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 LICENSE	:	NO. 2689
Issued to: ERIC NORMAN SHINE	:	

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

By a Decision and Order (hereinafter "D&O") dated November 13, 2008, Coast Guard Administrative Law Judge (hereinafter "ALJ") Walter J. Brudzinski revoked the merchant mariner license of Eric Norman Shine (hereinafter "Respondent) upon finding proved the charge of *incompetence*. In finding the alleged violation proven, the ALJ made 53 findings of fact, including several findings related to Respondent's actions aboard two merchant vessels and others regarding Respondent's medical treatment history. Respondent appeals.

APPEARANCE: Prior to filing his first appeal, Respondent was represented by Forgie, Jacobs & Leonard (Peter S. Forgie, Esq.), 4165 E. Thousand Oaks Boulevard, Suite 355, Westlake Village, CA 91362. From the time of his first appeal, Respondent has appeared *pro se*. The Coast Guard was represented by LCDR Chris Tribolet of U.S. Coast Guard Maintenance and Logistics Command Pacific, Alameda, California.

PROCEDURE & FACTS

The Coast Guard filed a Complaint, alleging that Respondent is medically incompetent due to a major depressive disorder, against Respondent's merchant mariner license on March 6, 2003. [D&O at 3] The Complaint stemmed from incidents that occurred while Respondent acted under the authority of his merchant mariner license by serving as the Third Engineer (and/or Second Engineer) aboard the M/V MAUI between March 6, 2001, and June 11, 2001, and while Respondent served as the Third Engineer aboard the M/V PRESIDENT JACKSON between December 2, 2001, and January 5, 2002. [Hearing Transcript (hereinafter "Tr.") at 61-63; 217-255]

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credential at issue in these proceedings. [Coast Guard Exhibit (hereinafter "Ex.") 2] The Coast Guard alleges that, while serving aboard the M/V MAUI and the M/V PRESIDENT JACKSON, Respondent engaged in behavior that was viewed by his supervisors and members of the crew as harassing, aggressive, litigious and unsafe. [D&O at 13-17] Testimony from the Chief Engineer onboard the M/V MAUI alleged that at various times Respondent alternatively refused to work or was very difficult to supervise and direct. [*Id.* at 13-14] He testified that Respondent did not have the necessary skills to perform his duties and possessed an overall inability to work with other crewmembers. [*Id.*] The Chief Engineer onboard the M/V PRESIDENT JACKSON testified that Respondent's presence onboard the ship created an un-seaworthy condition due to his insubordination, inability to follow orders, dangerous working practices, constant threats of litigation, and aggressive behavior toward other crewmembers. [*Id.* at 15-17]

What followed in this matter, after the Complaint was issued, is long and storied, involving over two hundred motions, replies and orders.[1] Respondent's case was initially assigned to Coast Guard ALJ Parlan McKenna who issued three Orders (on July 30, 2003, August 4, 2003, and September 8, 2003) requiring Respondent to submit to a psychological examination by an independent doctor of the ALJ's choosing. *See* Appeal Decision 2661 (SHINE). Respondent did not comply with any of those orders to the satisfaction of ALJ McKenna, and instead, on August 1 and August 22, 2003, submitted to a psychological evaluation by a medical doctor of his own choosing. [*Id.*] As a consequence, on September 10, 2003, citing the negative inference created by Respondent's failure to submit to the psychological examination ordered by the ALJ, as well as many other pieces of evidence, the Coast Guard filed a "Contingent Motion for Summary Decision" which Respondent replied to. [*Id.*] Following the issuance of numerous other orders, motions and replies, on February 20, 2004, the ALJ issued a Summary Decision, in favor of the Coast Guard. A hearing was not held before the Summary Decision was issued. [*Id.*]

Respondent properly appealed the Summary Decision and, as a result, Appeal Decision 2661 (SHINE), which vacated ALJ McKenna's Summary Decision and remanded the matter for a hearing, was issued on December 27, 2006. Following the remand, the case was re-assigned to a new ALJ (ALJ Brudzinski) on January 30, 2007.

Citing 33 C.F.R. § 20.1313, ALJ Brudzinski ordered Respondent to undergo a medical (psychiatric) examination on February 26, 2008. Respondent refused, claiming the designated psychiatrist was conflicted. [Tr. at 797-798]

[1] To be precise, there were 179 pleadings (129 party filings) prior to the remand. Following the remand, there were 73 pleadings (41

ALJ Brudzinski convened a hearing in the matter on May 20, 2008, in Long Beach, California. The hearing lasted four days and concluded on May 23, 2008. During the hearing, the Coast Guard introduced sixty-seven exhibits into the record, including various medical records related to Respondent and written statements made by Respondent relating to his mental health in pleadings or letters to insurers and unions, and offered the testimony of three witnesses. *See, e.g.*, Coast Guard Exhibits 23, 25-29, 30, 32, 70-71. The hearing transcript shows that Respondent spent the last two days of the hearing arguing with ALJ Brudzinski on various issues, including medical privilege, the court's statutory authority to hold the hearing and Respondent's assertions as to the general unfairness/illegality of the proceedings. [Tr. at 660-906] During this time, although ALJ Brudzinski provided Respondent great latitude to put forth some type of defense, Respondent called no witnesses, but did enter two exhibits into the record and actively and extensively cross examined the Coast Guard's witnesses.

