UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 764137 AND	:	
MERCHANT MARINER DOCUMENT	:	ON APPEAL
[REDACTED]	:	
	:	NO. 2626
Issued to: Christopher J. Dresser	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.[1] By an order dated February 4, 1999, an Administrative Law Judge (ALJ) at New Orleans, Louisiana, revoked Appellant's license and document. Appellant was charged with *use of a dangerous drug* in a single specification based on a positive test for marijuana.

The hearing was held on April 29, June 11-12 and 24, 1998, at New Orleans, Louisiana. Appellant was represented by legal counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of twelve witnesses and twenty-three exhibits. Appellant introduced into evidence the testimony of three witnesses and nineteen exhibits and testified on his own behalf. The charge and specification were found *proved* and Appellant's license and document were revoked.

The ALJ's Decision and Order (D&O) was served on Appellant on February 4, 1999. Appellant filed a notice of appeal with the ALJ on February 19, 1999. Appellant filed his appeal on March 17, 1999. Appellant filed a Motion to Disqualify the Commandant on April 9, 1999, and requested that the Motion and decision be made part of the record of this action. Appellant filed a second Motion to Disqualify the Commandant on August 4, 1999, and requested that the Motion and decision be made

[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 the hearing. Any reference in this opinion to 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).

part of the record of this action. Appellant also filed Motion to File a Supplemental Brief on November 22, 1999. The Coast Guard granted this Motion and accepted the Supplemental Brief. This matter is properly before me for review.

APPEARANCES: Mr. J. Mac Morgan, Esq. for Appellant. The United States Coast Guard Investigating Officer was Lieutenant Commander Laticia J. Argenti, USCG.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license and document.

On November 13, 1997, Appellant provided a urine sample pursuant to a pre-employment drug test. The person who collected Appellant's urine sample did so in accordance with the applicable procedures found at 49 C.F.R. Part 40. Subsequently, Appellant's specimen was sent to a Department of Health and Human Services (DHHS) certified laboratory, Quest Diagnostics, Inc.

The laboratory received Appellant's urine specimen intact and conducted the prescribed tests in accordance with 49 C.F.R. Part 40. The screening test was positive for marijuana/Tetrahydrocannabinol (THC) metabolite. The confirming Gas Chromatography/Mass Spectrometry test confirmed the presence of marijuana/THC metabolite. The laboratory forwarded the test results to the Medical Review Officer (MRO), Dr. Steven Oppenheim, M.D.

On December 15, 1997, the MRO determined that Appellant's specimen was positive for marijuana/THC metabolite. The MRO made this determination in accordance with 49 C.F.R. § 40.33(c)(5)(ii),[2] after his staff attempted to contact the Appellant on five separate occasions between November 21 and December 10, 1997. Appellant failed to return any phone calls and the MRO never spoke directly to Appellant about his positive test.

Based on a request from Appellant's counsel, a second test was conducted on a portion of the remaining urine specimen by a referee DHHS-certified laboratory,

[2] 49 C.F.R. § 40.33(c)(5)(ii) states in relevant part, "The MRO may verify a test as positive without having communicated directly with the employee about the test in three circumstances: . . . Neither the MRO nor the designated employer representative, after making all reasonable efforts, has been able to contact the employee within 14 days of the date on which the MRO receives the confirmed positive test result from the laboratory . . . ."

Northwest Toxicology, Inc. The referee laboratory confirmed that Appellant's sample was positive for marijuana/THC metabolite.

During the presentation of Appellant's defense, he denied the charge and specification for marijuana use. Appellant claimed he ingested liquid hemp seed oil, a legal dietary product, which caused Appellant's urine specimen to be reported as positive for marijuana metabolite. Appellant claimed he used liquid hemp seed oil since November 1996, because it is good for the heart and cardiovascular system. Appellant stated that he used the hemp seed oil approximately four to five times a week during this period.

On March 18, 1999, the Commandant of the Coast Guard issued an ALCOAST message to all Coast Guard personnel that prohibited the use of hempseed oil. The Commandant issued the ALCOAST to prevent Coast Guard personnel from inadvertently testing positive during Coast Guard random drug tests.

