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'S LICENSE	:	NO: 2671
Issued to: ROY PAUL BOUDREAUX	:	

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 29, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard dismissed with prejudice a Complaint against Mr. Roy Paul Boudreaux's (hereinafter "Respondent") merchant mariner license upon finding a single charge of *misconduct* not proved consistent with 46 C.F.R. 5.567(a).

PROCEDURAL HISTORY

On December 20, 2004, the United States Coast Guard (hereinafter "Coast Guard") issued a Complaint against Respondent's merchant mariner license alleging a single specification of *misconduct*. [Complaint at 1] The Coast Guard sought to suspend Respondent's merchant mariner license outright for a period of 12 months. [*Id.* at 2] The specification alleged that while Respondent was acting under the authority of his Coast Guard issued merchant mariner license, he failed to have a proper lookout on the tug and tow UTV JOHN 3:16, which he was piloting in the Gulf Intracoastal Waterway, thereby

causing a collision with a small fiberglass fishing vessel, in violation of International and Inland Rule 5. [*Id.* at 3] The Coast Guard further alleged that Respondent was acting in the capacity of "master" onboard the UTV JOHN 3:16. [*Id.* at 2]

Respondent filed an Answer to the Complaint wherein he denied that he was the "master" of the UTV JOHN 3:16, rather that he was in fact a "Relief Captain," and moreover, that he maintained a proper lookout at all times. [Answer to the Complaint] Respondent also affirmatively alleged several defenses: (1) the accident was unavoidable; (2) there had been spoliation of evidence; (3) insufficiency of proof; (4) Laches; and (5) excessive penalty. [*Id.*] Respondent demanded a hearing on the matter. [*Id.*]

Over the subsequent eleven months, Respondent and the Coast Guard engaged in extensive motions practice. The motions most relevant to the appellate issues presented *infra* are delineated below:

- January 12, 2005: The ALJ issued an "Order Confirming Matters Discussed at Pre-Hearing Conference and Establishing Procedural Schedule" wherein an initial discovery timeline was announced. All initial discovery was to be completed by March 30, 2005 in anticipation of a hearing date of April 12, 2005.

- February 3, 2005: Respondent filed a "Motion to Propound Written Discovery Requests" wherein he requested the Coast Guard respond to a set of 15 Interrogatories.

- February 9, 2005: Coast Guard submitted Exhibits and Witnesses lists to the Respondent and the ALJ. Two of the exhibits, photographs and a common nautical chart, were not provided, however the Coast Guard offered to provide the negatives of the photographs to the Respondent and the ALJ and further stated that the chart could be purchased at "most marine stores."

- February 16, 2005: A second pre-hearing conference was held and the ALJ issued an "Order Confirming Matters Discussed At Second Pre-Hearing Conference and Suspending Procedural Schedule" wherein she described how the Coast Guard refused to provide the nautical chart listed as a proposed Coast Guard exhibit to the Respondent or the ALJ. In addition, the ALJ noted that the Coast Guard refused to make copies of the photographs for the ALJ

even though the Respondent offered to do so. Moreover, the ALJ noted that the Coast Guard announced its intention to "not take action on any subpoenas or any interrogatories [the ALJ] may send [to the USCG] through an order." Therefore, the ALJ indefinitely suspended the hearing date and her previously issued "Order Confirming Matters Discussed at Pre-Hearing Conference and Establishing Procedural Schedule."

- February 16, 2005: Respondent filed a "Motion to Propound Amended Discovery Requests" wherein the Respondent altered the previously filed Interrogatories in light of the Coast Guard's "Exhibits and Witnesses List" filing.

- March 1, 2005: The ALJ issued an "Order Granting to Propound Amended Discovery Requests." The ALJ ordered that the Coast Guard respond to the Amended Discovery Requests no later than 21 days after the requests are served on the Coast Guard. The ALJ also ordered that objections to the interrogatories must be filed no later than 15 days after the requests are served on the Coast Guard.

- March 4, 2005: Respondent filed "Amended Discovery Requests Propounded by Respondent, Roy Paul Boudreaux," containing 14 interrogatories.

- March 21, 2005: The Coast Guard filed a "Request for Deadline Extension to Respond or Object to Amended Interrogatories."

- March 24, 2005: The ALJ issued an "Order on Request for Deadline Extensions and Request for Reconsideration of the Suspension of Procedural Schedule," wherein she denied the Coast Guard's motion to extend the time in which to file objections to the interrogatories. However, the ALJ extended the time to respond to the interrogatories by 10 days.

