UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 011129 (7th Issue) and	:	
LICENSE NO. 039389 (8th Issue)	:	ON APPEAL
AND	:	
MERCHANT MARINER'S	:	NO. 2624
DOCUMENT NO. [redacted]	:	
	:	
Issued to DAVID T. DOWNS	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701[1]. By order dated September 17, 1999, an Administrative Law Judge of the United States Coast Guard at Beaumont, Texas, revoked Appellant's License and Document based upon finding proved a charge of *misconduct*. The specification supporting the charge alleged that on or about October 22, 1998, Appellant wrongfully refused to provide a urine specimen for a reasonable cause drug test.

The hearing was held at the United States Attorney's Office, 350 Magnolia Street, Suite 150, Beaumont, Texas, on May 4, 1999. The Appellant appeared *pro se* and entered a response denying the charge and specification. The Coast Guard Investigating Officers introduced into evidence I.O. Exhibits 1 through 18 and the testimony of three witnesses. In defense, Appellant entered into evidence Respondent's Exhibits 1 through 6.

[1] Since the time of Appellant's hearing before the Administrative Law Judge, the procedural regulations for Coast Guard suspension and revocation hearings have been amended. See 64 Fed. Reg. 28075 (May 24, 1999), 46 C.F.R. Part 5 (2000 Edition), 33 C.F.R. Part 20 (2000 edition). As Appellant's hearing occurred prior to the change in the regulations, this appeal is based on the procedural rules in place at the time of hearing. Any reference in this opinion on the regulations contained in 46 C.F.R. Part 5 (§§ 5.1-5.905) is a reference to 46 C.F.R. Part 5 (1998 edition).

At the end of the hearing, the Administrative Law Judge made an oral finding that the charge and specification were found proved, then issued his order on September 17, 1999, which revoked Appellant's license and merchant mariner's document.

Appellant filed a timely Notice of Appeal, *pro se,* on October 22, 1999. After receiving numerous extensions, counsel for Appellant completed the appeal by filing a brief on October 6, 2000. This appeal is properly before me.

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FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned licenses and Merchant Mariner's Document. Appellant's licenses authorized him to serve as master of United States steam or motor vessels of any gross tons upon oceans, to act as offshore installation manager of mobile offshore drilling units without restriction and as barge supervisor for a period of five years beginning January 11, 1994. They also contained an endorsement for "Radar observer unlimited." License number 011129 expired on January 11, 1999. This was the license held by the Appellant at the time of the incident giving rise to the captioned matter. The second license captioned above, numbered 039389, is Appellant's current license and provides Appellant with the same rights and privileges as did the first.

In these proceedings, the only license of significance is license 039389 because it is the current document, the prior license having expired. Appellant also holds a Merchant

Mariner's Document, which is endorsed "any unlicensed and deck department including AB."

At all relevant times, the Appellant was an employee of Westbank Riverboat Services, Inc. (Westbank) of Harvey, Louisiana. Westbank is a contract vessel operator hired by Players Island Casino (Players) in Lake Charles, Louisiana, to operate two gambling boats. The boats are the M/V STAR CASINO and the M/V PLAYERS III. The Appellant, at all relevant times, was employed by Westbank to serve as master of the M/V STAR CASINO.

Appellant worked twenty-one day cycles with shifts of fourteen days on and seven days off. By 5:30 a.m. on October 21, 1998, the Appellant had completed his fourteenth day of work and was due for seven days off. However, his supervisor requested that he work an extra day shift, commencing at 5:30 a.m. on October 22, 1998. Appellant agreed.

At 5:30 a.m. on October 21, 1998, the Appellant completed his work aboard the M/V STAR CASINO and went to a local bar with Michael Vicknair, his first mate. Although it is uncertain precisely how long the Appellant remained at the bar, he was still there at 11:30 a.m., when First Mate Vicknair left. At sometime thereafter, and prior to 1:26 p.m. on that same day, Appellant left the bar, drove off in his motor vehicle, and got into an accident with a parked car at the intersection of Enterprise Boulevard and Alamo Street in Lake Charles, Louisiana. Sergeant Jim Jones of the Lake Charles Police Department responded to the incident. Jones arrested the Appellant on a charge of driving while intoxicated. Incident to the arrest, Sgt. Jones gave the Appellant a pat down search which disclosed the presence of a five inch "crack pipe" in the Appellant's sock above his left ankle. Appellant was thereupon charged with possession of drug paraphernalia.