On August 16, 1999, the Investigating Officer, Lieutenant Commander Laticia Argenti, who represented the Coast Guard at Appellant's suspension and revocation hearing, was assigned as a staff attorney to the Office of Maritime and International Law at Coast Guard Headquarters, Washington, D.C. This Office reviews and processes suspension and revocation appeals for the Commandant. Her duties as a staff attorney involve vessel documentation, hazardous materials, civil penalty process, deepwater ports and port security. For this case, Lieutenant Commander Argenti filed an Affidavit stating that since her arrival at the Office of Maritime and International Law, she has not been involved in any aspect of Appellant's appeal. The Office assigned another staff attorney, Lieutenant Commander William L. Chaney, to review and process this case. Lieutenant Commander Argenti states in her Affidavit that she has not spoken to anyone in the Office of Maritime and International Law, including Lieutenant Commander Chaney, about the substance of this appeal.

MOTIONS TO DISQUALIFY

Appellant asserts that the Commandant cannot decide this appeal because: 1) the Commandant issued a General Order prohibiting the use of hemp seed oil and therefore

prejudged this case (*See* Motion to Disqualify dated April 9, 1999); and, 2) the Investigating Officer who represented the Coast Guard in this case was subsequently assigned to the Office of Maritime and International Law (the Office that processes suspension and revocation appeals for the Commandant) and therefore creates a conflict of interest (*See* Motion to Disqualify dated August 4, 1999). Appellant's Motions dated April 9 and August 4, 1999, requesting disqualification of the Commandant, and that his Appeal be forwarded to the National Transportation Safety Board, are denied.

Coast Guard suspension and revocation regulations do not include a procedure for Appellant to seek disqualification of the Commandant. 46 C.F.R. Part 5. However, under the Administrative Procedures Act (APA), a party may seek disqualification of the presiding employee in an agency proceeding. 5 U.S.C. § 556(b). The moving party must submit, in good faith, a timely and sufficient affidavit that requests disqualification of a presiding employee based on personal bias or other disqualification. Keating v. Office of Thrift Supervision, 45 F.3d 322, *cert. denied* 116 S. Ct. 94, 133 L.Ed. 2d 49 (9th Cir. 1995). The party seeking disqualification carries the burden of proof. Schweiker v. McClure, 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982). There is a rebuttable presumption that hearing officers are unbiased. Prejudgment also serves as a basis for disqualification. 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, the Appellant 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). 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 a matter critical to the disposition of the proceeding. Association of National Advertisers v. FTC, 617 F.2d. 1151 (D.C. Cir. 1979).

Appellant asserts that the Commandant must be disqualified from hearing this appeal because he has clearly prejudged the issues based on his General Order of March 18, 1999, prohibiting the use of hemp seed oil by U.S. Coast Guard personnel. [Appellant's Exhibit A submitted with his Motion to Disqualify dated April 9, 1999.] Specifically, Appellant asserts that since this appeal involves issues concerning hemp seed oil (including but not limited to its beneficial attributes and whether it caused

Appellant's urine drug screen to test positive for marijuana metabolite) and the Commandant has already made decisions about this issue, he cannot hear this appeal. The General Order states that hemp seed oil may contain varying levels of THC that is detectable as marijuana under a Coast Guard drug test. In order to prevent Coast Guard personnel from inadvertently testing positive from hemp seed oil use, the General Order prohibits its use.

There is a significant difference between the Commandant's General Order that applies to Coast Guard personnel and prejudgment of the specific facts of Appellant's case. If the Commandant prejudged the facts of Appellant's case, then he must be disqualified. American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966). If the Commandant merely enters the proceedings with advance views on matters in issue, then there are no grounds for disqualification. Hortonville Joint School District v. Hortonville Education Association, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976). For example, a public statement about a matter that is also subject to adjudication by the agency is not evidence of prejudgment, but when an agency member has delivered a speech on a case pending before the agency, and the speech evidences an already formed opinion as to the guilt of the party involved, the courts will find prejudgment to exist. FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979). In the present case, the Commandant's General Order states the Coast Guard's internal policy regarding hemp seed oil that applies to Coast Guard personnel. The General Order does not apply to merchant mariners who may use hemp seed oil and does not specifically address the facts and circumstances of Appellant's positive test for marijuana and alleged use of hemp seed oil. It is simply a broad statement about the use of hemp seed oil by Coast Guard personnel.