After the hearing concluded, ALJ Brudzinski invited the Coast Guard and Respondent to file briefs of proposed findings of fact and conclusions of law. Respondent did so by filing a 170 page post hearing brief entitled "CONCLUSONS [sic] OF LAW AND FACT ORDERED FILED BY JULY 10, 2008 – FILED UNDER DURESS AND BY COMPULSION." The Coast Guard declined to file a post hearing brief.

On November 13, 2008, ALJ Brudzinski issued the D&O now at issue, finding the charge of *incompetence* proved. [D&O at 4] Thereafter, on December 10, 2008, Respondent, without regard to the unambiguous requirements of 33 C.F.R. §§ 20.1001-

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party filings) up to an including the November 13 2008, D&O.

1003 (Procedures for Appeal), filed 15 separate pleadings with the ALJ Docketing Center, some were entitled "Notices of Appeal," while other were simply entitled "Motions."

Respondent submitted a second filing on January 9, 2009, styled as a "Second Notice." Respondent's "Second Notice" was comprised of 16 pleadings that were essentially duplicative of the December 10, 2008, filings, but for the additional claim that the first set of filings was not properly entertained by the ALJ Docketing Center. Also on December 9, 2009, the ALJ Docketing Center received a second package from Respondent entitled "[UNPERFECTED] APPEAL ON DECISION AND ORDER AND ALL PRECEEDINGS" which was comprised of over two thousand pages, weighed approximately 22 pounds and included 149 "issues" on appeal. At no time did Respondent file an Appellate Brief conforming to the requirements of 33 C.F.R. § 20.1003.

Notwithstanding Respondent's failure to adhere to the proper procedures for filing a "Notice of Appeal" and "Appellate Brief," and taking into consideration the fact that Respondent has appeared *pro se* since before the remand, I will consider Respondent's combined pleadings filed up to and including January 9, 2009, as sufficing for both the Notice of Appeal and Appellate brief.[2] Respondent effectively perfected his appeal through his combined filings of December 10, 2008, and January 9, 2009, and I consider this appeal as being properly before me.[3]

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[2] The Coast Guard ALJ Docketing Center, in a February 9, 2009, letter to Respondent, advised Respondent that his combined filings of December 10, 2008, and January 9, 2009, would serve as effectively conforming to the requirements set out in 33 C.F.R. §§ 20.1001-1004 (Appeals).

[3] Respondent filed yet another set of pleadings on January 12, 2009, (weighing 22 pounds) which was properly rejected by the ALJ Docketing Center since they already considered Respondent's prior filings as satisfying the Notice of Appeal and Appellate Brief filing requirements of 33 C.F.R. §§ 20.1001-1004.

BASES OF APPEAL

This appeal is taken from the ALJ's D&O which found the charges of *incompetence* proved. In his *pro se* appellate filings, Respondent raises hundreds of "issues," points and topics for consideration on appeal. However, in Coast Guard Suspension and Revocation proceedings, appealable issues are limited by 33 C.F.R. § 20.1001(b) which states:

> (b) No party may appeal except on the following issues:
>
> (1) Whether each finding of fact is supported by substantial evidence.
>
> (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
>
> (3) Whether the ALJ abused his or her discretion.
>
> (4) The ALJ's denial of a motion for disqualification.

Additionally, the regulations mandate that a party appealing an ALJ's opinion file an Appeal Brief that adheres to the requirements of 33 C.F.R. §20.1003(a), which states:

> (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the—
>
> (i) Basis for the appeal;
> (ii) Reasons supporting the appeal; and
> (iii) Relief requested in the appeal.
>
> (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

Moreover, Commandant Decisions on Appeal dictate that "[w]hen acting on an appeal from an agency decision, the agency has all the powers which it would have in making the initial decision." *See* Appeal Decision 2610 (BENNETT) *citing* 5 U.S.C. § 557(b). This includes the power to exclude "irrelevant, immaterial or unduly repetitious

evidence." *See* Appeal Decision 2610 (BENNETT) *citing* 5 U.S.C. § 556. *See also* 33 C.F.R. § 20.802.

To ascertain Respondent's salient arguments has proven a painstaking and arduous task, given the sheer volume of Respondent's post D&O-filed pleadings and his almost complete failure to clearly present the basis for appeal or to cite to portions of the record supporting his issues as required by 33 C.F.R. §20.1003(a)(1). In short, rather than follow the clear instructions of 33 C.F.R. Part 20 which require only the filing of a "Notice of Appeal" and one "Appellate Brief," Respondent has filed a multitude of ambiguous pleadings, leaving it to the undersigned to attempt to identify the issues suitable for review. A laborious assessment of Respondent's filings has resulted in identifying the following twelve issues for consideration on appeal. Any other issues, points of discussion, or questions raised by Respondent, not enumerated below, are beyond the scope of appealable issues under 33 C.F.R. §20.1001(b) and are deemed immaterial, irrelevant or unduly repetitious and are hereby denied.