Thereafter, Major Landry of the Lake Charles Police Department contacted the General Manager of Players Casino, Ms. Cathy Walker, to advise her of the arrest and the pending charges, and she, in turn, informed the Appellant's supervisors at Westbank, Captains Ducote and Beals. Captain Ducote called Major Landry at the police station to

confirm what he had been told by Ms. Walker. The two Captains thereafter conferred and decided that based upon the fact that the Appellant had been found by police to be intoxicated and in possession of a "crack pipe", reasonable cause existed to obtain a urine sample from the Appellant for the purpose of testing him for drug usage. It was also decided that the test was to be taken before the Appellant stood his next watch.

In a telephone conversation about 5:30 p.m. that evening, Captain Beals informed the Appellant that he was required to give a urine sample for a reasonable cause drug analysis based upon his arrest earlier in the day for intoxication and possession of drug paraphernalia. Captain Beals told the Appellant to call him at work the next morning between 9:00 and 9:30 a.m. so that he could tell the Appellant where and when to go for the test. Apparently, through the evening, there were numerous calls to Captain Beals' apartment by Appellant related to his employer's demand for a drug test.

In addition, Appellant also called Captain Ducote to discuss the necessity of the test. Captain Ducote, who is the Westbank Port Captain and Director of Marine Operations, told Appellant that if he did not take the test in the morning, he would be terminated. Appellant did not call Captain Beals the next morning as he was instructed and did not take the test. As a consequence, Appellant was terminated by Westbank and these proceedings were initiated.

BASES OF APPEAL

Initially, the Appellant was proceeding *pro se* when he filed his first Notice of Appeal on October 22, 1999. Appellant denied that he refused to submit to a urine drug test and claimed that he was unaware that a test had been scheduled. The remainder of the notice is a request for reconsideration of the penalty imposed, arguing that revocation of his license and document was unduly harsh and suggesting that a proper punishment would include suspension of his license and document for a period of from twelve to twenty-four months. The second Notice of Appeal, filed by Appellant's attorney, seeks to have the decision of revocation reversed, altered, modified or remanded for further proceedings on several grounds:

1. There was no reasonable cause for a drug test as defined under 33 CFR 95.035.
2. Appellant was not a "crew member" at the time he was required to take the drug test as required under 46 CFR 16.105.
3. The Court abused its discretion when it denied Appellant's request for a continuance pending the outcome of the state criminal charges.
4. The Court acted arbitrarily and capriciously by allowing the hearing to go forward when it was apparent Appellant was unprepared and lacked the knowledge to put on an adequate defense.
5. State criminal charges have been dismissed allowing Appellant to ask the Court for *de novo* review of the facts submitted into evidence on the record.
6. The revocation of Appellant's license is unduly harsh given the record of no prior disciplinary action in a thirty year career in the U.S. Merchant Marine.

The issues contained in Appellant's first Notice of Appeal also appear in the second Notice of Appeal. The issues will be discussed in the order in which they appear in the second Notice.

OPINION

I

Appellant's first ground for appeal is that there was no reasonable cause for a drug test as defined in 33 C.F.R. § 95.035. That regulation states that reasonable cause for permitting an employer to direct a drug test exists when "the individual is suspected of being in violation of the standards in § 95.020..."

Section 95.020 reads, in pertinent part[2], as follows:

> A person is intoxicated when:
>
> (c) The individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner,

[2] 33 C.F.R. § 95.020 contains three subsections. The first and second subsections do not apply to this case because subsection (a) applies only to recreational vessels that are underway. Subsection (b) requires that there be found a specific blood alcohol concentration. The record clearly establishes that Appellant was employed aboard a commercial, non-recreational vessel. The record further establishes that the Lake Charles police officer concluded from a personal observation of the Appellant that he was intoxicated, but there is no evidence in the record concerning whether a breathalyzer examination was ever obtained.

> disposition, speech, muscular movement, general appearance or behavior is apparent by observation.

Appellant argues that he did not meet these criteria because the standard set forth in that section, permitting an employer to direct a drug test, requires that the individual be operating a vessel at the time the observations are made.

I disagree with the Appellant's assertion that there was no reasonable cause for his employer to direct a drug test. Appellant relies on the words "operating any vessel" for the assertion that reasonable cause did not exist. Those words comprise a term of art, however, which is defined at § 95.015, in pertinent part, as follows:

> For purposes of this part, an individual is considered to be operating a vessel when:
>
> * * *
>
> (b) The individual is a crewmember (including a licensed individual), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel.