I find that Appellant failed to meet his burden to establish that the Commandant has prejudged the issues presented in Appellant's case. The Commandant's General Order states Coast Guard policy; it does not address the specific issues and facts presented in Appellant's case. Appellant failed to establish that the Commandant has an unalterably closed mind on the facts and circumstances of Appellant's case. Appellant's Motion dated April 9, 1999, is denied.

Appellant also asserts that the Commandant must be disqualified from deciding this appeal due to a conflict of interest. Appellant asserts that since the Investigating Officer, Lieutenant Commander Laticia Argenti, who represented the Coast Guard at Appellant's suspension and revocation hearing has been assigned to the Commandant's Office of Maritime and International Law, there is a conflict of interest. This Office reviews and processes administrative appeals for the Commandant. Appellant offers no further justification for his position and cites no specific factual or legal basis in support of his Motion.

Appellant offers no evidence that warrants disqualification other than Appellant's bald assertion that the Investigating Officer's assignment to the Office of Maritime and International Law somehow creates an automatic conflict of interest. This simply is not the case. Her immediate supervisor has precluded the Investigating Officer from acting on or discussing the substance of Appellant's appeal with other staff attorneys within the Office of Maritime and International Law. [Affidavit of Lieutenant Commander Argenti dated February 9, 2001.] The Office of Maritime and International Law assigned Appellant's case to another staff attorney, Lieutenant Commander William L. Chaney, who reviewed and processed this case for the Commandant. Based on the applicable ethical standards, Lieutenant Commander Chaney is not precluded from preparing this appeal due to a conflict of interest based on an imputed disqualification.[3] There is no imputed disqualification since Lieutenant Commander Argenti has been screened from any involvement in Appellant's case.

I find that Appellant failed to meet his burden to establish that the Commandant must be disqualified from deciding the issues presented in Appellant's case due to a conflict of interest. Appellant's assertion in this respect amounts to nothing more than

[3] The Coast Guard has not published ethical rules for its attorneys and therefore, Coast Guard attorneys must abide by their State bar rules. Lieutenant Commander Chaney is an attorney admitted to the Michigan State Bar. The Michigan Rule of Professional Conduct 1.10 - Imputed Disqualification: General Rule states, "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which that lawyer was associated, is disqualified under Rule 1.9(b) [Conflict of Interest: Former Client], unless: the disqualified lawyer is screened from any participation in the matter . . . ." Based on the Comment for this Rule, the Office of Maritime and International Law would be considered a "firm" for the purpose of this Rule and Lieutenant Commander Laticia Argenti was screened from any involvement with Appellant's appeal.

speculation without any factual or legal support. Appellant's Motion dated August 4, 1999 is denied.

BASIS OF APPEAL

Appellant filed an original and supplemental brief in this matter. Appellant raises the following issues on appeal:

I. The ALJ clearly erred when he denied Appellant's Motion to Disqualify the ALJ.

II. The ALJ clearly erred when he did not *sua sponte* reconsider and grant Appellant's Motion to Disqualify the ALJ.

III. The ALJ clearly erred when he tainted his final Decision and Order with adverse inferences against Appellant because of his employment of an attorney and requesting an aliquot of his urine specimen retested by a referee laboratory.

IV. The ALJ clearly erred when he denied Appellant's motion for a mistrial.

V. The ALJ clearly erred when he denied Appellant's objections to the telephone testimony of the Coast Guard's witnesses.

VI. The ALJ clearly erred when he refused to allow Appellant to cross-examine the Coast Guard's witnesses.

VII. The ALJ clearly erred when he ruled that the urine specimen was submitted, collected, transported, analyzed and/or reported in full accordance with standard federal drug testing procedures, rules and/or regulations.

VIII. The ALJ clearly erred when he wholesale adopted as his own the Coast Guard's proposed findings of fact and conclusions of law because they were clearly contrary to the law and were not supported by reliable, substantial and probative evidence.

IX. The ALJ clearly erred when he ruled that the charge and specification had been proven by reliable, substantial and probative evidence.

X. Appellant's rights to fundamental fairness and due process were clearly denied as a result of the manner and method within which this suspension and revocation proceeding was conducted by the ALJ.

OPINION

I.