I. *Whether the Coast Guard has Jurisdiction to Consider Matters Related to Mariner Credentials;*

II. *Whether Coast Guard Suspension and Revocation proceedings are constitutional;*

III. *Whether the ALJ erred by not applying the Federal Rules of Civil Procedure;*

IV. *Whether the ALJ erred by not recusing himself;*

V. *Whether the ALJ erred by not disqualifying the Coast Guard "prosecutor" (Investigative Officer) and whether the Investigating Officer committed misconduct;*

VI. *Whether the ALJ erred by allowing certain witnesses for the Coast Guard to testify;*

VII. Whether the ALJ improperly denied Respondent the opportunity to call witnesses;

VIII. Whether the ALJ conducted improper EX PARTE proceedings;

IX. Whether the ALJ erred by ordering Respondent to submit to a medical evaluation;

X. Whether Respondent had/has a right to privacy and privilege with respect to medical/personal records pertaining to his medical condition;

XI. Whether there was excessive delay of the proceedings as a whole; and,

XII. Whether the Coast Guard carried its burden of proof.

OPINION

Before addressing the above issues, in addition to considering allowable bases for appeal, it is necessary to address the criteria for reversal of an ALJ's opinion. The standard of review for appeals of Suspension and Revocation (hereinafter "S&R") proceedings is that the ALJ's findings must be supported by reliable, probative, and substantial evidence. *See, e.g.*, Appeal Decisions 2603 (HACKSTAFF), 2592 (MASON), 2584 (SHAKESPEARE), and 2575 (WILLIAMS). Numerous prior Commandant Decisions on Appeal make clear that, in evaluating the evidence presented at a hearing, the ALJ is in the best position to both weigh the testimony of witnesses and assess the credibility of evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2421 (RADER), 2319 (PAVELIC), 2589 (MEYER), 2592 (MASON), and 2598 (CATTON). The ALJ's decision is not to be reversed on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'd* NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581

(DRIGGERS), 2474 (CARMIENKE), 2589 (MEYER), 2592 (MASON), and 2560 (CLIFTON).

I.

Whether the Coast Guard has Jurisdiction to Consider Matters Related to Mariner Credentials

The first issue presented in this case is whether the Coast Guard has jurisdiction to suspend or revoke a merchant mariner credential. Throughout these proceedings, Respondent has asserted that the Coast Guard, as a branch of the military, has no authority to consider issues related to his merchant mariner license, since he is a civilian in the merchant marine. For example, Respondent states:

> Appellant is being forced, or in fact compelled under duress and at the hands of a now self-declared and "Special" Branch of the Military to file his Appeal to the Uniformed Military Head, as Commandant of, and Admiral within, a Special Branch of Military that Appellant is not a member of, nor has ever been a member of or in the service in.

[Respondent's "Second Notice of Appeal to the Commandant; and Notice and Motion to the Coast Guard and Reaffirmation of all 15 Related Appeal Motions and Previously Filed and Left Unnoticed and Undocketed by ALJ Docketing Center Staff Debra Gundy" at 5]

Additionally:

> The Coast Guard is declaring itself to be a Special Branch of Military that the Respondent is not in as stated, and the Coast Guard is declaring that it can carry on Civilian Affairs and not just Police Work, but carry on Investigations, issue and enforce its own subpoenas without Article III Judicial Notice. It does not have the right to put on its case and the Appellant has repeatedly made these issues as to venue and jurisdiction clear.

[Respondent's Appeal Brief at 284]

46 U.S.C. § 2103 states that "[t]he Secretary[4] has general superintendence over the merchant marine of the United States and of merchant marine personnel." The Secretary of the Department of Homeland Security has delegated this authority to the Commandant, United States Coast Guard. *See* Department of Homeland Security Delegation No. 0170.1. Under 46 U.S.C. § 7701(b), "[l]icenses, certificates of registry, or merchant mariner's documents may be suspended or revoked for acts described in section 7703 of this section." 46 U.S.C. § 7703 states, in relevant part, that "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder...has committed an act of incompetence relating to the operation of a vessel." *See* 46 U.S.C. § 7703(4) As such, to the extent it bears repeating, I find that this appeal is appropriately before me, and that the prior proceedings leading up to this appeal were undertaken pursuant to proper United States Coast Guard authority to address alleged acts of misconduct of those holding merchant mariner credentials.

II.

Whether Coast Guard Suspension and Revocation proceedings are constitutional

In his appeal, Respondent questions the constitutionality of these proceedings. To that end, Respondent devotes more than one hundred pages of his appeal filings to various questions of constitutionality, invoking issues of due process, the right to a jury, separation of powers, "*ultra vires*" issues, and concurrently asserts violations of Constitutional Amendments III, V-VII, XIV, XVI, and XXIII.

[4] Pursuant to 46 U.S.C. § 2101(34), the term "Secretary" means "the Secretary of the department in which the Coast Guard is operating."