Contrary to Appellant's assertion, under this definition, to be considered "operating any vessel" one need only be a crew member, pilot, or watch stander of a non-recreational vessel. The vessel need not be underway, nor is a crew member required to be aboard or working at the time the observations are made. Appeal Decision 2551 (LEVENE).

Appellant was, at all material times, employed by Westbank as the master of the M/V STAR CASINO. (Tr. at 46, 130; I.O. Ex. 14.) Once established that Appellant was a crewmember of the M/V STAR CASINO, sufficient to satisfy the requirements of §§ 95.020 and 95.015, the remaining facts demonstrate that probable cause existed. That evidence shows that for a number of hours prior to the time Appellant was arrested, he had been drinking alcoholic beverages, (Tr. at 168, 169; I.O. Ex. 9), that he had left the bar in his motor vehicle and had struck a parked car close to the bar, (Tr. at 49, 50; I.O. Ex. 18), that the police were at the scene of the accident when he returned, that upon his return, Sgt.

Jones of the Lake Charles, Louisiana, Police Department had an opportunity to observe the Appellant and based upon those observations, arrested him for driving while intoxicated. (Tr. at 168, 169; I.O. Ex. 9.)

Incident to the arrest, Appellant was searched, and the search disclosed that Appellant was in possession of a crack cocaine pipe. Appellant was thereupon charged with possession of drug paraphernalia. This information was made known to the Appellant's employer by the police. (Tr. at 168, 169; I.O. Ex. 9.)

Based upon the observations of the police officer and the telephone conversation between Captain Ducote and Major Landry, appellant's employer correctly concluded that reasonable cause existed to direct Appellant to provide a urine specimen for drug testing.

Appellant further alleges that in violation of 33 C.F.R. § 95.035(b), the employer never directed him to take a drug test and he was never told where to go to have a urine sample taken. I disagree.

Questions of fact are for the Administrative Law Judge (ALJ) to decide. See Appeal Decisions 2621 (PERIMAN), 2614 (WALLENSTEIN), 2608 (SHEPHERD), 2421 (RADER), 2319 (PAVELIC) and 2584 (SHAKESPEARE). An ALJ's fact determinations will not be overturned except in cases where the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. See Appeal Decisions 2621 (PERIMAN), 2614 (WALLENSTEIN), 2608 (SHEPHERD), 2570 (HARRIS), NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE) and 2584 (SHAKESPEARE).

The ALJ found that Appellant had refused to provide a urine sample for purposes of conducting a reasonable cause drug test as directed by his employer on the

evening of October 21, 1998, (D & O at 3), and that Appellant had been told to call Captain Beals on the morning of October 22, 1998, for the time and place he was to report to provide a urine specimen to test. (Id. at 3.) The ALJ also found that the Appellant did not make the telephone call to Captain Beals, as he was directed, and did not provide the urine sample. (Id. at 6.)

The ALJ's findings were based upon the testimony provided by Captains Beals and Ducote, the exhibits entered on behalf of both the IO and the Appellant, and upon the record as a whole. Nothing in the record suggests that the ALJ's findings of fact were made arbitrarily, capriciously, erroneously, or on inherently incredible evidence. Accordingly, I will not disturb the findings.

Appellant also claims that all the evidence in the record bearing on whether reasonable cause existed for the employer to direct a drug test was based upon hearsay. Although Appellant does not claim that as an independent ground to overturn the ALJ's decision, it is implied. Hearsay evidence, however, is not inadmissible under the rules of evidence applicable to administrative hearings. 46 C.F.R. § 5.537(a); Appeal Decisions 2608 (SHEPHERD), 2413 (KEYS) and 2404 (MCALLISTER). Hearsay evidence may be submitted and used to support an ultimate conclusion, the only caveat being that the findings must not be based on hearsay alone. Appeal Decisions 2608 (SHEPHERD), 2183 (FAIRALL), aff'd sub nom. Commandant v. Fairall, NTSB Order EM-89 (1989); Appeal Decisions 2464 (FUTCHER III), 2432 (LEON) and 2413 (KEYS).