Appellant asserts that the ALJ clearly erred when he denied Appellant's motion to disqualify the ALJ. A respondent may, in good faith, request the ALJ to withdraw on the grounds of personal bias or other disqualification. 46 C.F.R. § 5.507(b). The party seeking disqualification carries the burden of proof. Schweiker v. McClure, 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982). There is a rebuttable presumption that hearing officers are unbiased. 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. 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, the Appellant 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). 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).

Appellant generally claims in his Motion and Affidavit that the ALJ formed a personal bias, prejudged the ultimate factual and legal issues and/or is not impartial. [ALJ Exhibit I.] Specifically, Appellant claims that the ALJ impeded his hemp seed oil defense by not allowing him to effectively cross-examine two government witnesses, Mr. George Ellis and Mr. James Callies. Mr. Ellis testified about the role of an MRO and Mr. Callies testified about laboratory procedures. Appellant also claims the ALJ prejudged the factual and legal issues in the case.

Regarding Mr. Callies's testimony, Appellant asserts that the ALJ prevented his counsel from cross-examining Mr. Callies to establish that liquid hemp seed oil would cause a urine sample to screen positive for marijuana metabolite (a false positive) and whether or not hemp seed oil is a legal substance. Appellant also claims that the ALJ subsequently questioned Mr. Callies about a false positive to defeat Appellant's defense. Appellant asserts that this action by the ALJ demonstrated that he had prejudged the ultimate issue in this case. Based on the record, the ALJ limited Appellant's questions to Mr. Callies about this topic because they went beyond the scope of direct examination.

[TR at 57-66.] The ALJ told Appellant's counsel that he could call Mr. Callies as his own witness and ask the questions. [TR at 57-66.] Also, the ALJ asked Mr. Callies about the term "false positive" but only for the purpose of clarification after Appellant's counsel brought up the issue of false positives. [TR at 64-66.]

Regarding Mr. Ellis' testimony, Appellant attempts to show that the ALJ influenced the witness' testimony when Appellant's counsel cross-examined Mr. Ellis about the definition of marijuana under the Controlled Substance Act. 21 U.S.C. § 801 *et. seq*. Specifically, Appellant cites the following exchange:

> Judge Boggs: He's obviously going to answer no, Mr. Morgan.
>
> Mr. Morgan: Well, let's hear what his answer is.
>
> Judge Boggs: What's your answer, Mr. Ellis?
>
> Mr. Ellis: My answer is no.

[TR at 143-144.]

The questions just prior to this exchange had been objected to by the Investigating Officer and sustained by the ALJ. At this point, Appellant's counsel wanted to make a proffer. Specifically, the record states:

> Mr. Morgan: And, I just want to – just for clarity purposes, sir, did you know that the United States Congress had stated in its acts that hemp seed oil is not a dangerous drug?
>
> LCDR Argenti: Your Honor, I object, A, to the form of the question. It is an improper characterization. I would request that Mr. Morgan prove that assumption. Our position is that Congress has not specifically said that about hempseed oil.
>
> Mr. Morgan: Well, I'm asking this witness if he knows that.
>
> Judge Boggs: I'm going to sustain the objection.
>
> Mr. Morgan: Well, I'd like to make a proffer, Judge. I'm asking this gentleman if he's aware that the United States Congress has specifically stated in its Controlled Dangerous Substance Act that hemp seed oil is not a dangerous drug.
>
> LCDR Argenti: We keep the objection on the record, your Honor.
>
> Judge Boggs: He's obviously going to say "no," Mr. Morgan.
>
> Mr. Morgan: Well let's hear what his answer is.

Judge Boggs: What's your answer, Mr. Ellis?

Mr. Ellis: My answer is no.

[TR at 140-144.]

Appellant further argues that a witness (the person who collected Appellant's sample) for the Coast Guard was allowed to testify about the drug testing procedures under the federal regulations but Appellant could not do the same during Mr. Ellis' testimony. Finally, Appellant argues that the ALJ's decision to call the MRO (originally, the Coast Guard did not intend to call the MRO) benefited the Coast Guard. Based on the foregoing, Appellant argues that the ALJ demonstrated a high degree of favoritism towards the Coast Guard and had prejudged important issues concerning Appellant's case.

