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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	
	:	NO. 2703
MERCHANT MARINER LICENSE	:	
	:	
	:	
Issued to: TERRY D. WEBER	:	

APPEARANCES

For the Government:
LT Jeff A. Fry, USCG
James P. Fink, USCG

For Respondent:
Terry D. Weber, *pro se*

Administrative Law Judge: Walter J. Brudzinski

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

By a Decision and Order (hereinafter "D&O") dated September 22, 2011, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked the Merchant Mariner License of Mr. Terry D. Weber (hereinafter "Respondent") upon finding proved a charge of *use of dangerous drugs* in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. The specification found proved alleged that on January 31, 2011, Respondent submitted to a random drug test and provided a urine sample that tested positive for the presence of marijuana metabolites.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent's mariner credential on April 29, 2011. On May 17, 2011, Respondent filed his Answer to the Complaint, wherein he admitted the jurisdictional allegations and admitted to taking a random drug test on January 31, 2011. Respondent denied the remaining allegations. On May 25, 2011, a pre-hearing teleconference was conducted to schedule the hearing and address motions.

On June 7, 2011, Respondent filed a Motion to Dismiss because the caption in the Complaint mentioned addiction to as well as use of dangerous drugs but the Complaint does not allege addiction. On the same date, he filed a Motion for ALJ to Disqualify Himself. The ALJ denied the Motion to Dismiss on June 20, 2011, and the Motion to Disqualify Himself on June 23, 2011.

The hearing convened at Miami, Florida, on July 19, 2011, and Respondent represented himself. At the hearing, the Coast Guard presented the testimony of three witnesses and introduced seven exhibits. Respondent did not call any witnesses, did not offer any exhibits, and did not testify on his own behalf.

Respondent renewed his Motion to Dismiss and the ALJ amended the caption in the Complaint, striking the words "or addiction," but did not dismiss the charge.

Following the hearing, Respondent and the Coast Guard filed post-hearing briefs. The ALJ issued his D&O on September 22, 2011.

On September 26, 2011, Respondent filed his Notice of Appeal. Respondent perfected his appeal by filing his appellate brief on November 18, 2011. This appeal is properly before me.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner License issued to

him by the United States Coast Guard. [D&O at 11; Transcript (hereinafter "Tr.") at 17-18] On January 31, 2011, Respondent provided a urine specimen for random drug testing. [D&O at 11; Respondent's Answer at 1] A certified specimen collector collected a split urine sample from Respondent. [D&O at 12; Coast Guard Exhibits (hereinafter "CG Ex.") 1 and 2; Tr. at 32-35, 38-39] The specimen collector substantially followed the applicable Department of Transportation (hereinafter DOT) collection procedures. [D&O at 12; Tr. at 36-44;] Lab One, doing business as Quest Diagnostics, received Respondent's specimen and used DOT-approved procedures to handle and analyze the specimen. [D&O at 12; Tr. at 59-62 and 67-68; CG Ex. 4 and 8]

Quest Diagnostics analyzed Respondent's specimen using immunoassay as the initial screening test and Gas Chromatography/Mass Spectrometry (GC/MS) as a confirmatory test. [D&O at 12; Tr. at 60-61, 63 and 66; CG Ex. 8] The specimen tested positive for marijuana metabolites. [D&O at 12; Tr. at 63 and 66-67; CG Ex. 8 at 70] A Medical Review Officer contacted Respondent on February 15, 2011, regarding the positive drug test results, and verified Respondent's positive drug test results on that date. [D&O at 13; Tr. at 87-89, 90-92, and 94-96; CG Ex. 4]

BASES OF APPEAL

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

I. *The ALJ erred in his denial of Respondent's motions to dismiss the Complaint because the specification alleged use of or addiction to the use of dangerous drugs, but there was no evidence proving that Respondent was addicted to dangerous drugs;*

II. *The due process rights of Respondent were violated because the Complaint filed against him was not signed by the Investigating Officer, and instructions included in the Complaint were improper additions to the Complaint in violation of applicable regulations and were an attempt to intimidate Respondent; and*

III. *The ALJ should be disqualified.*

OPINION

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; whether the ALJ committed any abuses of discretion; and a denial of a motion to disqualify the ALJ. 46 C.F.R. § 5.701 and 33 C.F.R. § 20.1001(b).