S&R proceedings are administrative, not judicial. *See, e.g.*, Appeal Decision 2646 (McDONALD). Their purpose is to promote safety at sea. *See* 46 U.S.C. § 7701(a). Following final agency action and appeal to the National Transportation Safety Board, judicial review is available in the federal courts. *See* 5 U.S.C. § 702; *see also* 46 C.F.R. § 1.01-30, 46 C.F.R. § 5.713 and 33 C.F.R. § 20.1101(b)(2). S&R proceedings have as the focus of their inquiry issues of compliance with statutes and regulations. The constitutionality of statutes are the province of the Federal Courts. *See Weinberger v. Salfi,* 422 U.S. 749, 765 (1975); Appeal Decisions 2632 (WHITE), 2135 (FOSSANI), 2049 (OWEN) and 1382 (LIBBY).. Because this is not the proper forum to address the constitutionality of duly enacted regulations, I will not make a determination on Respondent's constitutional claims.

I do note, however, that Respondent's due process rights have been safeguarded within the Coast Guard's administrative process and that this process that has been held to be constitutionally sufficient. *See, e.g., Williams v. Dept. of Transp.,* 781 F.2d 1573, 1579 (11th Cir. 1986). The record clearly indicates that Respondent has been afforded the right to appear before a neutral trier of fact, to face all evidence presented against him, to present evidence on his own behalf, to cross-examine the Coast Guard's witnesses and to call witnesses on his own behalf, and to appeal the ALJ's decision to a higher authority. Based on thorough review of the transcripts from the extensive hearing, nothing can be found to indicate that the ALJ's treatment of the Respondent was contrary to the requirements of 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Therefore, although it is not my province to determine the validity of the constitutional claims raised by

Respondent, I have little doubt that his claims would be found baseless upon further review.

III.

Whether the ALJ erred by not applying the Federal Rules of Civil Procedure

Respondent asserts that the Federal Rules of Civil Procedure should govern the procedural aspects of the hearing. He states:

> More normally, under the APA the Federal Rules of Civil Procedure are to apply in the lower proceedings as to the so-called ALJ's, but herein the Coast Guard has stated that the FRCP's do not apply and are not controlling and the Coast Guard can somehow make up its own rules in the midst of proceedings as can be seen from the transcripts of proceedings from October 23, 2007 and May, 2008. This is a violation of Due Process.

[Respondent's "Second Notice and Appeal on Decision, Order and on All Proceedings: And Related Motions Contained Herein" at 3]

Coast Guard administrative proceedings are governed by the Administrative Procedure Act, not the Federal Rules of Civil Procedure (hereinafter "F.R.C.P."). *See* 46 U.S.C. § 7702(a); *See also* Appeal Decision 2679 (DRESSER). A review of the F.R.C.P. shows that although the Rules govern procedures in numerous courts of the United States, they are not expressly made applicable to either administrative proceedings, in general, or Coast Guard S&R proceedings in particular. *See* Fed. R. Evid. 101; Fed. R. Evid. 1101; Fed. R. Civ. P. 1; Fed. R. Civ. P. 81. As a result, administrative agencies, like the Coast Guard, are not bound by the same rules governing criminal or civil trials. *Compare Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (agencies not bound by same rules of evidence as a jury trial). Moreover, the applicable procedural rules make clear that the F.R.C.P. should only be applied if a "specific provision" is not

addressed within 33 C.F.R. Part 20. *See* 33 C.F.R. § 20.103(c). Therefore, I conclude that the ALJ did not err in conducting these proceedings in accordance with the procedural rules set out in 33 C.F.R. Part 20, rather than the F.R.C.P.

IV.

Whether the ALJ erred by not recusing himself

Respondent asserts that the ALJ erred by not recusing himself from the proceedings. The record shows that prior to the remand, Respondent moved for the recusal of ALJ McKenna. Following the remand, ALJ McKenna recused himself *sua sponte* and the case was assigned to ALJ Brudzinski who remained with the proceedings through the execution of the D&O. Following reassignment, Respondent moved for recusal of ALJ Brudzinski due to alleged conflicts of interest. To support this allegation, Respondent alleges that the ALJ's past uniformed service in the Coast Guard and as a prosecutor create a conflict of interest that necessitates recusal of ALJ Brudzinski. [RESPONDENT'S NOTICE OF MOTION REGARDING RECUSAL OF ALJ BRUDZINSKI DUE TO CONFLICT OF INTEREST; Tr. at 770-772] Respondent also claims that the ALJ's involvement in subsequent hearings rendered him conflicted. Finally, Respondent cites the ALJ's consistent ruling against him as evidence of bias and cause for recusal. [RESPONDENT'S NOTICE OF MOTION REGARDING RECUSAL OF ALJ BRUDZINSKI DUE TO CONFLICT OF INTEREST; Tr. at 40, 772-773, 890]

In S&R cases, a party may move the ALJ to disqualify himself and withdraw from the proceeding for "personal bias or other valid cause." 33 C.F.R. § 20.204(b). Such a motion must be made "promptly upon discovery of the facts or other reasons allegedly constituting cause" and be filed along with a supporting affidavit prior to the

issuance of the ALJ's D&O. [*Id.*] The party seeking disqualification carries the burden of proof. *Schweiker v. McClure*, 456 U.S. 188, 196 (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." *See* Appeal Decision 2658 (ELSIK) *citing Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1977). If the ALJ denies the motion for disqualification, the moving party may raise the issue on appeal once the S&R hearing has concluded. *See* 33 C.F.R. § 20.204(b)(2).