- April 14, 2005: The ALJ issued an "Order Establishing Procedural Schedule" which set the schedule as follows: May 2, 2005 - Respondent provides discovery pursuant to 33 C.F.R. § 20.601(a); May 16, 2005 - The Coast Guard supplements discovery pursuant to 33 C.F.R. § 20.601(a), if necessary; May 23, 2005 - Respondent supplements discovery pursuant to 33 C.F.R. §20.601(a), if necessary; and June 2, 2005 - the hearing will commence in Houma, Louisiana. The ALJ further stated that the schedule is predicated on the assumption that there will be no further discovery disputes. If there are further discovery disputes, the ALJ stated the hearing will be continued.

- April 21, 2005: The ALJ issued an "Order Modifying Procedural Schedule" and postponed the hearing until June 23, 2005 based on a mutual agreement between the parties.

- April 25, 2005: Respondent filed a "Motion to Compel More Complete Responses to Discovery" and a "Motion for Issuance of a Subpoena Duces Tecum."

- May 5, 2005: Respondent filed a "Motion to Take Depositions by Oral Examinations" wherein he demanded to take depositions of two third party witnesses and the Coast Guard investigator.

- May 16, 2005: The Coast Guard filed an "Opposition to Motion to take Depositions by Oral Examination – Paul Roy Boudreaux."

- May 26, 2005: The ALJ issued an "Order Notifying Parties of Change in Procedural Schedule [a]nd Requiring Submissions" in which she postponed the hearing date for personal reasons and requested the Parties submit proposed new hearing dates. In addition, the ALJ noted that the Coast Guard had not filed responses to Respondent's motions for more complete discovery requests and a subpoena duces tecum. The ALJ ordered the Coast Guard to respond to these motions by June 10, 2005, or else she would assume the Coast Guard has no objection.

- June 16, 2005: Respondent filed a "Reply Memorandum of Respondent" whererin he reasserted his previous request for depositions.

- June 29, 2005: The ALJ issued an "Order Ruling on Outstanding Motions and Scheduling Hearing" in which she ordered the hearing to commence in Layfayette, Louisiana on August 26, 2005. The ALJ denied the Respondent's motion for more complete answers to discovery because she found that any further orders requiring the Coast Guard to be more responsive to discovery would be pointless given the Coast Guard's "inability to meaningfully engage in discovery in this proceeding." In addition, the ALJ denied Respondent's motions related to the subpoena duces tecum and the taking of depositions. Moreover, the ALJ stated that after the Coast Guard presents its case-in-chief, "the Respondent will have an opportunity to assess his readiness to proceed with his case at that time ([t]his includes the opportunity to request that witnesses be subject to recall for additional cross-examination)....[b]esides entertaining any Motion for Continuance that the Respondent might make on the record at the close of the USCG's case in chief, the undersigned will also be prepared to hear and rule on any Motion for Dismissal that the Respondent might make on the record at that time, based on the argument that the USCG has failed to make a [*prima facie*] case. Both parties are hereby put on notice that *the undersigned will hear and rule from the bench* on the Respondent's Motion for Continuance (if any) and/or the Respondent's Motion for Dismissal (if any). Both parties should be prepared to argue the merits of these motions on the date of the hearing." (emphasis added)

- July 29, 2005: The Coast Guard filed a motion requesting the ALJ authorize the telephonic testimony of the investigating officer, LT Robert Butts, USCG. At the time of the proposed hearing, LT Butts was stationed in Tampa, Florida.

- August 10, 2005: The Coast Guard filed a motion requesting the ALJ authorize the telephonic testimony of Capt. Daniel Alario, who was onboard the vessel contemporaneous with the Respondent. Capt. Alario was expected to be on a vessel in an unknown location at the time of the hearing. In addition, the Coast Guard filed "Replacement Witness and Exhibit Lists" which included six witnesses (including the two proposed to testify telephonically) and nine exhibits. In addition, on the same date, the Coast Guard filed a motion requesting the ALJ authorize the telephonic testimony of Major Charles Cossey, a Louisiana law enforcement officer who collected physical evidence from the scene.

- August 12, 2005: The ALJ issued an "Order Denying Motion for Telephone Testimony" wherein she denied the Coast Guard's motion to permit LT Butts to testify telephonically. The ALJ noted that as to LT Butts, she denied Respondent's motion to depose this witness "anticipating that this witness would testify in person at this hearing, thus providing the Respondent a meaningful opportunity to question the witness about his investigation, and, specifically, to question him about documents (reports or other documents) he authored as well as witnesses he interviewed, evidence he collected or directed the collection of, and evidence he made the decision to have tested. It appears from the record before me that this witness will be a key witness in the presentation of the USCG's case. As such, his credibility is of paramount importance. Lastly, I note that the witness is a short plane ride away."

