.

Respondent alleges that the transcript of the hearing is incomplete and omits verbal harassment and attacks by ALJ Brudzinski directed towards Respondent. The Administrative Procedure Act requires appellate agency review to consider the record as a whole, which includes the transcript of testimony, hearing exhibits and motions filed in the proceeding. 5 U.S.C. § 556(e). The regulations controlling suspension and revocation proceedings similarly state that "... the transcript of the hearing, together with all papers and exhibits filed, shall constitute the record for consideration and review." 46 C.F.R. 5.803; *See also* 33 C.F.R. 20.1002(a).

When a transcript is accompanied by a certification of a qualified court reporter, "[a] presumption of regularity accompanies the official functions of such persons." Appeal Decision 2309 (CONEN) *citing* Appeal Decision 1793 (FARIA).

Prior Commandant Decisions on Appeal have found that the lack of a transcript precludes review, requiring dismissal if the transcript cannot be produced. *See* Appeal Decisions 1916 (McGOWAN) (complete lack of hearing transcript precludes appellate

review), 2157 (KING) (no decipherable record available) and 2394 (ANTUNEZ) (no transcript of hearing available because recording lost). Even when a transcript exists, if it contains substantial errors, the record may not be sufficient for meaningful appellate review. *See* Appeal Decisions 2168 (COOPER) (extensive material changes to text renders transcript suspect) and 2276 (LUDLUM) (substantial omissions from a hearing record relating to significant matters effectively preclude meaningful review).

The cases that found transcript errors warranted dismissal were cases where there was, essentially, a complete lack of a transcript to review. Minor defects are not prejudicial. *See generally* Appeal Decisions 1933 (HERRING) (clerical defects not prejudicial) and 2490 (PALMER) (majority of testimony on a particular minor issue was accurately recorded).

Like the Respondent in *Conen*, Respondent has not indicated any basis for his contention that statements by ALJ Brudzinski were omitted or that the verbatim transcript was altered. Here, a facially complete transcript of the hearing is accompanied by a certificate from a Certified Shorthand Reporter for the State of California who certified that the transcript was a "true record of the proceedings." [Tr. at 179] A careful and thorough review of the transcript reveals no apparent omissions or gaps other than routine recesses. Respondent has provided no evidence to overcome the presumption of regularity and therefore Respondent's final basis of appeal is not persuasive.

CONCLUSION

The actions of ALJ Brudzinski had a legally sufficient basis and, for the reasons stated above, I find that his decision was not arbitrary, capricious, or clearly erroneous.

Respondent has submitted no creditable evidence that the Investigating Officer committed misconduct, that ALJ Brudzinski was biased in this case or that there were any defects in the transcript. Therefore, I find Respondent's appeal to be without merit.

ORDER

Accordingly, the Order of the Administrative Law Judge at San Diego, California, on March 17, 2009, is hereby AFFIRMED.

Sally Brice-O'Hara, VADM, VCG

Signed at Washington D.C. this 4th of April, 2011.

SALLY BRICE-O'HARA
Vice Admiral, U. S. Coast Guard