This appeal contends, in essence, that the ALJ committed various abuses of discretion, and also that he should be disqualified.

I.

The ALJ erred in his denial of Respondent's motions to dismiss the Complaint because the specification alleged use of or addiction to the use of dangerous drugs, but there was no evidence proving that Respondent was addicted to dangerous drugs.

Prior to the hearing, Respondent filed a motion to dismiss the Complaint because, he asserted, the Complaint alleged two of the three charges specified by 46 C.F.R. § 5.35 for cases where any charges are based exclusively on the provisions of 46 U.S.C. § 7704. [Respondent's Motion to Dismiss (Pleadings File, Document 8)] The block on the first page of the Complaint labeled "Regulatory Authority" reads: "46 CFR 5.35 (Use) Use of, or addiction to the use of dangerous drugs." In his motion, Respondent noted that the Complaint did not include any factual allegations to support a charge of addiction to the use of dangerous drugs and that the Complaint was not signed. Respondent asked that the Complaint be dismissed because of the lack of any factual allegations to support the charge of addiction to the use of dangerous drugs. The ALJ denied the motion to dismiss. [Order Denying Respondent's Motion to Dismiss (Pleadings File, Document 21)]

At the hearing, Respondent raised his motion to dismiss the Complaint again. [Tr. at 22-30] Respondent added to his previous arguments the citation of Appeal Decision 2568 (SANCHEZ *et al.*) (1995) as authority for his position that the proper remedy for the allegedly faulty complaint was withdrawal of the Complaint without prejudice and service of a new Complaint. [Tr. at 23] Opposing the motion to dismiss, the Coast Guard proposed that the caption

be amended. [Tr. at 24] The ALJ again denied the motion to dismiss, but, over Respondent's objection, amended the "Regulatory Authority" block on page one of the Complaint by striking out the words "or addiction" in order to clarify that the only charge alleged against Respondent was use of dangerous drugs. [Tr. at 25-30]

On appeal, Respondent points out that on page 2 of the Complaint under factual allegations, the charge is still labeled "Use of, or addiction to the use of dangerous drugs." [Respondent's Appeal Brief at 5] Respondent argues that the Complaint continues to charge him with two offenses: use and addiction. [Respondent's Appeal Brief at 5] Respondent further argues that because the Complaint alleges addiction to the use of dangerous drugs, the Coast Guard was required to prove addiction or withdraw the charge, and that Appeal Decision 2568 (SANCHEZ *et al.*), and a regulation cited in *Sanchez*, 46 C.F.R. § 5.525(c), support his position that the proper relief is withdrawal of the charge and that the Complaint should be dismissed. [Respondent's Appeal Brief at 5-6]

The Complaint's second page contains the factual allegations against Respondent's mariner credential:

> 1. FACTUAL ALLEGATIONS – Use of, or addiction to the use of dangerous drugs
>
> The Coast Guard alleges that:
>
> 1. On 1/31/2011 Respondent took a random drug test.
>
> 2. A urine specimen was collected by [name of specimen collector] of APCA Consortium.
>
> 3. The Respondent signed a Federal Drug Testing Custody and Control Form.
>
> 4. The urine specimen was analyzed by LabOne, Inc. DBA Quest Diagnostics, Lenexa, KS 66219 using procedures approved by the Department of Transportation.
>
> 5. That specimen subsequently tested positive for marijuana metabolites, as determined by the Medical Review Officer, [name of medical review officer].

As Respondent noted, the Coast Guard alleges only use of dangerous drugs based on a failed urinalysis test. Only in the introductory language preceding the allegations is there a

reference to addiction to the use of dangerous drugs. The ALJ found that the Complaint only charged Respondent with use of dangerous drugs, and that the Complaint served its purpose of giving Respondent notice of the conduct giving rise to the alleged offense so he could prepare his defense. [D&O at 5] The ALJ also found that the Coast Guard was not required to prove both use and addiction to the use of dangerous drugs, because 46 U.S.C. § 7704(c) makes either offense a ground for revocation of a license. [D&O at 5] These findings by the ALJ were entirely correct. Inclusion of the additional language concerning addiction to the use of dangerous drugs in the introduction to the factual allegations was harmless surplusage. In short, the charge did not violate 46 C.F.R. § 5.35.

Although the ALJ did not amend the introductory language on page two of the Complaint to eliminate the language about addiction to the use of dangerous drugs, the ALJ did strike out that language on the first page in the "Regulatory Authority" block to make it clear that Respondent was only charged with use of dangerous drugs.

