U N I T E D S T A T E S O F A M E R I C A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
vs.	:	DECISION OF THE
	:	COMMANDANT
MERCHANT MARINER'S LICENSE NO. 036305	:	ON APPEAL
	:	NO. 2608
MERCHANT MARINER'S DOCUMENT NO. redacted	:	
Issued to Charles R. Shepherd	:	

This appeal has been taken in accordance with 46 USC § 7702 and 46 CFR § 5.701.

By Final Decision and Order dated December 8, 1997, the Chief Administrative Law Judge ("ALJ") of the United States Coast Guard at Tampa, Florida, revoked Mr. Charles R. Shepherd's ("Appellant") license and document based upon findings proved the charges of *use of a dangerous drug, misconduct,* and *violation of law*. The *use of a dangerous drug* charge was supported by one specification which was found proved. The *misconduct* charge was supported by six specifications, which were found proved. One specification was found not proved and five other specifications were dismissed with prejudice. The *violation of law* charge was supported by two specifications, which the first specification was found proved. The second specification was found not proved.

The hearing was held on May 22, 1997, and June 27, 1997, at the U.S. Coast Guard's Marine Safety Office, 155 Columbia Drive, Tampa, Florida. Appellant entered a response denying each charge and specification.

During the course of the hearing the Coast Guard Investigating Officer (I. O.) introduced into evidence the testimony of seven (7) witnesses and twenty-six (26) exhibits. In defense, Appellant entered into evidence the testimony of four (4) witnesses and nineteen (19) exhibits.

The ALJ issued an initial Decision and Order on October 7, 1997, and a Final Decision and Order on December 8, 1997. The ALJ found the charge *use of a dangerous drug* and the supporting specification proved, the charge *misconduct* and the first, second, third, fourth, eighth, and tenth supporting specifications proved, and the charge *violation of law* and the first supporting specification proved. Based upon these findings, the ALJ revoked Appellant's license and document. However, revocation was ordered stayed until December 28, 1998, pending Appellant's satisfactory completion of the "cure" process as set forth by the ALJ.

The Final Decision and Order was served on Appellant on December 11, 1997. Appellant, through his attorney, filed a timely notice of appeal. A transcript was requested on December 19, 1997. The Appeal was perfected on January 9, 1998. Therefore, this appeal is properly before me.

FINDINGS OF FACT

The Appellant is holder of Merchant Mariner' Document No. [redacted] and License No. 036305 (Investigating Officer's Exhibit 1; hereinafter "I.O. Ex.").

A urine sample was collected from Appellant on December 6, 1996. The drug test was performed by the Chief Medical Assistant at Central Arbutus. See I.O. Ex. 4,5;
Tr. 95. Kim Bates was the collector. She verified the identification of the donor, assigned a chain of custody number, checked the urine temperature, sealed the specimen in a bottle, had the Appellant initialize the specimen indicating that he was the donor, and had him watch as she placed the bottle in the shipping container. See Tr. 96, 101. The containers were properly sealed for shipment. See I.O. Ex. 4,5; Tr. 102, 105. The shipment was sent, via courier, to an approved SAMSHA/DHHS certified laboratory, Corning, National Center for Forensic Science. See I.O. Ex. 8. Upon arrival, the package was examined to see if there were any abnormalities or signs of tampering. None were found. See Tr. 114. The sample was tested to determine whether it showed any use of a dangerous drug. The first test, Enzyme Immunoassay (EIA), indicated that the result was above the 50 NG/ML cutoff for Cannabinoids. See I.O. Ex. 6, 7. A second sample was removed and a second more advanced test, Gas Chromatography/Mass Spectrometry (GCMS), found the specimen contained 51 NG/ML of Cannabinoids (Marijuana). See I.O. Ex. 6, 7. Dr. Lowe, certifying scientist at Corning, certified the positive result on December 9, 1996. See I.O. Ex. 5. The laboratory test results were forwarded to the Medical Review Officer, Dr. Grabowski, who contacted the Appellant via telephone on December 11, 1996. See I.O. Ex. 5; Tr. 152. During the interview with Appellant, Dr. Grabowski found no legal reason why he would have marijuana in his system. See
Tr. 152, 153. The Appellant tested negative for marijuana on December 10, 1996. See Defendant's Ex. 4; (hereinafter "Def. Ex.".)