A review of the record shows that the ALJ, more often than not, ruled against Respondent with respect to his numerous motions and objections. However, consistent adverse rulings, even if done in a derogatory manner, are not sufficient to justify withdrawal or disqualification. *See* Appeal Decision 2658 (ELSIK). Evidence of bias must be of a personal nature before it can be held to taint proceedings. *See Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1977). Alternatively, Respondent must show that the ALJ's mind was "irrevocably closed" on the particular issue being decided before disqualification will be deemed necessary. *See, e.g., Southern Pac. Communications v. American Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984).

The record shows that there is no evidence to support a conclusion that the ALJ either harbored any personal bias toward Respondent or that he had an unalterably closed mind as to the matters critical to the disposition of this case. To the contrary, although often clearly frustrated with Respondent's behavior during both the October 23, 2007, Prehearing Conference and the May, 2008, hearing, the ALJ exhibited significant restraint. In consideration of Respondent's *pro se* status, the ALJ made a substantial

effort to accommodate Respondent's apparent lack of understanding of the procedural aspects of the S&R hearing. [Tr. at 783-785, 841-845] Consequently, I find that the ALJ did not err by refusing to grant Respondent's request for recusal/withdrawal.

It is unclear from Respondent's appeal whether he is also asserting error with respect to his request for recusal of the original sitting ALJ (ALJ McKenna), prior to the remand. To the extent that Respondent is making such a claim and using the same criteria discussed above, the fact that ALJ McKenna did, in fact, recuse himself prior to the convening of the second hearing renders that issue moot. Accordingly, Respondent's assertions regarding recusal of the ALJ are not persuasive.

V.

Whether the ALJ erred by not disqualifying the Coast Guard "prosecutor" (Investigative Officer) and whether the Investigating Officer committed misconduct

Throughout the proceedings, Respondent has alleged that the Investigating Officer should have been disqualified from "prosecuting" this case because he was previously involved with investigating other matters related to Respondent's shipboard activities and frequently called for his disqualification. An example of his claims:

> The prosecutor is a Judge Advocate General Officer in the Officer Corps of the Coast Guard as a Military Attorney in a Military Uniform of a self-proclaimed Special Branch of Military that is not supposed to adjudicate any civilian affairs, let alone labor disputes either for personnel working directly for the Coast Guard as Civil Servants, or even for their own spouses or children or family members, but it wishes to extend its authority out over individuals it is not supposed to have any "authority" over as a Branch of Military as the fact of being a Branch of Military itself acts as a Bar such proceedings.
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> Beyond this as laid out in other sections there is not separation of powers whatsoever, let alone separation of duties, as the JAG Prosecutor was also acting as the Complainant, Citing Officer, Summoning Officer, Investigating Officer and the JAG Uniformed Military JAG Prosecutor as

> well. This is in violation or the Separation of Powers Doctrine, and the Separation of Duties as its own governing regs as well.

[Respondent's Appeal Brief at 297]

Respondent alleges that it is improper for one individual to serve as the Investigating Officer, "charging officer," and "prosecutor" in the same case. This is but one more area that demonstrates Respondent's profound mischaracterization of the administrative hearing process as a criminal trial.

Coast Guard S&R 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." 46 C.F.R. § 5.5. While the Coast Guard has enacted regulations to protect the due process rights of individuals during the administration of their cases, those regulations are to "be construed so as to obtain a just, speedy, and economical determination of the issues presented." 46 C.F.R. § 5.51. As such, those rights normally afforded to trials, such as trial by jury, do not apply to administrative hearings. *See*, Appeal Decisions 2049 (OWEN) and 1405 (POWELL). Moreover, contentions of improper separation of functions with respect to members of the Coast Guard participating in administrative hearings are improper in these proceedings. *See* Appeal Decision 2167 (JONES). That is because it is fully in accordance with Coast Guard regulations that members of the Coast Guard participate in the process of S&R proceedings. *Id.* Therefore, the ALJ did not err by refusing to disqualify the Investigating Officer.

The record shows that the actions of the Investigating Officer throughout the course of these proceedings were undertaken in accordance with 33 C.F.R. Part 20 and 46 C.F.R Part 5. Respondent has not demonstrated that there has been any impropriety

committed in the disposition of his case. Furthermore, Respondent has not demonstrated that the regulations governing these proceedings fail to provide adequate separation of functions and contact. As such, Respondent's claims of Investigating Officer misconduct are not persuasive.

VI.

Whether the ALJ erred by allowing certain witnesses for the Coast Guard to testify

Respondent asserts that the witnesses presented by the Coast Guard were biased, hostile, or lacked necessary knowledge/expertise to render a valid opinion.