The ALJ did not abuse his discretion in denying the motions to dismiss the Complaint and, instead, amending the "Regulatory Authority" block to delete the reference to addiction.

There is nothing in Appeal Decision 2568 (SANCHEZ *et al.*) that requires a different result. The *Sanchez* case involved a faulty charge. The faulty charge was not cured before or during the hearing. Instead, the ALJ sought to cure the problem in his written decision by implicitly making a substantial change to the charge to conform to the evidence, without notice to the parties. The Vice Commandant found that this did not meet the requirements of the then applicable 46 C.F.R. § 5.525(c), which placed a duty on the ALJ to have defective charges withdrawn, and it did not give the mariners notice and an opportunity to contest what would have been the proper charge.

46 C.F.R. § 5.525 has been replaced by 33 C.F.R. § 20.305, which codifies the concept that pleadings in a Suspension and Revocation proceeding may be amended so long as the mariner is provided with notice and an opportunity to defend against any new matter. It states:

Each party or interested person shall amend or supplement a previously filed

> pleading or other document if she or he learns of a material change that may affect the outcome of the administrative proceeding. However, no amendment or supplement may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues.

33 C.F.R. § 20.305(a).

In this case, the factual allegations alleged use of dangerous drugs based on Respondent's failing a drug test. The factual allegations were never changed and the ALJ found that they were proved. To address Respondent's concern, the ALJ amended the "Regulatory Authority" block of the Complaint to clarify that only use of dangerous drugs was alleged, and that there was no charge of addiction to the use of dangerous drugs. This amendment narrowed the issues rather than broadening them, if it had any practical effect at all. No one was surprised or misled by the amendment.

Unlike the situation in *Sanchez*, Respondent has failed to show that the Complaint contained any error requiring its withdrawal. Accordingly, the ALJ did not err in denying Respondent's motions to dismiss the Complaint, and Respondent's first basis of appeal is rejected.

II.

The due process rights of Respondent were violated because the Complaint filed against him was not signed by the Investigating Officer, and instructions included in the Complaint were improper additions to the Complaint in violation of applicable regulations and were an attempt to intimidate Respondent.

Among the arguments Respondent raised in his motion to dismiss the Complaint was an argument that including the instructions on page 3 of the Complaint was an improper use of the Complaint, and assertions that it was not the function of the Investigating Officer to instruct Respondent on his rights and responsibilities. [Respondent's Motion to Dismiss (Pleadings File, Document 8) at 2-3] In his order denying the motion to dismiss the Complaint, the ALJ pointed out that 46 C.F.R. § 5.107(b) requires the Investigating Officer to advise the respondent of certain rights, possible results, and the consequences of a failure to answer or appear, in connection with the service of a Complaint in a Suspension and Revocation proceeding. [Order Denying Respondent's Motion to Dismiss (Pleadings File, Document 21) at 4-5]

On appeal, Respondent argues that the inclusion of the instructions on page 3 of the Complaint is improper and violates due process because it constitutes an attempt to intimidate the mariner. [Respondent's Appeal Brief at 7-8] Respondent also notes that the Complaint was not signed in accordance with 33 C.F.R. § 20.307(c). [Respondent's Appeal Brief at 7-8] I will address the latter point first.

The rules of practice for Coast Guard Suspension and Revocation proceedings address a motion to dismiss a complaint in these terms:

> § 20.311 Withdrawal or dismissal.
>
> * * *
>
> (d) Any respondent may move to dismiss a complaint . . . or any party may lodge a request for relief, for failure of another party to –
>
> (1) Comply with the requirements of this part or with any order of the ALJ;
>
> (2) Show a right to relief based upon the facts or law; or
>
> (3) Prosecute the proceeding.
>
> (e) A dismissal resides within the discretion of the ALJ.