On June 23, 1996, the Appellant worked the 1600 to 2000 watch on board the M/V SEA-LAND EXPEDITION. See Def. Ex. 10; Tr. 312. The M/V SEA-LAND EXPEDITION is a freight vessel of 20,987 gross tons. See I.O. Ex. 13. At approximately 1700 an alarm in the engine room sounded and continued for nearly 15 minutes. See I.O. Ex. 11; Tr. 186, 314. At about 1700 the Chief Mate called the engine room. The phone rang 10-15 times with no answer. See Tr. 170. Shortly after 1700, the Chief Engineer also called the engine room several times with no answer. See Tr. 171, 313. At about 1715, the Captain, the Chief Mate, the Chief Engineer, and the First Assistant Engineer went down to the engine room. See Tr. 172. The Chief Engineer then silenced the alarm. See Tr. 314. The Appellant was the sole member of the crew on watch in the engine room. See Tr. 317. The Captain and the Chief Engineer repeatedly tried to wake the Appellant. After several moments he woke up. See Tr. 172, 318. It would have been possible for the Appellant to get relief from his watch if in fact he was exhausted and unable to stand watch. See Tr. 331. The Chief Mate noticed that Appellant smelled of alcohol, was slurring words, and having motor difficulties. See Tr. 175. The Captain and the Chief Engineer smelled alcohol on the Appellant and testified that he appeared intoxicated. See Tr. 325, 343, 344. Appellant was ordered to take a drug/alcohol test. See I.O. Ex. 11; Tr. 184, 343. The Appellant refused to submit to any alcohol or drug testing. See Id. Pursuant to company policy, an employee is subject to substance abuse testing as a condition of employment. See I.O. Ex. 12. The Captain fired the Appellant at approximately 1825. See Tr. 351.

On September 14, 1993, Appellant applied for a duplicate Merchant Mariner's Document at the Regional Examination Center in New Orleans. On the application, he answered "no" to the following question; "Have you ever been convicted of a violation of the narcotic laws of the U.S., D.C., or any other state or territory of the U.S.?" See I.O. Ex. 17.

On June 24, 1993, Appellant applied for a license renewal in New Orleans. See I.O. Ex. 26. The license renewal application of June 24, 1993 queried; "Have you been convicted by any court – including military court – for other than a minor traffic violation?". The Appellant answered "yes" and was directed to disclose all his criminal convictions. See I.O. Ex. 26. The Appellant disclosed only a conviction for DUI in 1989. See I.O. Ex. 26. The Appellant was convicted of driving under the influence of a controlled dangerous substance (I.O. Ex. 22) and of unlawful possession with intent to distribute of a controlled dangerous substance (Phencyclidine, also known as PCP) on February 9, 1978, in Maryland. (I.O. Ex. 22). The Appellant was convicted of driving under the influence, on December 6, 1995, in Florida. See I.O. Ex. 24. The Appellant was also convicted of assault in Maryland on May 16, 1997. See I.O. Ex. 25.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the ALJ:

1. The ALJ erred when he denied Appellant's statute of limitations motion.
2. The ALJ erred when he denied Appellant's motion for summary judgment.
3. The ALJ erred when he denied Appellant's objections to the telephone testimony of all the Coast Guard's witnesses.
4. The ALJ erred when he allowed the Coast Guard to amend and add new specifications after it had already begun the presentation of its case and evidence.
5. The ALJ erred when he found proved the first charge and specification based on the hearsay exhibits and testimony of witnesses without any personal knowledge of the chain of custody and testing of Appellant's urine sample.
6. The ALJ erred when he found proved the second charge, first, second, and third specifications, based on the hearsay exhibits and contradictory hearsay testimony of the witnesses.
7. The ALJ erred when he found proved the second charge, fourth, eighth, and tenth specifications, based on the unauthenticated hearsay exhibits and the unsworn and hearsay statements of the Coast Guard Investigating Officer's interpretation and meaning of those exhibits.
8. The ALJ erred when he found proved the second charge, fourth, eighth, and tenth specifications, when the evidence established that Appellant was placed on probation before judgment which is not a conviction or finding of guilt.
9. The ALJ erred when he found proved the fourth charge, first specification, because it was premature.
10. The ALJ erred when he imposed sanctions on Appellant which exceeded the guidelines set forth in SWEENEY.
11. Appellant's rights to fundamental fairness and due process were denied as a result of the I.O.'s bad faith refusal to provide Appellant with information necessary for the preparation of Appellant's defense, the I.O.'s bad faith amendment of and addition to specifications, the I.O.'s bad faith filing of specifications which she knew were not supported by the evidence, and the I.O.'s engaging in pretrial and trial strategies of deception, threats, intimidation, and trial by ambush.