The record shows that, during the hearing, the Coast Guard presented three witnesses. The first two were mariners who served with Respondent on two different seagoing ships. [Tr. at 61, 202] Respondent asserts that their testimony should not have been allowed since they were either named or interested parties to civil proceedings filed by Respondent in Federal District Court[5] and should have, at a minimum, been declared "hostile[6]." [Tr. at 50, 56, 166] Respondent further asserts that the Coast Guard's third witness, Chief of the Coast Guard Medical Evaluations Office, should not have testified since he was a Coast Guard officer and not a psychiatrist. [Tr. at 523, 547, 558, 573]

After careful scrutiny, it appears that the crux of Respondent's argument is one of credibility. Respondent argues that the three Coast Guard witnesses had improper biases against him which rendered their testimony not creditable. [Respondent's Appeal Brief at 432 - 445]

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[5] Starting in 2001, Respondent filed several actions in Federal court, apparently related to various labor disputes between himself, his labor union, and his employer(s). They have no bearing on these proceedings; I merely note that all the cases have been listed as closed, the last one in June, 2008.

[6] Respondent could not/would not accept the explanation that only witnesses adverse to a party in direct testimony could be declared hostile.

"In evaluating the evidence presented at a hearing, the ALJ is in the best position to weigh the testimony of witnesses and assess the credibility of evidence." Appeal Decision 2632 (WHITE) *citing* Appeal Decisions 2584 (SHAKESPEARE), 2421 (RADER), 2319 (PAVELIC), 2589 (MEYER), 2592 (MASON) and 2598 (CATTON). The ALJ has broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in evidence. *Id.*, *citing* Appeal Decisions 2560 (CLIFTON), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2598 (CATTON), 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), and 2290 (DUGGINS). I will not reverse the ALJ's decision on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'd* NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2589 (MEYER), 2592 (MASON) and 2560 (CLIFTON).

The record shows that the issue of witness bias/credibility was brought up repeatedly by Respondent during the May 2008 hearing. [Tr. at 56, 64, 68, 110, 228, 252, 314, 341, 344, 387, 640] As such, it is reasonable to conclude that the ALJ considered such potential bias in his deliberations. See Appeal Decision 2643 (WALKER). A review of the hearing transcripts does not indicate that the three Coast Guard witness' testimonies were clearly implausible or conflicted.

As the trier of fact, the ALJ in this case had the opportunity to observe the demeanor of the witnesses and determine their credibility and veracity. Considering the above standard of review, I find that the ALJ's determinations regarding witness

testimony, credibility, and the evidentiary value of such testimony were not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Nothing in the record indicates that ALJ Brudzinski abused this discretion. As such, I will not second guess his conclusions.

VII.

Whether the ALJ improperly denied Respondent the opportunity to call witnesses

Respondent has consistently alleged that he was denied the opportunity to call defense witnesses during the hearing. [Tr. at 54] He continues to raise this issue on appeal.

Respondent's first witness list contained over 170 names and demanded that the Coast Guard issue subpoenas to all of them. The list included United States Senators (Senator Barbara Boxer and Senator Dianne Feinstein), a Congressman (Congressman Elijah Cummings), Secretaries of the Department of Transportation (Secretary Norman Mineta and Former Secretary Andrew Card), several judges, five Coast Guard admirals, a host of Coast Guard personnel, and several merchant mariners. [Respondent's "NOTICE; AND MOTION IN RESPONSE AND OPPOSITION TO "STATUS NOTICE AND ORDER" AS PERTAINING TO WITNESS LIST; AND MOTION IN RESPONSE AND OPPOSITION TO "STATUS NOTICE AND ORDER" AS PERTAINING TO WITNESS LIST" (Pleading No. 55, filed May 1, 2008] Absent from Respondent's first witness list was any explanation regarding the need for the putative witnesses' testimony. Also absent was any contact information. The ALJ denied Respondent's request for witness subpoenas. Thereafter, on the first day of the hearing,

Respondent submitted an amended witness list that reduced the requested number of court ordered subpoenas to approximately 45 individuals.

Under Coast Guard regulations, the ALJ may issue a subpoena for "the attendance of a person, the giving of testimony, or the production of books, papers, documents, or any other *relevant evidence.*" 33 C.F.R. § 20.608 (emphasis added). Respondent, even in his amended (and untimely) witness list, failed to both justify the issuance of subpoenas for the individuals named and to show how the testimony of those individuals was relevant to the issue at hand (medical incompetence). *See* Appeal Decision 2328 (MINTZ). Accordingly, the ALJ did not err in declining to issue the subpoenas requested by Respondent.

Moreover, denial of the issuance of subpoenas does not equate to the refusal to allow Respondent to call witnesses to testify. The record shows that, during the hearing, Respondent was free, and in fact encouraged to call witnesses. Instead, Respondent chose not to call any witnesses. [D&O at 34, Tr. at 898-904] Despite having full opportunity to present evidence in support of his defense in the form of witnesses, Respondent offered no testimony. I find that insofar as the ALJ refused to issue court ordered subpoenas, he neither erred nor unfairly prejudiced Respondent.

VIII.

Whether the ALJ conducted improper EX PARTE proceedings

Respondent makes numerous claims that the ALJ had improper *ex parte* discussions with various individuals, asserting that *any* communication, whether written, telephonic or in person, between the ALJ and a party, without all interested parties

present, constitutes an improper *ex parte* communication. [Respondent's Post Hearing Brief at 86-87] Respondent's definition of *ex parte* communications is clearly broader than that which is proscribed by the APA.