Ordinarily, failure to make an appropriate objection at the time the hearsay evidence is offered into evidence waives the objection. *See, e.g.,* Fed. R. Civ. Pro. 46. Although *pro se* respondents are generally given wider latitude to raise evidentiary issues for the first time on appeal than respondents who are represented by counsel, the errors alleged, if true, did not prejudice the Appellant at the hearing on this matter sufficiently to raise a due process concern. See Appeal Decision 2608 (SHEPHERD).

For all of the aforementioned reasons, I do not find the Appellant's allegations concerning hearsay compelling and I will not disturb the ALJ's order based upon those assertions.

Appellant also alleges that under § 95.035, to find reasonable cause, when practicable, an employer should base a determination upon the observation of two persons. Because the observations were made by only one person, Sgt. Jim Jones of the Lake Charles Police Department, who did not provide testimony at the hearing on this matter, Appellant claims that the ALJ's decision should be overturned. Once again, I disagree.

Section 95.035(c) states:

> When practicable, a marine employer should base a determination of the existence of reasonable cause . . . on observation by two persons.

This section is addressed to employers in those cases where it is the employer that makes the observations directly, it does not apply to those cases where a law enforcement officer makes the observation, which is governed by § 95.035(a). In this case, it was a law enforcement officer that made the direct observation and, as a consequence of finding probable cause, he made the arrest. It was the verbal report of the police to Appellant's employer that provided the basis of reasonable cause for the employer to direct a urine drug test. Under these circumstances, § 95.035(c) has no application and is not determinative in evaluating the marine employer's procedures.

Based upon the foregoing, I conclude that there existed reasonable cause for Appellant's employer to direct the taking of the test and that Appellant was provided with adequate notice concerning the time and place he was to provide the urine specimen. Appellant's first assignment of error is denied.

II

Appellant's second assignment of error alleges that he was not a "crew member" at the time he was directed to take the urine drug test as defined by 46 CFR §16.105. Appellant relies upon subsection (a) of 46 CFR § 16.105 to support his argument. Subsection (a) states, in pertinent part, that a crewmember is an individual who is:

> On board a vessel acting under the authority of a license, certificate of registry, or a merchant mariner's document issued under this subchapter, whether or not the individual is a member of the vessel's crew

Appellant's argument is that to be a crewmember, one must be physically on board a vessel. Certainly, subsection (a) would make that appear so on its face, but Appellant overlooks subsection (b), which makes clear that one need not be on board a vessel to be considered a crewmember. Subsection (b) of that section provides an alternate definition and states in the disjunctive that a crewmember may also be an individual who is:

> Engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter . . .

Subsection (b) makes it clear that an individual need only be "engaged or employed" aboard a vessel, and not be physically onboard, to be considered a crewmember. While a seaman is on leave or otherwise not physically on board the vessel, his status as a seaman continues. See Appeal Decisions 2551(LEVENE), 389 (VENTOLA) .

Appellant mixes into his argument facts that are not in evidence in an attempt to support the position that at the time he was directed to take the urine test, he was not on the vessel or not employed by the vessel. Appellant argues that because he had completed a work cycle of fourteen days on and seven days off, that he was not a crewmember during the period he had off. Appellant, however, overlooks the fact that he had agreed to work an extra day shift on the very day he failed to provide the urine specimen. The assertion is also without legal support because, as indicated above, one need only be "engaged or employed" aboard a vessel to be considered a crewmember.

Similarly, Appellant alleges that he was "asked or compelled to work more hours than were called for in his agreement and this justifies the seaman's discontinuance of his service because of this breach." This factual allegation is not supported by evidence in the record. The record shows only that Appellant had been requested by Captain Beals to work an extra day shift on October 22, 1998, and that the Appellant had consented. There is no indication that the Appellant was coerced or that he was otherwise pressured into working this extra shift. Moreover, there is no evidence in the record that the Appellant ever attempted to discontinue his service to the employer nor any indication in the record that the Appellant felt his employer had breached the employment agreement. Appellant has not offered any evidence to support these accusations. Accordingly, I reject these contentions and will not consider them upon review. It appears from the record that obtaining Appellant's services for an additional day shift, following fourteen days of work, was consensual. Therefore, Appellant's second assignment of error is denied.

III

Appellant's third and fifth assignments of error are closely related and, accordingly, I will discuss them together. Appellant's third and fifth assignments of error allege that: 1) the Court abused its discretion when it denied Appellant's request for a continuance pending the outcome of the state criminal charges, and 2) because the state court dismissed all criminal charges on or about February 14, 2000, upon a *de novo* review by this office, the ALJ's decision should be reversed or remanded for further proceedings. I disagree with both contentions.