APPEARANCE: J. Mac Morgan, Esq. New Orleans, Louisiana.

OPINION

I

Appellant's first argument is that the three-year statute of limitations as set forth in 46 CFR § 5.55 (a)(3)[1] should apply to the second charge, specifications 4, 8, and 10, and not the five-year statute of limitations as set forth in 46 CFR § 5.55(a)(2).[2] Appellant asserts that the second charge and supporting specifications control which statute of limitations period is applicable. Appellant

argues that in order for the five-year statute of limitations to apply, he should have been charged with "misconduct" on the basis of "interference with … government officials in performance of official duties" instead of "misconduct" on the basis of submitting a fraudulent application.

I agree with Appellant that the three-year statute of limitations applies because Appellant's actions constituted a charge for "an act or offense not otherwise provided for." I disagree that the five-year statute of limitations would apply if the Coast Guard filed a charge for "interference with government officials in performance of official duties" because Appellant's conduct did not amount to interference within the meaning of the regulation. However, although the five-year statute of limitations does not apply, the charges were still served on Appellant within the three-year statute of limitations period because of Appellant's time at sea.

The ALJ ruled that 46 CFR § 5.61(a)(10) applies to specifications 4, 8, and 10 because Appellant's false application for renewal of license constituted "interference with . . . government officials in performance of official duties." The ALJ's determination as to what constitutes "interference" with government officials in performance of official duties is incorrect. Several prior decisions demonstrate what I hold to be interference within the meaning of 46 CFR § 5.61(a)(10). In one case the Captain of a ship broke up a confrontation between the Chief Mate and the Appellant and ordered the Appellant to leave the ship. See Appeal Decision 2452 (MORGANDE). The Appellant subsequently berated, struck, and grabbed the Captain. See Id. I held that such "(interference with the master in his duty to protect a member of the crew) was the type of occurrence identified in 46 CFR § 5.55(a)(2) which allows for service of process for up to five years after the alleged incident." See Id. In another case, the Appellant assaulted two senior officers of his vessel. I stated that "Appellant's conduct in this case constitutes interference with the Master and Chief Engineer in performance of their official duties . . . Prior to the assault, the Master was engaged in obtaining relief for the Appellant. This interference with official duties is one of the enumerated offenses in 46 CFR § 5.61(a)." See Appeal Decision 2469 (VETTER).

As illustrated, interference within the meaning of 46 CFR § 5.61(a)(10) is generally intended to encompass affirmative acts (e.g., a physical motion or verbal pronouncement) which have the effect of preventing a government official, master, or ship's officer from discharging his or her duties. Appellant's submission of a false application to an Officer in Charge, Marine Inspection does not rise to this level. However, this determination does not mean that express written falsification can never be considered interference with a government official in his official duties. Facts in other circumstances may give rise to such interference. However, in this case, the actions of Appellant do not rise to a level that constitutes interference within the meaning of 46 CFR § 5.61(a)(10). Therefore, because specifications 4, 8, and 10 do not fall within the enumerated offenses in 46 CFR § 5.61(a)(10), the five-year statute of limitations stated in 46 CFR § 5.55(a)(2) does not apply. The specifications are governed by the three-year statute of limitations as set forth in 46 CFR § 5.55(a)(3) because the specifications constituted an "act or offense not

otherwise provided for."