Based on the record, it is clear that the ALJ's treatment of these witnesses did not demonstrate a personal bias or other basis, such as prejudgment, for disqualification in accordance with 46 C.F.R. § 5.507(b). As stated above, 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). The witness exchanges cited above do not demonstrate that the ALJ had a personal interest in this case or that he had an unalterably closed mind about the facts and issues. Rather, it appears that the ALJ simply exercised his authority to regulate the course of the hearing so that relevant and material information came out at the appropriate time. The ALJ shall regulate and conduct the hearing in such a manner so as to bring out the relevant and material facts, and to insure a fair and impartial hearing. 5 U.S.C. § 556(c) and 5 C.F.R. § 5.501(a). This includes limiting the testimony of each witness as he determines is necessary to bring out only relevant and material facts. Appeal Decisions 2582 (SKINNER) and 2490 (PALMER).

Furthermore, the reasons cited above do not demonstrate that the ALJ had an unalterably closed mind about the facts and issues concerning Appellant's case. Based on the vigorous litigation in this case by both parties and the in depth defense the Appellant presented, it is clear that the ALJ did not prejudge the factual or legal issues in this case and allowed both parties an opportunity to fully present the facts and issues.

I find that Appellant failed to meet his burden to establish that the ALJ was either biased or had prejudged the issues presented in Appellant's case. Appellant failed to

establish that the ALJ had a personal interest or exhibited an unalterably closed mind concerning the facts and circumstances of Appellant case.

II.

Appellant asserts that the ALJ clearly erred when he did not *sua sponte* reconsider and grant Mr. Dresser's Motion to Disqualify the ALJ due to *ex parte* communications. Appellant claims the ALJ had *ex parte* conversations with his son and the Coast Guard about a products liability law suit that Appellant filed against the manufacturer of the hemp seed oil that Appellant claims he ingested and made him test positive for marijuana/THC metabolite. The ALJ's son is an attorney who represents a party in Appellant's civil suit. Appellant also raised an issue about an advisory opinion the ALJ sought from the Coast Guard's Chief ALJ to determine whether the ALJ could continue with this case.

The legal basis for disqualification has already been stated above. The APA sets forth the standard for *ex parte* communications in an administrative proceeding. 5 U.S.C. § 557(d). Generally, an interested person is prohibited from making statements, to an ALJ, relevant to the merits of a pending proceeding. 5 U.S.C. § 557(d).

Based on the exhibits Appellant submitted with his Supplemental Brief, it is clear that the ALJ spoke to his son and the Coast Guard briefly about Appellant's case. [Exhibits A - G attached to the Appellant's Supplemental Brief dated November 22, 1999.] However, Appellant provided no evidence that established the ALJ and his son discussed the merits of Appellant's case. It is also clear that the ALJ spoke briefly to the Coast Guard about Appellant's case but that no substantive matters were discussed.

Appellant's case came up during casual conversation between the ALJ and his son. [Exhibit C.] Once the ALJ realized his son represented a party in Appellant's civil action, he ended the conversation. Apparently, neither the ALJ nor his son knew about the other person's involvement in this matter. Based on the Exhibits submitted by Appellant, the ALJ and his son did not get into the substance of Appellant's proceeding with the Coast Guard. [Exhibits C – D.]

Once the matter came up between the ALJ and his son, the ALJ took the extra step and notified the Coast Guard about the conversation with his son and sought an advisory opinion from the Chief Administrative Law Judge. [Appellant's Exhibit D.] In

turn, the Chief Administrative Law Judge sought guidance from the Coast Guard ethics counselor to determine whether the ALJ should continue to preside over Appellant's case. The Coast Guard's ethics counselor did not find a conflict of interest based on this situation. [Appellant's Exhibit E.] The ALJ was allowed to continue to preside over Appellant's case.

Regarding the Coast Guard, it appears that communication between the ALJ and Coast Guard involved a brief exchange between the Senior Investigating Officer at Marine Safety Office New Orleans and the ALJ about Appellant's case. [Appellant's Exhibit G.] The substance of the conversation focused on the status of Appellant's case and the reason for the delay in rendering a decision. [Exhibit G.] Based on Appellant's exhibits, there is no evidence that the Senior Investigating Officer and ALJ discussed the merits of Appellant's case. There is no prohibition against a party requesting a status report on a pending case. Raz Inland Navigation Co., Inc. v. United States, 652 F.2d 258 (9th Cir. 1980). A status report, such as the one sought by the Senior Investigating Officer, does not amount to an attempt to influence an ALJ about a pending case.