The Administrative Procedure Act prohibits *ex parte* communication relevant to *the merits* of the proceeding. 5 U.S.C. § 557(d) (*emphasis added*). In addition, an ALJ cannot consult with a person or party regarding a fact at issue without notice and an opportunity for all parties to participate. 5 U.S.C. § 554(d)(1).

It is difficult to address Respondent's claims because of his overly broad interpretation of what constitutes improper *ex parte* communications. He alleges that the ALJ frequently engaged in such actions with the Coast Guard without identifying the specific conduct. [Tr. at 42, 46, 237, 315, 780] I have made an extensive review of the record and while it is possible that the ALJ may have engaged in some communication with the Coast Guard Investigating Officer during a hearing recess, and certainly did so in the form of pleadings when issuing orders or notices, there is no indication that he or any of his staff discussed any fact at issue relevant to the proceedings with the Investigating Officer or any interested person unless all parties were present; the record does not contain any evidence to support a conclusion that the ALJ had communications that ran contrary to APA requirements. *See* Appeal Decision 2655 (KILGROE). Therefore, I do not find this basis for appeal persuasive.

IX.

Whether the ALJ erred by ordering Respondent to submit to a medical evaluation

Respondent asserts that his due process rights were violated because he was ordered, without a hearing, to undergo a psychiatric examination with a doctor who had an alleged conflict of interest.

As noted above, Respondent was ordered to submit to a psychiatric evaluation by a physician designated by the ALJ. Respondent filed a motion in opposition to the ALJ's order, comprised of 67 pages of largely indecipherable arguments with an additional 100 pages of attachments. Citing 33 C.F.R. § 20.309(a), the ALJ denied the motion, leaving the order for psychiatric evaluation intact. Respondent refused to submit to the examination. [Tr. at 12-13, 797-798]

Respondent maintains that an evidentiary "due process hearing" should have been held to determine whether there was a need for psychiatric examination. [RESPONDENT'S NOTICE; AND MOTION IN OPPOSITION TO "ORDER DIRECTING PSYCHIATRIC EXAMINIATION" at 14-15; Prehearing Conference Transcript at 101-102] Additionally, he claims that because the designated psychiatrist personally called him to schedule an appointment, he was somehow "conflicted." [Tr. at 12-13, 797-798]

33 C.F.R. § 20.1313 states in relevant part:

> In any proceeding in which the physical or mental condition of the respondent is relevant, the ALJ may order him or her to undergo a medical examination. Any examination ordered by the ALJ is conducted, at Federal expense, by a physician designated by the ALJ. If the respondent fails or refuses to undergo any such examination, the failure or refusal receives due weight and may be sufficient for the ALJ to infer that the results would have been adverse to the respondent.

The central issue presented in Respondent's case was whether Respondent was medically competent to hold a merchant mariner credential. As such, Respondent's mental

condition was relevant. Moreover, the applicable regulations do not require any type of "evidentiary" or "due process" hearing before the ALJ may require a Respondent to submit to a medical evaluation of any kind.

The notion that a designated examining physician who personally calls the Respondent to schedule an interview is *de facto* "conflicted" and should therefore be disqualified is an issue of first impression in these proceedings. However, I can find no reason to conclude that such an act would render a medical professional incapable of forming an unbiased medical opinion. Moreover, the record is devoid of any facts to support such an assertion in this case. Accordingly, Respondent's argument that he was justified in refusing to submit to the psychiatric examination is not persuasive and, as such, the ALJ did not err in ordering Respondent to undergo a medical examination in this case.

X.

Whether Respondent had/has a right to privacy and privilege with respect to medical/personal records pertaining to his medical condition

Respondent has repeatedly claimed that his medical records are privileged and cannot be used against him in this proceeding.

The physician-patient privilege does not exist between a physician and a respondent for the purposes of S&R proceedings. 46 C.F.R. § 5.67. Moreover, there is nothing in the record indicating that records were improperly obtained. Accordingly, Respondent's claims on this issue are without merit.

XI.

Whether there was excessive delay of the proceedings as a whole

Respondent has often made note of the excessive duration of these proceedings (approaching ten years), but does not articulate an actual issue for appeal. It seems that Respondent is alleging that the Coast Guard has intentionally drawn out the S&R process in his case, resulting in some harm or hardship to Respondent. There is no doubt that the process of considering the Coast Guard's claims with respect to Respondent has been a lengthy one.

Excessive and unexplained delay in the proceedings may be grounds for reversal. Appeal Decision 2064 (WOOD). However, delay, in and of itself, is not *per se* grounds for reversal. Appeal Decision 1972 (SIBLEY). Before making a determination of excessive delay, a review of the record is necessary to determine the cause of the delay, and whether there was any resulting unfair prejudice to the holder of the credential. *Id.*

The two incidents that gave rise to the claim of medical incompetence at issue here occurred aboard the vessels M/V MAUI and M/V PRESIDENT JACKSON on June 11, 2001, and January 5, 2002, respectively. The record shows that the Coast Guard issued a Complaint to Respondent on March 6, 2003, approximately 15 months after the second incident occurred.