33 C.F.R. § 20.311.

Respondent's arguments before the ALJ about the Investigating Officer's failure to sign the Complaint fell under 33 C.F.R. § 20.311(d)(1) because 33 C.F.R. Part 20, Subpart C includes a requirement at 33 C.F.R. § 20.303(c) that pleadings be signed. According to 33 C.F.R. § 20.311(e), it was within the discretion of the ALJ to dismiss the Complaint because it was not signed by the Investigating Officer. The ALJ did not do so. Instead, in his order denying the motion to dismiss, the ALJ called the sending of an unsigned Complaint to Respondent a "technicality" and concluded that it did not warrant dismissal of the Complaint because Respondent had notice of the use of dangerous drugs charge, answered the Complaint, and exercised his right to dispute the charge at a hearing. [Order Denying Respondent's Motion to Dismiss (Pleadings File, Document 21) at 6] The ALJ correctly observed that Respondent cited no authority requiring that a Complaint be dismissed because it was unsigned, where there was no showing that the technical error prejudiced Respondent. [*Id.*]

On appeal, Respondent notes that the Complaint was unsigned, but does not challenge the ALJ's conclusion that the technical error was not prejudicial and did not warrant dismissal of the Complaint, or otherwise develop any issue from the omission. [Respondent's Appeal Brief at 7-8]

The ALJ did not abuse his discretion in finding that the unsigned Complaint did not warrant its dismissal, and the decision is not otherwise unlawful. However, the lack of a signature bespeaks carelessness. Investigating Officers are urged to sign Complaints before filing and serving them.

The remainder of Respondent's argument, that the instructions on page three of the Complaint abuse the rules, violate due process and are contrary to public policy, is wholly unpersuasive.

The ALJ noted that the Investigating Officer is required by 46 U.S.C. § 5.107(b) to advise the respondent of certain rights, possible results, and the consequences of a failure to answer or appear, in connection with the service of a Complaint in a Suspension and Revocation proceeding. [Order Denying Respondent's Motion to Dismiss (Pleadings File, Document 21) at 4-5] He declared that the third page of the Complaint "is necessary to fulfill [the Coast Guard's] obligations under the regulations pertaining to issuing a Complaint." [*Id.* at 5] The ALJ also found that the instructions in the Complaint contain nothing inappropriate and do not mandate or attempt to mandate the respondent's actions. [*Id.*]

The ALJ did not abuse his discretion, in accordance with 33 C.F.R. § 20.311(e), in denying the motion to dismiss based on Respondent's arguments about the instructions included with the Complaint. On appeal, Respondent offers no support for his claim that the instructions were an attempt to intimidate him, nor does he state that he was, in fact, intimidated. Coast Guard regulations require that, when a Complaint is filed against a mariner's credentials, the mariner be advised of certain things. 46 C.F.R. § 5.107(b). I agree with the ALJ that the third page is a permissible means of meeting that requirement. Respondent's due process rights are not infringed by the Coast Guard's choosing to comply with its regulation by including the required advice in

instructions on the final page of the Complaint. Respondent's second basis of appeal is rejected.

III.

The ALJ should be disqualified.

On appeal, Respondent asserts that he was not afforded a hearing before an unbiased ALJ. [Respondent's Appeal Brief at 8] Before the hearing, Respondent filed a motion for the ALJ to disqualify himself, including Respondent's affidavit setting forth the reasons for disqualification, in accordance with 33 C.F.R. 20.204(b). [Motion for ALJ to Disqualify Himself (Pleadings File, Document 9)] The ALJ issued an order denying the motion. [Order Denying Respondent's Motion to Disqualify the Administrative Law Judge (Pleadings File, Document 22)] Respondent appeals from the denial of the motion. [Respondent's Appeal Brief at 9]

As he did in his affidavit included in the motion, Respondent states that the ALJ was biased because during the pre-hearing conference the ALJ suggested that Respondent should accept the Coast Guard's settlement offer, before the ALJ considered any of the evidence in the case; and because the ALJ summarily overruled his discovery motion at the pre-hearing conference. [*Id.* at 9-10] Respondent states that, subjectively, he concluded that the ALJ was an adversary, and that the ALJ had determined the result in his own mind by the time of the pre-hearing conference. [*Id.* at 9]

Respondent also raises a new basis for finding bias. Respondent states that two of the witnesses at his hearing, the specimen collector and the Medical Review Officer, perjured themselves, but that the ALJ showed his bias by finding that the witnesses had testified truthfully. [*Id.* at 10]

Among the principles applicable to the resolution of a claim of bias or prejudice against an ALJ are these:

> 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). Prejudgment also serves as a basis for disqualification. As a result, a proceeding is subject to challenge if it appears that the action has been prejudged. Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959).