I find that the Appellant failed to meet his burden of proof to establish that the ALJ had a personal bias in this matter or prejudged the case based on his alleged *ex parte* communications with his son and Coast Guard.

III.

Appellant asserts that the ALJ erred when he tainted his final D&O with adverse inferences against Appellant because of his employment of an attorney and request to have his urine specimen tested by a referee laboratory. Appellant claims that the ALJ made an adverse inference in violation of Appellant's right to legal representation found at 46 C.F.R. § 5.519(a)(1).[4]

In order to prevail, Appellant must show that the ALJ erred and that the error prejudiced his case. 5 U.S.C. § 706. If the error does not prejudice Appellant's case, then it will be considered harmless error. Lewis v. Glickman, 104 F. Supp. 2d 1311 (D. Kan. 2000). The rule requires only a possibility that the error would have resulted in some change in the final decision. Evans v. Perry, 944 F. Supp. 25 (D.C. 1996).

[4] 46 C.F.R. § 5.519(a)(1) states, "The Administrative Law Judge advises the Respondent on the record, of the right to: Be represented by professional counsel, or any other person desired."

Based on the record, it is clear that the ALJ's finding of fact about Appellant's employment of an attorney and subsequent retest of his sample does not reveal an adverse inference against Appellant for employing an attorney. Rather, the ALJ found it significant that Appellant employed an attorney and requested a retest before he received formal notice of his positive drug test. [D&O at 17, 19 and 21.] If anything, the potential adverse inference that Appellant expected to test positive would support Appellant's theory that he had ingested hempseed oil that resulted in the positive test. It is clear that, whether the ALJ drew the adverse inference or not, the outcome of the case would be the same. I do not agree that the ALJ erred.

IV.

Appellant asserts that the ALJ clearly erred when he denied Appellant's motion for a mistrial. Appellant made a motion for a mistrial based on the MRO's testimony that Appellant had twice previously tested positive for marijuana. [TR at 25-26.] An individual's prior record is not disclosed to the ALJ until after a conclusion has been made as to each charge and specification. 46 C.F.R. § 5.565(a).

The MRO's statement concerning Appellant's previous drugs test provided no details nor described any action taken by the Coast Guard. The ALJ stated, on the record, that he would disregard the MRO's testimony on this point and not consider it as a prior record. [TR at 25-27.] It is clear that the ALJ gave the MRO's statement no weight based on his general comment that if Appellant had twice tested positive for marijuana, the present case would not be before him. [TR at 27.] Furthermore, the statement does not appear in the ALJ's finding of fact.

It is clear from the record that the ALJ did not err because he gave no weight to the MRO's statement.

V.

Appellant asserts that the ALJ clearly erred when he overruled Appellant's objections to the telephonic testimony of the Coast Guard's witnesses. Appellant argues that because the Federal Rules of Evidence is an Act of Congress, and Acts of Congress take precedence over regulations, the Federal Rules of Evidence (FRE) should trump the Coast Guard regulation allowing for telephonic testimony. Also, Appellant argues that he was prevented from meaningful cross-examination because he did not have the benefit

of watching a witness' non-verbal responses to determine whether they were consistent with the verbal answers.

The statute that establishes applicability of the FRE does not make them applicable to suspension and revocation proceedings. Although the FRE are the primary guide for evidentiary matters, 46 C.F.R. § 5.537(a), strict adherence to the FRE is not required in suspension and revocation proceedings. 46 C.F.R. § 5.537(a) and Appeal Decision 2608 (SHEPARD). Furthermore, the ALJ is authorized to hear telephonic testimony when testimony would otherwise be taken by deposition. 46 C.F.R. § 5.533(f). Personal confrontation is not a right of an appellant at suspension and revocation proceedings. Appeal Decisions 2538 (SMALLWOOD) and 2476 (BLAKE).

Based on the foregoing, I find that the ALJ did not err when he overruled Appellant's objections to the use of telephonic testimony for Coast Guard witnesses.

VI.