The time limitations for the Coast Guard to provide service of a Complaint related to an act of incompetence "shall be within five years after commission of the offense alleged therein." 46 C.F.R. § 5.55. Nonetheless, merely filing a complaint within the applicable statute of limitations is not, itself, controlling and the due process clause of the Fifth Amendment to the U.S. Constitution requires a balancing of the reasonableness of a delay against any resultant prejudice. *See U.S. v. Jackson*, 504 F. 2d 337, 339 (8th Cir. 1974).

In the instant case, it is evident that significant investigation was necessary to determine whether issuance of a complaint was justified. The investigation involved contacting various parties and reviewing a significant amount of documentation. During this time, Respondent still held his merchant mariner license and could obtain employment. Respondent has failed to make any showing that this delay was unreasonable. Accordingly, I find no excessive delay with respect to the time that it took the Coast Guard to issue a Complaint to Respondent.

The time between the original two incidents and the filing of the Complaint, however, accounts for less than two years of the overall time up to the ALJ's D&O on November 13, 2008, making a review of the duration of proceedings following the filing of the Complaint justified. [Tr. at 60-679, 202-258; Coast Guard Ex. 3,4] A careful review of the docket and the pleadings contained therein makes it evident that Respondent, himself, is the primary cause for the subsequent prolongation of the proceedings before the ALJ.

As noted above, prior to the remand, the record contained 179 filings, 67 of which were filed by Respondent and most of the remainder were required responses to Respondent's pleadings. Following the remand, 73 additional filings were added to the record, again, the bulk of which were either filed by Respondent, or required responses thereto. In short, the vast majority of the filings were either generated by Respondent or filed by the Coast Guard or the ALJ in response. The record further indicates that Respondent often requested continuances, both by motion and during the hearings, claiming that he needed more time to consider the claims against him and the Coast Guard's exhibits.

Many of Respondent's filings were lengthy, numbering in the hundreds of pages, did not conform to the motion practice of 33 C.F.R § 20.309, and were often ambiguous and/or frivolous. Nonetheless, their submission necessitated consideration by the Coast Guard for response and, thereafter, by the ALJ prior to rendering a decision. The record further indicates that Respondent requested additional "evidentiary hearings" during these proceedings.

I do not suggest that Respondent does not have a right to put forth a comprehensive defense on his behalf during all stages of the proceedings. However, it belies Respondent's claims of harmful delay when his own actions significantly contributed to delays associated with these proceedings.

In any event, Respondent has not demonstrated how he has been unfairly prejudiced by the "delay." Nor has he made any showing that any particular "delay" was unreasonable. Furthermore, the record does not contain any evidence to support a conclusion that the "delay" that occurred in this case had a negative effect (or any effect) on locating witnesses or their ability to testify. Nor is there any indication that the "delay" substantially altered any witnesses' ability to recall facts or events. *See, generally* Appeal Decisions 2064 (WOOD). Accordingly, Respondents assertions regarding "delay" are not persuasive.

XII.

Whether the Coast Guard carried its burden of proof

A final issue, not fully articulated by Respondent, centers on whether the Coast Guard successfully carried its burden to prove that Respondent is medically incompetent.

In these proceedings, the Coast Guard bears the burden of proving its case by a preponderance of the evidence. 33 C.F.R. §§ 20.701-702. In the instant case, the ALJ had to decide whether the Coast Guard proved that Respondent is medically incompetent, necessitating revocation of his merchant mariner credential. Appeal Decision 2181 (BURKE). As noted at the onset of this opinion, I will not disturb the ALJ's findings absent a determination that they are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence.

I will not recount the Coast Guard's case in chief here. I will consider whether the findings in the ALJ's D&O are supported by reliable, probative, and substantial evidence. The Coast Guard's first two witnesses established that Respondent's actions on board vessels in which he was employed were of such a nature that they detrimentally affected the safety of those vessels. The Coast Guard's exhibits, including medical documents prepared by Respondent in support of his claims of disability to his union, employers and the State of California, and other documents prepared by various health care officials and doctors, established that Respondent continues to suffer from a mental illness and will not seek treatment. Respondent's further refusal to submit to a psychiatric examination adds weight to this determination. Testimony of the Chief of the Coast Guard's Medical Evaluations Branch at the National Maritime Center established that medical/mental impairments such as those suffered by Respondent would result in an unsafe/unseaworthy condition should he continue to serve under his credentials aboard a merchant vessel.

Respondent failed to impeach any of the Coast Guard witnesses. He did not contradict the wealth of documentation attesting to the extent of his mental illness. He

failed to provide any affirmative defense or establish any reason to doubt the Coast Guard's evidence. Therefore, the ALJ's findings of fact were supported by substantial evidence and will not be disturbed.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. As has been discussed herein, the ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, Respondent's bases of appeal, such that can be identified, are not persuasive and are without merit.

ORDER

The order of the ALJ, dated on November 13, 2008, at New York, New York, is AFFIRMED.

Sally Brice-O'Hara, VADM, USCG
Vice Commandant SEP 30 2010

Signed at Washington, D.C. this _____ day of _____, 2010.