Appeal Decision 2658 (ELSIK) at 14-15.[1]

> Prejudgment exists when:
>
> the decision maker is "not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' " [Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n., 426 U.S. 482, 96 S.Ct. 2308 (1976)] at 493, 96 S.Ct. 2308 (quoting [United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941)] at 421, 61 S.Ct. 999). This standard is met when the challenger demonstrates, for example, that the decision maker's mind is "irrevocably closed" on a disputed issue. [FTC v. Cement Inst., 333 U.S. 683, 68 S.Ct. 793 (1948)] at 701, 68 S.Ct. 793.

NEC Corp. v. U.S., 151 F.3d 1361, 1373 (Fed. Cir. 1998).

A.

I will begin by addressing Respondent's arguments that the ALJ demonstrated bias and prejudice by attempting to coerce him into accepting the Coast Guard's settlement offer, and that the same acts also demonstrated that the ALJ had already determined the matter in his own mind.

> In his affidavit in support of his motion, Respondent stated:
>
> The ALJ admonished the Respondent that the Respondent needed to understand the realistic options available to the Respondent. The ALJ explained the "realistic options"; it is easier to go thru the process of taking a plea agreement and go thru the re-licensing procedure, that the process is fundamentally easier, and that the remedial proceedings are established for the good order of mariner operations.

[Pleadings File, Document 9 at 2]

[1] Contrary to *Elsik*, however, it is not the case that disqualification requires a clear and convincing showing.

There is nothing improper about an ALJ conducting a pre-hearing conference and inquiring about the status of settlement discussions. 33 C.F.R. § 20.501(b), (g)(9), and (g)(11).[2]

Given the nature of the charge brought against Respondent, it is clear that if the charge was proved the ALJ would be required to revoke Respondent's License. 46 C.F.R. § 5.59(b); 46 C.F.R. § 5.569, Table 5.569. In such a case, a mariner may apply for a new credential after three years from compliance with the order of revocation.[3] 46 C.F.R. § 5.901(a). The three-year period may be waived if certain conditions are met. 46 C.F.R. § 5.901(d). The application for a new credential must include information regarding the mariner's rehabilitation or cure from the use of dangerous drugs. 46 C.F.R. § 5.903(c)(2). The application will be considered by a board appointed by the Commandant. 46 C.F.R. § 5.905. It appears that choosing to contest the charge at a hearing with the possibility of revocation of his credential was one of the "realistic options" the ALJ discussed with Respondent. The fact that Respondent would face the possibility of revocation of his License if he chose to contest the charge does not in any way foreclose the possibility that the ALJ would find the charge not proved. In the context of an ALJ's inquiry about settlement, any reasonable person would view a discussion about the consequences of an unfavorable hearing result as fair comment about the proceedings, and not of a nature to raise a question about the ALJ's impartiality.

In the same context, the ALJ's reviewing the possible advantages of settlement as a "realistic option" and encouraging settlement does not raise a question about the ALJ's impartiality. Respondent's affidavit indicates that the ALJ viewed the typical settlement offer as offering Respondent an easier path to the return of his mariner's credential. The fact that the ALJ encouraged Respondent to consider the Coast Guard's settlement offer does not show a bias or prejudice against Respondent, nor does it indicate anything about how the ALJ would decide the case if Respondent rejected the settlement offer, as he evidently did.

As a practical matter, no doubt the Coast Guard makes settlement offers in order to achieve

---

[2] The record in this case does not include the settlement offer served by the Coast Guard on the Respondent.

[3] This would be an application for an original credential, i.e. it would not build on the former, revoked credential, but would require, among other things, the taking of any examinations required for the credential. 46 C.F.R. § 10.235(b).

a predictable result and avoid the expense of a hearing, among other things. That necessarily means that the Coast Guard will be most interested in settlement, and the respondent will often be in his or her strongest bargaining position, before the hearing begins. Accordingly, it is customary for settlement discussions to occur before ALJs have heard evidence in the proceedings, and for ALJs to encourage settlement although they have not heard the evidence. ALJ comments promoting the benefits of settlement over the uncertainties of a hearing are not wrongful or improper because they occur before the ALJ has heard the evidence. A judge "often can get a feel for a case prior to trial, which means that his perceptions can be based on the conduct of the parties and the evidence." *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980). That court further noted:

> The relevant inquiry is whether the trial judge's pretrial comments were linked to his evaluation of the case based on the pleadings and other materials outlining the nature of the case, or whether the comments were based on purely personal feelings towards the parties and the case.