Although the three-year statute of limitations applies, it does not mean that specifications 4, 8, and 10 should have been dismissed. The charges were served within the three-year statute of limitations period. 46 CFR § 5.55(a)(3) states that "service shall be within three years after the commission of the act or offense alleged therein." 46 CFR § 5.55(b) goes on to state that "When computing the time period . . . there shall be excluded any period or periods of time when the respondent could not attend a hearing or be served charges by reason of being outside of the United States." The offenses charged in specifications 4 and 10 occurred on June 24, 1993, and the offense in specification 8 occurred on September 14, 1993. The Sea Report contained in the record (See Affidavit of Barbara White) indicates that between those dates and May 10, 1997 (the date Appellant was served Appellant acquired sea time of 448 days (approximately one year, 2 months and 23 days). During this time Appellant "could not attend a hearing or be served charges by reason of being outside of the United States." 46 CFR § 5.55(b). The statute of limitations would have originally expired on June 24, 1996 and September 14, 1996, respectively, but because Appellant was at sea for 448 days, 46 CFR § 5.55(b) requires exclusion of those days from computation of the statute of limitations. The Coast Guard could have served Appellant up to 448 days after June 24, 1996, for specifications 4 and 10 and 448 days after September 14, 1996, for specification 8. It does not take a mathematician to see that service on May 10, 1997, clearly falls within this range for any of the three specifications. Therefore, service was timely.

II

Appellant's second argument is that the ALJ erred by denying Appellant's motion for summary judgment. Appellant states that the second charge, specifications 4 and 8 should have been dismissed by the ALJ because the Coast Guard did not allege or prove specific intent in alleging that Appellant submitted a fraudulent application for renewal of his license and/or document.

In his original motion for summary judgment Appellant argued that the second charge, specifications 4 and 8 required proof of specific intent to defraud. These specifications were listed under the charge of misconduct of which specific intent is not a required element. I have previously held that specific intent is not a prerequisite element of a charge of misconduct or a violation of law or regulation in suspension and revocation hearings which are by their nature remedial in nature. See Appeal Decisions 2496 (MCGRATH); 2490 (PALMER); 2286 (SPRAGUE); 922 (WILSON); 2445 (MATHISON); 2248 (FREEMAN). In the original allegations against Appellant, stated in the second charge, specifications 4 and 8, the Coast Guard was not required to allege specific intent nor was it required to offer any proof of specific intent. The specifications at issue were part of a misconduct charge in which specific intent is not an element. Therefore, the ALJ was correct in denying Appellant's motion for summary judgment on specifications 4 and 8.

III

Appellant's third argument is that the ALJ erred when he overruled Appellant's objection to the telephone testimony of the Coast Guard's witnesses. Appellant argues that the Federal Rules of Evidence do not allow for telephone testimony because such testimony is hearsay. Furthermore, Appellant asserts that because the Federal Rules of Evidence are an act of Congress, and acts of Congress take precedence over Coast Guard regulations, the rules should trump the Coast Guard regulation allowing for telephone testimony.

Strict adherence to the Federal Rules of Evidence, however, is not required in suspension and revocation proceedings (46 CFR § 5.537, formerly 46 CFR § 5.20-95(a)), and hearsay evidence is not, as Appellant urges, inadmissible. See Appeal Decisions 2413 (KEYS); 2404 (MCALLISTER). Since strict adherence to the Federal Rules of Evidence is not required, there is no conflict between the Coast Guard regulation allowing telephone testimony and the Federal Rules of Evidence. In addition, although the telephone testimony of the Coast Guard's witnesses is hearsay, the testimony is admissible under 46 CFR § 5.535(f), as shown above.

Appellant next argues that he was not able to observe these witnesses' responses when they were subject to cross-examination. 46 CFR § 5.535(f) specifically authorizes an ALJ to hear the testimony of a witness by telephone, when testimony would otherwise be taken by deposition. Personal confrontation is not a right of the Appellant at suspension and revocation hearings. See Appeal Decisions 2538 (SMALLWOOD), 2476 (BLAKE). In suspension and revocation hearings, the taking of telephonic testimony is consistent with the constitutional concept of due process and is sufficient to protect the legitimate interests of the Appellant. See Appeal Decisions 2538 (SMALLWOOD); 2476 (BLAKE), aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989); aff'd sub nom., Blake v. Dept. of Transportation, NTSB, No. 90-70013 (9th Cir. 1991); 2252 (BOYCE). Therefore, Appellant's argument that he was not able to observe the witnesses during cross-examination fails.