Both contentions raise issues concerning the relationship of the state court criminal proceedings to the Coast Guard's suspension and revocation hearing. Both contentions assume, that, in this case, the outcome of the state court criminal proceeding would dictate the outcome of the suspension and revocation proceeding.

The charge and specification before the ALJ was unrelated to the charges pending before the state criminal court. The only thing they had in common was that they arose from the

same fact pattern. Before the ALJ was a single charge and specification of misconduct for failure of the Appellant to comply with an employer-directed urine drug test. This offense occurred on October 22, 1998. The proceeding at issue was not a criminal proceeding, and the charge and specification before the ALJ was not a criminal charge. The state proceeding, on the other hand, was criminal in nature, it was brought against the Appellant, *in personam*, the offense occurred on October 21, 1998 (the day prior to the misconduct violation), and the charges being tried in that forum were for driving while intoxicated and possession of drug paraphernalia.

This is not a situation where a merchant mariner is being proceeded against based upon a conviction in a state court of record for committing a criminal offense. In those cases, where frequently the sole evidence is the court record of a criminal conviction, a dismissal of those charges or a pardon might have significant impact. Appeal Decisions 2608 (SHEPHERD), 1954 (STOCKSTILL) and 1105 (HILTON). Instead, the proceeding at issue was a separate and distinct civil proceeding to consider whether action against Appellant's license and MMD was appropriate in light of the alleged misconduct, i.e., Appellant's refusal to provide a urine sample in connection with an employer-directed urine test.

With respect to Appellant's third contention, "the decision to continue a hearing is within the sound discretion of the Administrative Law Judge." 46 C.F.R. § 5.51. The Administrative Law Judge's decision will only be reversed for an abuse of discretion. See Appeal Decisions 2551 (LEVENE), 2506 (SYVERSTEN), 2492 (RATH), 2378 (CALICCHIO), 2333 (AYALA) and 2302 (FRAPPIER). "'"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case.'" Appeal Decision 2592 (MASON) quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

Upon a review of the evidence, I can find no legal or factual basis upon which to sustain Appellant's third assignment of error that the ALJ abused his discretion when he denied the Appellant's request for an adjournment pending the outcome of the state criminal

court proceeding. The State criminal case and this case addressed entirely different issues. Accordingly, this assignment of error is denied.

Regarding the allegation that the State dismissal warrants similar action here, Appellant cites Appeal Decisions 1954 (STOCKSTILL) and 1513 (ERDAIDE) in support. Both of those decisions, however, involved suspension and revocation proceedings against merchant mariners who were charged with having been convicted of violations of the narcotics laws of a State, pursuant to 46 U.S.C. § 239b (recodified at 46 U.S.C. § 7704(b)). In Stockstill, I opined that:

> The regulations promulgated in conjunction with section 239b, 46 C.F.R. § 137.03-10 [now, 46 C.F.R. § 5.577(b)] . . . provide that a revocation order made pursuant thereto will be rescinded by the Commandant upon submission of 'satisfactory evidence that the court conviction on which the revocation is based has been set aside for all purposes . . .'"

In both cases, satisfactory proof that the convictions had been set aside for all purposes was presented to the ALJ. In both cases, the revocations of the mariners' licenses were vacated. Appellant contends that his case should receive similar consideration because the underlying criminal charges have been dismissed. I disagree. There is a very distinct difference between the case before me now and the cases cited by Appellant in support of his contention.

In this case, the Appellant was not charged with having violated a dangerous drug law of a state. He was charged with misconduct pursuant to 46 U.S.C. § 7703(b) and 46 C.F.R. Part 15. There is no regulatory provision for charges of misconduct, as there is for charges of conviction of state dangerous drug laws, that requires vacating the suspension or revocation upon a showing that the underlying criminal charge had been set aside for all purposes. The two kinds of charges are different in nature. Unlike conviction for violation of state drug laws, misconduct is a separate and distinct offense from underlying or related state court criminal charges, and a finding of proved to the misconduct charge is not dependent upon a State first obtaining a successful prosecution of the criminal charge.

Accordingly, Appellant's third and fifth assignments of error are denied.

IV

Appellant's fourth assignment of error states that the Court acted arbitrarily and capriciously by allowing the hearing to go forward when it was apparent Appellant was unprepared and lacked the knowledge to put on an adequate defense. I disagree.