- August 18, 2005: Respondent filed an "Opposition Memorandum of Respondent" in which he requested the ALJ deny the Coast Guard's telephonic testimony motions as to LT Butts and Capt. Alario.

- August 19, 2005: The ALJ issued an "Order Denying Motions for Telephone Testimony" wherein she denied the Coast Guard's motions for telephonic testimony for Major Cossey and Capt. Alario. In support of her decision, the ALJ noted that the Coast Guard had over sixty (60) days to secure the presence of the witnesses, the witnesses will be testifying about critical physical evidence, Major Cossey is only 48 miles away, and that the ALJ previously truncated the discovery proceedings. In addition, the ALJ determined that witness credibility is very important to this case, and that "the undersigned should have every opportunity to fully assess the credibility of each and every witness." Moreover, the ALJ indicated that if these witnesses did not testify in person, related pertinent physical evidence would be subject to exclusion.

- August 26, 2005: The hearing commenced in Layfayette, Lousiana. The Coast Guard moved for reconsideration of the ALJ's denial of the Coast Guard's motions for telephonic testimony for LT Butts, Capt. Alario, and Major Cossey. After hearing arguments from both Parties, the ALJ reaffirmed her previous rulings. Thereafter, the Coast Guard rested without calling any witnesses. The Respondent moved to dismiss the Complaint, and the ALJ granted the motion from the bench and dismissed the Complaint with prejudice.

- November 29, 2005: The ALJ issued the written Decision and Order, confirming her ruling from the bench that the Complaint is dismissed with prejudice.

On December 1, 2005, the Coast Guard filed a Notice of Appeal and thereafter perfected its appeal by properly filing an Appellate Brief on December 30, 2005. Responded filed a Reply Brief on January 31, 2006. Although the Reply Brief is untimely (it was due on January 19, 2006), I nonetheless considered it in the interest of fairness to the Respondent, and therefore this appeal is properly before me.

APPEARANCE: Andre J. Mouledoux, Attorney for Respondent, 701 Poydras Street, New Orleans, Louisiana. The Coast Guard was represented by LTJG Timothy Tilghman and Mr. Jim Wilson, USCG, Marine Safety Office Morgan City, Louisiana.

FACTS

This case was not factually developed on the record. There were numerous exhibits and witness lists exchanged between the parties, however, none of them were fully analyzed or exercised on the record. Since the disposition of this case hinges primarily on matters of law that can be fully understood from the procedural history and Transcript Record (hereinafter "TR") in this case, a recitation of the "facts" that can be deduced from the record would not be fair since neither party presented nor contested any proffered facts on the record, and the ALJ dismissed the Complaint.

BASES OF APPEAL

The Coast Guard has raised two issues on appeal:

I. *The ALJ erred by denying the Coast Guard's telephonic testimony motions.*

II. *The ALJ was biased against the Coast Guard and "prejudged" the case, thus leading the ALJ to deny the Coast Guard's telephonic testimony motions and dismissing the case with prejudice.*

OPINION

I. The ALJ erred by denying the Coast Guard's telephonic testimony motions.

The first issue raised on appeal is the denial by the ALJ of the Coast Guard's two motions, which were renewed at the hearing, requesting authorization for witnesses to appear at the hearing telephonically rather than in person. [Transcript Record (hereinafter "TR") at 13-18; Coast Guard Appellate Brief (hereinafter "Appellate Brief") at 1, 5-11] As can be deduced from the prolific procedural history of this case, there has been extensive motions practice between the parties regarding a host of issues, including telephonic testimony. *See* Procedural History, *supra*. The denial of telephonic testimony has been documented and sufficiently established on the record so as to be ripe for decision on appeal.

Coast Guard regulations permit an ALJ to "order the taking of the testimony of a witness by telephonic conference call." 33 C.F.R. § 20.707(a). The only requirements mentioned in the regulations for telephonic testimony is that "the call must let each participant listen to and speak to each other within the hearing of the ALJ, who will ensure the full identification of each so the reporter can create a proper record." [*Id.*] Since the provision for telephonic testimony was added to the Code of Federal

Regulations, there have been numerous Commandant Decisions on Appeal (hereinafter "CDOA") that have addressed the permissibility of telephonic testimony in various circumstances. *See* Appeal Decisions 2476 (BLAKE), aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989), 2492 (RATH), 2538 (SMALLWOOD), 2608 (SHEPHERD), 2616 (BYRNES), 2626 (DRESSER) and 2657 (BARNETT). These cases largely involved the permissible use of telephonic testimony for witnesses over the objection of another party. [*Id.*] In this case, however, the issue is presented in the reverse in that the ALJ did not permit the use of telephonic testimony.