Finally, Appellant argues the circumstances of this case did not justify telephone testimony. The Coast Guard regulation permitting telephonic testimony provides for an orderly, dignified, and credible procedure, ensuring proper identification of all parties and reliable cross-examination. See Appeal Decisions 2492 (RATH); 2476 (BLAKE). Such procedures are designed to expedite the hearing when long distances must be traveled by the prospective witness. See Appeal Decisions 2538 (SMALLWOOD); 2476 (BLAKE). The hearing in this case was clearly the type of situation contemplated by the regulation. The hearing was in Tampa and the witnesses were testifying from various cities around the United States. The taking of telephonic testimony was more convenient and judicially efficient than requiring each witness to travel to Tampa for the hearing. In addition, the procedures used by the ALJ to take the telephonic testimony were

consonant with 46 CFR § 5.535(f). Each witness was sworn in under oath, properly identified, and subject to direct and cross-examination. Therefore, Appellant's right to confront witnesses was not infringed upon in any way.

IV

Appellant's fourth argument is that the ALJ erred when he allowed the Coast Guard to amend and add new specifications after the Coast Guard had already begun its case. Specifically, Appellant contends the ALJ erred by allowing the Coast Guard to amend the second charge, specifications 4 and 8 from submitting a "fraudulent" license renewal application to submitting a "false" license renewal application and by allowing the Coast Guard to add four new specifications to the same charge.

The regulation providing for amendments to charges and specifications, 46 CFR § 5.525(a), allows the ALJ, on motion of the ALJ or of either party, to amend charges and specifications to correct harmless errors. An ALJ may amend charges and specifications to correct minor errors. See Appeal Decisions 2393 (STEWART); 2332 (LORENZ). Only if there is prejudice, a lack of notice, or no fair opportunity to litigate, does he exceed his discretion. See Appeal Decisions 2393 (STEWART); 2209 (SIEGELMAN).

Appellant argues that by changing specifications 4 and 8 from "fraudulent" to "false" there was a (prejudicial) substantive change because a fraudulent charge requires a showing of specific intent. This is incorrect. As stated earlier, it is well established that specific intent is not a prerequisite element of proof when alleging misconduct or statutory violations in suspension and revocation proceedings because such proceedings are, by their very nature, remedial. See Appeal Decisions 2512 (OLIVO); 2496 (McGRATH); 2286 (SPRAGUE); 1999 (ALT & JOSSY); 922 (WILSON). The amended allegation that Appellant had submitted a false application is a lesser included offense of the original allegation (that Appellant had submitted a fraudulent application). See Appeal Decision 2205 (ROBLES) (revocation of license is only appropriate disposition where fraud in the procurement of a license is found). Thus, the ALJ's actions in allowing the wording of specifications 4 and 8 to be changed (from "fraudulent" to "false") constituted, at best, harmless rather than substantive error.

Appellant also argues that he did not have an opportunity to defend against these specifications. Findings that lead to the suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, (D.C. 1950); Appeal Decisions 2545 (JARDIN); 2422 (GIBBONS); 2416 (MOORE); 1792 (PHILLIPS); 2578 (CALLAHAN). When the record clearly indicates that the parties understand exactly what the issues are, the parties cannot afterward make a claim of surprise, lack of notice, or other due

process shortcoming. See Appeal Decision 2545 (JARDIN); Kuhn, *supra*. Since both the initial and amended allegations arose out of the same set of facts (e.g., Appellant's June 24, 1993 renewal application) Appellant cannot reasonably argue that the mere substitution of a word in the allegation denied him the opportunity to prepare a defense against the allegations. Therefore, Appellant knew, or should have known, from the day the initial charges were received what Appellant was being charged with. Appellant cannot now claim inadequate notice.