Appellant asserts that the ALJ clearly erred when he refused to allow Appellant to cross-examine the Coast Guard's witnesses. Appellant has the right to cross-examine witnesses at a suspension and revocation hearing. 46 C.F.R. § 5.519(a)(3). However, an ALJ is given broad authority to regulate and conduct a suspension and revocation proceeding in such a manner so as to bring out all the relevant and material facts, and to insure a fair and impartial hearing. 46 C.F.R. § 5.501(a) and Appeal Decision 2582 (SKINNER).

Appellant generally alleges that the ALJ prevented him from effectively cross-examining various witnesses for the Coast Guard. Based on the record in its entirety, it is clear that the ALJ allowed Appellant's counsel ample opportunity to cross-examine the Coast Guard's witnesses. This case involved robust litigation by both parties. Although there are instances in the record where the ALJ sustained the government's objection or instructed a witness not to answer a question, there is nothing to show that these actions denied Appellant his right to effectively cross-examine the witnesses against him.

I find the ALJ did not err or deny Appellant's right to cross-examine the Coast Guard's witnesses.

VII.

Appellant generally asserts that the ALJ clearly erred when he ruled that the urine specimen was submitted, collected, transported, analyzed and/or reported in full accordance with standard federal drug testing procedures, rules and/or regulations. Specifically, Appellant claims that the collector was not qualified and that the MRO did not contact Appellant's employer in accordance with the applicable federal regulations.

All drug testing programs subject to Coast Guard drug testing regulations found at 46 C.F.R. Part 16 must be conducted in accordance with the applicable Department of Transportation (DOT) drug testing regulations found at 49 C.F.R. Part 40, Procedures for Transportation Workplace Drug Testing Programs. 46 C.F.R. § 16.301. The DOT regulations state the qualifications necessary for a sample collector. 49 C.F.R. § 40.23(d). The DOT regulations also require the MRO to notify the "designated management official" who shall direct the individual to contact the MRO before the test is confirmed positive. 49 C.F.R. § 40.33(c)(3).

Appellant attempts to discredit the collector's qualifications based on her testimony where she stated that she was a "medical technician." [TR at 29.] Appellant argues that the collector was not a "licensed medical technician" as required by 49 C.F.R. § 40.23(d)(2). That regulation states, "A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician . . .." 49 C.F.R. § 40.23(d)(2). The Appellant attempts to discredit the Collector because she failed to state she was a "licensed" medical technician.

The record demonstrates that the collector had sufficient training and experience to conduct a urine collection for a drug test whether or not she was a "medical technician" or a "licensed medical technician." [TR at 29-30.] Specifically, the Collector had watched a video and completed a written test as part of her training. Also, she underwent on-the-job training and performed hundreds of sample collections before she collected Appellant's urine sample. It is clear based on the record that the collector met the requirements of 49 C.F.R. § 40.23(d)(2). Furthermore, the ALJ found the Collector qualified. [D&O at 23-24.] I will not disturb his finding on this point. The record reflects no discrepancies in the collection procedures and no irregularities with the chain of custody. [TR at 35-39.] Based on the record, the evidence clearly established

that the collector was qualified and followed the collection procedures in accordance with 49 C.F.R. Part 40.

Appellant also alleges that the MRO did not follow the procedures outlined in the federal regulations when he failed to contact a "designated management official" in accordance with 49 C.F.R. § 40.33(c)(3). There was no designated management official to contact in this case because Appellant was not employed at the time of the test or when the MRO made his report. [TR at 86-88.] The Appellant's union does not qualify as an employer for the purpose of 49 C.F.R. § 40.33(c)(2). 49 C.F.R. § 40.3. Based on the record, it is clear that the MRO followed the procedures outlined in 49 C.F.R. Part 40 before he confirmed Appellant's test as positive. [TR at 81-88.] An MRO is not prevented from making a determination that a test is positive because there is no management official to notify.

I find that the ALJ correctly found that the procedures described in 49 C.F.R. Part 40 for collector qualifications and employer reporting were met or did not apply in this case. I also find that the urine specimen was submitted, collected, transported, analyzed and reported in full accordance with standard federal drug testing procedures.

VIII.