The record shows that during the hearing on August 26, 2005, the Coast Guard moved the ALJ to reconsider the Coast Guard motions that were previously denied by the ALJ. [TR at 13-17] First, the Coast Guard moved for reconsideration of the telephonic testimony motion as it pertained to Capt. Alairo's testimony. [TR at 13.] The ALJ heard from both Parties concerning the motion and then ruled that telephonic testimony would not be allowed. [TR at 13-15] The Coast Guard then moved for reconsideration of the telephonic testimony motion as it related to LT Butts, and the ALJ subsequently denied that motion as well. [TR at 17]

It is long-standing precedent that the findings of the ALJ will be reversed only if his or her findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff.* NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). There is no mandate, either in regulation or prior CDOA's, requiring that an ALJ grant a motion for telephonic testimony, even though telephonic testimony has been allowed in

several cases. Appeal Decisions 2476 (BLAKE), aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989), 2492 (RATH), 2538 (SMALLWOOD), 2608 (SHEPHERD), 2616 (BYRNES), 2626 (DRESSER) and 2657 (BARNETT); *See* also Brown v. Gamage, 377 F.2d 154 (D.C. Cir. 1967) (stating that there is no right to personally confront a witness in a purely administrative hearing where procedural due process safeguards are in place). The Coast Guard places considerable emphasis on the fact that telephonic testimony has been authorized in numerous cases, and insists that due process safeguards in those cases preserved the integrity of the telephonic testimony. [Appellate Brief at 5-12] While that is true, the issue on appeal in this regard must be focused on whether the ALJ abused her discretion by denying the motions for telephonic testimony. 33 C.F.R. § 20.1001(b)(3). A prior CDOA has outlined the test for an abuse of discretion:

> The standard of review for abuse of discretion is highly deferential. A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion … [A]buse of discretion occurs where a ruling is based on an error of law or, where based on factual conclusions, is without evidentiary support. 5 Am. JUR. 2D *Appellate Review* § 695 (1997) (footnotes omitted).

Appeal Decision 2610 (BENNETT).

The ALJ articulated numerous times that she was concerned in this case with being able to judge the credibility of certain key witnesses, was concerned about the authentication of some key pieces of evidence, believed at least one of the witnesses was a "short plane ride away," and put the Coast Guard on notice prior to the hearing that telephonic testimony would not be permitted and that it would be prudent to secure the

testimony of the witnesses in person. [TR at 19-25; Order Denying Motion for Telephone Testimony, August 12, 2005; Order Denying Motions for Telephone Testimony, August 19, 2005] Interestingly, the Coast Guard did not request a continuance of the proceedings in order to secure the in-person testimony of the witnesses, nor did the Coast Guard attempt to seek a subpoena to compel the attendance of witnesses.

Prior CDOA's have held that telephonic testimony is entirely acceptable, however, none of them have held that an ALJ is required to grant a motion for telephonic testimony. Appeal Decisions 2476 (BLAKE), aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989), 2492 (RATH), 2538 (SMALLWOOD), 2608 (SHEPHERD), 2616 (BYRNES), 2626 (DRESSER) and 2657 (BARNETT). If the ALJ was under the impression that telephonic testimony was not authorized by regulation and therefore denied the motion, then that may constitute an abuse of discretion or a mistake of law. 33 C.F.R. § 20.707(a); Appeal Decision 2610 (BENNETT). However, that is not the case here since it is clear, based on the totality of the record, that the ALJ understood that telephonic testimony was permissible, however, in this particular matter, there were other important credibility and evidentiary equities that lead her to decide to deny these particular telephonic testimony motions. [Order Denying Motion for Telephone Testimony, August 12, 2005; Order Denying Motions for Telephone Testimony, August 19, 2005] Such a decision is within the ALJ's discretion, and I find that it was not *per se* an abuse of discretion to deny the motions. Appeal Decision 2610 (BENNETT).

II. The ALJ was biased against the Coast Guard and "prejudged" the case, thus leading the ALJ to deny the Coast Guard's telephonic testimony motions and dismissing the case with prejudice.

The Coast Guard's avers in its second issue on appeal that the ALJ was biased and prejudged the case. [Appellate Brief at 12-14] The Coast Guard noted:

> "[b]ecause the Administrative Law Judge prejudged this case, a fair and impartial hearing did not take place. Instead the ALJ abused the discretion given by 33 CFR 20.707(a) when, on two separate occasions, the Coast Guard was denied use of telephonic testimony for both Lieutenant Rob Butts and Captain Daniel Alero."