Although Appellant does not directly allege that he was improperly denied counsel, the issue is raised by implication. The question becomes, therefore, did the ALJ abuse his discretion when he denied Appellant a further continuance to obtain counsel.

A review of the record shows that the Appellant was first notified of the proceedings on November 10, 1998. That notice advised Appellant of the charge and specification against him and further advised him of his counsel rights. (I.O. Ex. 1.) He received an amended second notice of the proceedings on December 17, 1998, wherein he was again provided notification of his right to counsel. (I.O. Ex. 2.) Thereafter, Appellant requested and received from the ALJ continuances on or about December 31, 1998, (I.O. Ex. 3), to March 9, 1999, (I.O. Ex. 4), and from March 9, 1999 to May 4, 1999. (I.O. Ex. 5.) At the commencement of the proceedings on May 4, 1999, the ALJ once again advised Appellant of his right to counsel. (Tr. at 13 – 16.) At that time, the Appellant stated on the record his willingness to defend without the presence of counsel. (Tr. at 13 – 16.)

The decision to continue a hearing is within the sound discretion of the ALJ. See 46 C.F.R. § 5.511. The ALJ's decision will only be reversed for an abuse of discretion. Appeal Decision 2592 (MASON). Counsel rights of a respondent at a suspension or revocation proceeding appear at 46 C.F.R. § 5.519. "The responsibility of the government in this regard is fully exercised when the person charged has been duly informed of that right and given reasonable opportunity to procure representation." Appeal Decisions 2008 (GOODWIN) and 2592 (MASON).

Appellant was informed of his right to counsel on two distinct occasions prior to the hearing and was given a reasonable period of time to obtain counsel. The fact that Appellant neglected to do that or, as asserted by Appellant, that he obtained counsel who could not appear on the date and time scheduled for the hearing, does not shift the burden for that failure to the Coast Guard or the ALJ. Under the circumstances presented in the record of these proceedings, I am of the opinion that the ALJ did not abuse his discretion in denying a further continuance.

The allegations made by Appellant relating to the consequences of the ALJ's refusal to grant the continuance are in the nature of denials of due process. Appellant states that as a consequence of the ALJ's failure to grant the continuance "all exhibits of the Coast Guard . . . are admitted in block with no foundation," "heresy [sic, probably hearsay] continues throughout," "leading questions continue throughout the Coast Guard's case in chief and presentation of the testimonies of Captain Ducote and Captain Beals." Appellant also alleges that the Coast Guard Investigating Officer "coached" a witness in the course of the hearing and that he was not informed of his right to take the stand in his defense and that "what he states under oath will be the record of his defense."

I reject the Appellant's allegation that he was not advised of this right to testify.[3] Aside from that, even if Appellant has accurately characterized what occurred at the hearing, it does not amount to a denial of due process. As indicated above, at the hearing stage, due process requires only that the Appellant be given notice of the right to counsel and a reasonable opportunity to obtain counsel prior to the hearing. Failure of the Appellant to take advantage of the right to obtain counsel places upon his shoulders the responsibility

[3] Notwithstanding Appellant's assertion that he was not advised of his right to testify in his own defense, it is clear that at appropriate times throughout the proceedings the ALJ advised the Appellant that he had a right to take the stand and testify on his own behalf. See Tr. at 19, 185 and 198. Moreover, the Appellant was fully and completely advised of his rights to present evidence, call witnesses on his behalf, cross-examine government witnesses, etc. See Tr. at 12 – 19.

for whatever may follow at the trial of the matter. As the Supreme Court stated in Unger v. Sarafite, 376 U.S. 575, 589 (1964), "the matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process, even if the party fails to offer evidence or is compelled to defend without counsel." 376 U.S. at 589.

V

Finally, Appellant alleges that the revocation of his license was unduly harsh given a record of no prior disciplinary action in a thirty year career in the U.S. Merchant Marine. Once again, I must disagree.

The order imposed is exclusively within the ALJ's discretion and it will not be modified unless it is clearly excessive or an abuse of discretion. Appeal Decisions 2622 (NITKIN), 2423 (WESSELS), 2114 (HOLLOWELL), 2391 (STUMES) and 2578 (CALLAHAN).