Appellant asserts that the ALJ clearly erred when he wholesale adopted as his own the Coast Guard's proposed findings of fact and conclusions of law because they were clearly contrary to the law and were not supported by reliable, substantial and probative evidence. The ALJ will afford the investigating officer and respondent a reasonable opportunity to submit proposed findings and conclusions with supporting reasons. 46 C.F.R. § 5.561. Failure to comply within the time fixed by the ALJ is regarded as a waiver of this right. Id. The ALJ, as the trier of fact, evaluates the evidence and testimony presented at the hearing and has discretion to find ultimate facts pertaining to each specification. Appeal Decisions 2427 (JEFFRIES), 2282 (LITTLEFIELD) and 2395 (LAMBERT).

In the present case, the ALJ provided both the Coast Guard and Appellant ample opportunity to submit findings of fact and conclusions of law. [D&O at 21.] The Investigating Officer submitted both, and the Appellant declined to submit findings or conclusions. There is no prohibition against the ALJ adopting either the Coast Guard or

Appellant's findings and conclusions. In this case, the ALJ only had the findings and conclusions from the Coast Guard to consider. Appellant failed to prove that the ALJ's findings of fact or conclusions of law were clearly erroneous or based on inherently incredible evidence. The findings of an ALJ will not be disturbed on appeal unless they are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DIGGERS) and 2474 (CARMIENKE).

Based on the record, I find the ALJ did not err regarding his findings of facts and conclusions of law in this case.

IX.

Appellant asserts that the ALJ clearly erred when he ruled that the charge and specification had been proved by reliable, substantial and probative evidence. The findings of an ALJ will not be disturbed on appeal unless they are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DIGGERS) and 2474 (CARMIENKE).

Appellant's assertion is based on a number of claims against the ALJ and the sufficiency of the evidence in this case. Based on the record in its entirety, it is clear that the ALJ's findings are supported by reliable, probative and substantial evidence. 46 C.F.R. § 5.63. The Coast Guard established a *prima facie* case that Appellant used a dangerous drug and Appellant failed to rebut this case with his claim of innocent ingestion of hemp seed oil. [D&O at 41.] Appellant's entire defense was premised on his assertion that he innocently ingested hemp seed oil. The ALJ determined that Appellant failed to corroborate his assertion. [D&O at 44.] The ALJ doubted Appellant's credibility and ultimately did not believe that Appellant had tested positive for marijuana due to hemp seed oil. [D&O at 43-44 and 46.] There is no reason to disturb his finding.

Based on the record, I have determined that the findings of the ALJ are supported by reliable, probative and substantial evidence.

X.

Appellant asserts that his rights to fundamental fairness and due process were clearly denied as a result of the manner and method with which this suspension and revocation proceeding was conducted by the ALJ. Appellant claims there were a number of procedural errors that rendered the hearing unfair and inadequate. He cites several reasons for this assertion.

I find that procedural due process requirements were satisfied by providing Appellant with adequate notice and a full hearing pursuant to the requirements of the APA. 5 U.S.C. § 551 *et seq*. and Appeal Decision 2179 (COOPER). Substantive due process is satisfied if the sanction at issue is prescribed by legislation the enactment of which is within the scope of legislative authority, and the sanction imposed is reasonably related to the purpose of the legislation. Id. The applicable statute mandates that the license, document or certificate of registry shall be revoked if the holder is shown to be a user of a dangerous drug, unless the holder provides satisfactory proof of cure. 46 U.S.C. § 7704(c).

Based on the record, I am satisfied that these requirements were met in accordance with the applicable statute.[5] In the present case, Appellant received notice and he vigorously defended himself at a full hearing. Subsequently, the ALJ found *proved* the charge of *use of a dangerous drug* based on substantial, reliable and probative evidence that was presented at the hearing. The Appellant produced no evidence that he was *cured*. The only sanction authorized by Congress is revocation of Appellant's license and document. 46 U.S.C. § 7704(c). The sanction is remedial in nature and reasonably related to the purpose of maintaining standards for competence and conduct essential to the promotion of safety at sea. 46 C.F.R. § 5.5.

Based on the foregoing, I find that the requirements of procedural and substantive due process were satisfied in this case.

CONCLUSION

[5] 46 U.S.C. § 7704(c) states, "If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

The findings of the ALJ are supported on the record by substantial, reliable, and probative evidence. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The Decision and Order of the ALJ dated February 4, 1999, is AFFIRMED.

//S//
T. H. COLLINS
Vice Commandant
Acting Commandant

Signed at Washington, D.C. this 19th day of February, 2001.