[Appellate Brief at 14] The Coast Guard is essentially arguing in this issue on appeal that the ALJ should have been disqualified from hearing this case because she had prejudged the case before it went to a hearing. [Appellate Brief at 12-14]

It is important to note that a party may move the ALJ to disqualify herself or 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.*] If the ALJ denies the motion for disqualification, the moving party may raise the issue on appeal once the hearing has concluded. 33 C.F.R. § 20.204(b)(2). In this case, the Coast Guard did not file any motion prior to the issuance of the D&O requesting the ALJ to disqualify herself.

The regulations governing this appeal permit a party to appeal 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; and (4) the ALJ's denial of a motion for disqualification. 33 C.F.R. § 20.1001(b). Unfortunately, the Coast Guard did not file a

motion for disqualification to the ALJ, instead raising this issue for the first time on appeal. Even though the Coast Guard failed to properly preserve this issue for appeal, I have considered the argument and find the record demonstrates that the Coast Guard has failed to meet the substantial burden of demonstrating that the ALJ was biased or prejudged the case. Appeal Decision 2657 (BARNETT).

A prior CDOA has outlined the criteria and considerations that relate to a finding of bias or prejudgment on the part of an ALJ:

> The courts have long stated that there is a rebuttable presumption that hearing officers 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). In order to establish a disqualifying prejudgment, a respondent must demonstrate that the mind of the ALJ is "irrevocably closed" on the particular issue being decided. FTC v. Cement Institute, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Accordingly, a hearing officer should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matter critical to the disposition of the proceeding. Association of National Advertisers v. FTC, 617 F.2d. 1151 (D.C. Cir. 1979).

Appeal Decision 2657 (BARNETT). To this end, the Coast Guard suggests that the ALJ had already prejudged the case and was not going to consider any further arguments related to the telephonic testimony of the two witnesses. [Appellate Brief at 14]

The party seeking disqualification carries the burden of proof. Appeal Decision 2626 (DRESSER); Schweiker v. McClure, 456 U.S. 188 (1982). In this case, the only argument the Coast Guard posits in terms of bias and prejudgment relate to the June 29,

2005 "Order Ruling on Outstanding Motions and Scheduling Hearing" in which the ALJ stated:

> [b]esides entertaining any Motion for Continuance that the Respondent might make on the record at the close of the USCG's case in chief, the undersigned will also be prepared to hear and rule on any Motion for Dismissal that the Respondent might make on the record at that time, based on the argument that the USCG has failed to make a [*prima facie*] case. Both parties are hereby put on notice that *the undersigned will hear and rule from the bench* on the Respondent's Motion for Continuance (if any) and/or the Respondent's Motion for Dismissal (if any). Both parties should be prepared to argue the merits of these motions on the date of the hearing.

[Appellate Brief at 12] The Coast Guard's interpretation of this language is that:

> "the ALJ surely could not have been attempting to protect the Respondent's due process rights when the Respondent's attorney was informed that he should be prepared to make a Motion for Dismissal based on the argument that the USCG failed to present a prima facie case. Every competent attorney knows about that motion – it is not the type of motion that needs advance warning or advance research. What other reason for this notice could there be but prejudgment due to bias against the Coast Guard?"

[*Id.* at 13] This argument is hardly tenable considering the Coast Guard did not attempt to present a *prima facie* case and simply rested once the ALJ denied the telephonic testimony motions at the hearing. [TR at 18] The record is devoid of any bona fide attempt by the Coast Guard to ensure the presence of witnesses when it was apparent that telephonic testimony would not be allowed in this case. Furthermore, there is no indication in the record that the ALJ had prejudged the ultimate issue in this case, which is whether the Respondent had committed the action alleged in the Complaint. To the contrary, the record demonstrates that the ALJ was interested in hearing from the key witnesses and examining any evidence proffered. [TR at 24; Order Denying Motion for

Telephone Testimony, August 12, 2005; Order Denying Motions for Telephone Testimony, August 19, 2005] The denial of motions for telephonic testimony in this matter, which are within the ALJ's discretion, fall considerably short of the burden the Coast Guard bears to establish that the ALJ prejudged the outcome of the case or a matter critical to the outcome of the case. Appeal Decision 2657 (BARNETT).

CONCLUSION

The findings of the ALJ had a legally substantial basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. I find the Coast Guard's bases of appeal without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on November 29, 2005, is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 17th day of October, 2007.