The Appellant alleges that under 46 C.F.R. § 5.569, which is a table entitled "Suggested Range of an Appropriate Order," he should have received no more than a suspension of his license and MMD for a period of from 12 to 24 months. Moreover, upon review, Appellant urges that consideration be given to "remedial actions which have been undertaken independently by the respondent . . . and the prior record of the respondent." 46 C.F.R. § 5.569(b). Appellant also urges that consideration be given to actions taken by him following the incident of October 21, 1998, which include voluntary attendance at Alcohol Anonymous meetings and the submission of eight drug test result reports, including one forensic hair test, which allegedly had negative results. Finally, Appellant urges that consideration be given to "an exemplary 30-year career in the Merchant Marine and Naval Reserves, with no prior disciplinary action having been taken."

The record is clear that the ALJ took into consideration all of the matters Appellant now urges I consider on review. In addition to taking into consideration the Appellant's prior

clean record and actions taken following the incident, the ALJ noted that the "Commandant has held on appeal that a mariner's refusal to submit to a chemical test for dangerous drugs raises serious doubts of the individual's ability to perform safely and competently in the future." (D&O at 8.) He further noted that Appellant was "employed aboard a passenger vessel carrying numerous passengers and that the taking of drugs could endanger their lives." (Id. at 8.) And, finally, the ALJ concluded that based upon the above circumstances, the respondent's actions could not be tolerated. (Id. at 8.) It was upon all these considerations that the ALJ revoked Appellant's license and MMD. I will not disturb the ALJ's order.

Appellant's reliance on the table at 46 C.F.R. § 5.569, entitled "Suggested Range of an Appropriate Order," for the contention that he should not have received more than a suspension of his license and MMD for a period of from 12 to 24 months, is misplaced. That table is only intended for information and guidance, and is not binding upon the ALJ. Appeal Decisions 2414 (HOLLOWELL), 2362 (ARNOLD) and 2578 (CALLAHAN).

As stated in Callahan:

> An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. Appeal Decision 2475 (BOURDO); cf. Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360 (1962). . .
>
> * * *
>
> Of paramount concern is the safety of life at sea and the welfare of individual seamen. Appeal Decision 2017 (TROCHE), aff'd NTSB Order No. EM-49 (1976). Refusal to submit to a post incident chemical test raises a serious doubt about a mariner's ability to perform safely and competently in the future.[4] Furthermore, if mariners could refuse to

[4] The logic leading to the conclusion that a refusal to submit to a chemical test following the occurrence of an incident raises a serious doubt about a mariner's ability to perform safely and competently in the future, has equal application to those cases where the test is directed by an employer based on a finding of reasonable cause. In fact, the doubt raised when a mariner refuses a reasonable cause urine drug test may be greater because the basis for directing the test is the conduct, behavior and appearance of the particular mariner. In cases involving post-incident chemical testing, the testing is directed based upon an occurrence and it may have nothing to do with a particular mariner's conduct, behavior and outward appearance. In any event, federal courts have recognized that drug testing of employees involved in mass transportation is

> submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to being tested. Cf. Exxon Shipping Co. v. Exxon Seaman's Union, 73 F.3d 1287 (3rd Cir. 1996). * * * The Administrative Law Judge . . . determined that revocation was the appropriate remedy to ensure maritime safety, to guarantee the effectiveness of the drug testing program and to prevent potential abuse by the Appellant in the future.

In the case of Exxon Shipping Co. v. Exxon Seaman's Union, supra at 1294, the court stated that "the right to test employees for alcohol or drug use upon a showing of reasonable cause, on threat of discharge, is critical to achieving the objective of the Coast Guard regulations and of the environmental protection statutes . . . Were employees permitted to refuse to submit to such chemical tests, it is difficult to imagine why any drug user would consent."

Based upon the foregoing, I find that the ALJ's order was not clearly excessive nor did the ALJ abuse his discretion. Accordingly, Appellant's requests are denied.

CONCLUSION

After reviewing the entire record and considering all of Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the conclusions of the ALJ. The hearing the Appellant received was fair and in accordance with the requirements of the applicable regulations.

ORDER

The Decision and Order of the Administrative Law Judge dated September 17, 1999 is AFFIRMED.

//S//

T. H. COLLINS
Vice Admiral, U. S. Coast Guard
Acting Commandant

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widespread in agencies of the executive branch and that in most instances refusal to test equates to a positive test result. Exxon Shipping Co. v. Exxon Seaman's Union, 73 F.3d 1287(3rd Cir. 1996), cert. denied 517 U.S. 1251 (1996).

Signed at Washington, D.C. this 22nd day of October, 2001.