Id.

In this case, the ALJ had at least the Complaint and Respondent's Answer to provide him a feel for the case before the pre-hearing conference and the discussion of settlement and Respondent's "realistic options." Respondent had admitted to providing a urine specimen and the Coast Guard had alleged that standard scientific drug testing had established that the specimen was positive for marijuana metabolites. Therefore, the ALJ had a proper basis for his comments on Respondent's "realistic options," and Respondent has not suggested any reason why those comments would have been based on purely personal feelings on the part of the ALJ against Respondent. While Respondent may subjectively feel that the ALJ had prejudged the case or was biased against him, the affidavit supporting the motion for disqualification does not objectively raise a question about the ALJ's impartiality.

B.

I will now address Respondent's argument that denial of his motion for production of documents at the pre-hearing conference showed the ALJ's bias or prejudice against him. In his order denying Respondent's request for production of documents, the ALJ explained that he

denied the request because he viewed the request as not complying with the regulations, and the requested documents were irrelevant to the issues in the proceeding. [Pleadings File, Document 6] It is well established that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). Nothing about the ALJ's denial of the motion for production of documents suggests that it was based on anything other than the ALJ's fair evaluation of the merits of the motion. Respondent's contention here, again, does not raise a question about the ALJ's impartiality.

C.

Finally, I will address Respondent's argument that the ALJ displayed bias and prejudice by accepting as credible the allegedly perjured testimony of the specimen collector and the Medical Review Officer. The ALJ serves as the fact finder in Suspension and Revocation proceedings. As with other judicial rulings, decisions on credibility alone do not constitute a valid basis for a finding of bias.

In his appeal, Respondent admits that he cannot prove that the specimen collector committed perjury. [Respondent's Appeal Brief at 10] He offers no further argument to support his position regarding the specimen collector except to state that his offer to submit to a polygraph test was rebuffed. [Respondent's Appeal Brief at 10] Whether or not Respondent would have submitted to a polygraph test is irrelevant to the ALJ's fact finding. Respondent simply offers nothing to support his attack on the ALJ's finding that the specimen collector's testimony was credible.

Regarding the Medical Review Officer (hereinafter MRO), Respondent refers to statements made by him that Respondent views as clearly contradictory. The MRO testified about the functions he performed in connection with the drug testing that led to the charge against Respondent. [Tr. at 79-85] During the MRO's testimony, the Coast Guard offered Ex. 4 and 6. [Tr. at 82-91] Coast Guard Exhibit 4 is the Drug Testing Consortium's Report to Respondent of the results of his drug test. On page 2 of that exhibit, the MRO had recorded that he made contact with Respondent and Respondent admitted use. [Tr. at 88] Coast Guard Exhibit 6 is a form

prepared by the MRO which he referred to as the MRO's Action Report. That form also showed the MRO's recorded note that he contacted Respondent and Respondent admitted use. [Tr. at 88] Both exhibits were admitted into evidence without objection by Respondent. [Tr. at 91]

The MRO testified that he spoke with Respondent by telephone and asked him if he had used marijuana recently. [Tr. at 87-88] He testified that Respondent essentially admitted use. [Tr. at 88] Later, he testified that he did not remember the telephone conversation but was relying on his written notes of the conversation. [Tr. at 100] Respondent argues that this shows that the MRO perjured himself. I disagree. With respect to the MRO's telephone conversation with Respondent, his testimony was that he did not remember the conversation and his recorded notes in Coast Guard Exhibits 4 and 6 did not refresh his recollection. This is far from a showing of perjury.

Based on the foregoing, Respondent has failed to show that the MRO perjured himself. Accordingly, the premise for Respondent's argument that the ALJ showed bias and prejudice by accepting perjured testimony does not exist.

Respondent has failed to meet his burden by rebutting the presumption that the ALJ was unbiased. Respondent's third and final basis for appeal is rejected.

CONCLUSION

The ALJ did not abuse his discretion in his rulings; and there is no basis for concluding that the ALJ had a bias or prejudice against Respondent, or that the ALJ prejudged the case.

ORDER

The ALJ's Decision and Order dated September 22, 2011 is AFFIRMED.

J.P. CURRIER
Vice Admiral, U.S. Coast Guard

Signed at Washington, D.C., this 04 day of NOVEMBER, 2013.