Further, had the amended language constituted, arguendo, a substantive change to the charge and specifications, the I.O. withdrew the original charges and then prepared and re-served "a new charge and specification" in accordance with 46 CFR § 5.525(c). See Tr. 29. Counsel for Appellant stated during the June 27 hearing that Appellant accepted service of the new charge and specifications. See Tr. 31. Appellant did not show in the proceeding below or in his appeal brief here how, if at all, he was prejudiced by the amended specifications. Thus, it was reasonable for the ALJ to conclude that a decision to permit amendment of the specifications did not deny the Appellant a reasonable opportunity to prepare his defense. See 46 CFR § 5.107(c).

V

Appellant's fifth argument is that the ALJ erred when he proved the first charge and specification based on hearsay exhibits and testimony of witnesses without any personal knowledge of chain of custody and testing of Appellant's urine. Appellant asserts that the ALJ's decision on the first charge was based solely on the telephone testimony of the I.O.'s witnesses and various hearsay documents. Appellant states the ALJ based his entire decision on said hearsay evidence.

Appellant is correct in stating that hearsay evidence may be used to support an ultimate conclusion, as long as the findings are not solely based on hearsay. See Appeal Decisions 2404 (McALLISTER); 2183 (FAIRALL). However, in this case the ALJ's decision was not based on hearsay alone but was supported by additional evidence that meets an exception to the hearsay rule. For example, there are several documents (affidavit of the Senior Certifying Scientist attesting to laboratory records and security, drug testing custody and control form and report of enzyme immunoassay test results) in the record (See I.O.'s Exhibits 4 and 8) which would fall under an exception to the hearsay rule. It was reasonable for the ALJ to rely upon these documents in making his finding as to charge one and the associated specification: admission of these exhibits is permitted under Rule 803 of the Federal Rules of Evidence (official records kept in the course of business); and, there is no indication that the information contained on the forms is not trustworthy. See McALLISTER. Therefore, I find it reasonable to conclude that the ALJ's finding as to charge one was not based on hearsay alone.

Appellant also contends the witnesses who testified had no knowledge of the chain of custody and testing of Appellant's urine sample. There is evidence in the record to support the finding of

the ALJ that the chain of custody procedures of 49 CFR § 40 were satisfactorily complied with. The ALJ's conclusions will not be overturned unless they are without support in the record and inherently incredible. See Appeal Decisions 2424 (CAVANAUGH); 2423 (WESSELS); 2422 (GIBBONS). The testimony of these witnesses fully corroborates the documentary evidence and supports the integrity of the chain of custody. The witnesses sufficiently identified the documentary evidence as having been made within the regular course of collection and the processing and testing operations. The evidence fails to demonstrate any disruptions or irregularities in the chain of custody. The sufficiency of the chain of custody goes only to the weight of the evidence, not to its admissibility. See Appeal Decision 2467 (BLAKE), aff'd sub nom Commandant v. Blake, NTSB Order No. EM-156 (1990); U.S. v. Shackleford, 738 F.2d 776 (11th Cir. 1984); U.S. v. Lopez, 758 F.2d 1517 (11th Cir. 1985); U.S. v. Wheeler, 800 F.2d 100 (7th Cir. 1986). The ALJ will only be reversed if the findings are arbitrary, capricious, clearly erroneous or unsupported by law. See Appeal Decisions 2504 (GRACE); 2482 (WATSON); 2474 (CARMIENKE); 2390 (PURSER); 2344 (KOHAJDA); 2340 (JAFFE); 2333 (AYALA). Absent some evidence to the contrary (which Appellant has not advanced), the ALJ's findings regarding the chain of custody of Appellant's urine sample were not arbitrary, capricious, or clearly erroneous.

VI

Appellant's sixth argument is that the ALJ erred when he found proved the second charge, specifications 1, 2, and 3 based (allegedly) on the hearsay exhibits and contradictory testimony of the witnesses.

As noted in discussing Appellant's fifth argument, the ALJ's decisions as to the second charge, specifications 1, 2, and 3, were not based solely on hearsay evidence. The Government submitted additional documentary evidence that corroborated the testimony of the captain, chief mate, and chief engineer. For example, I.O. Exhibit 11, the Official Logbook of the Sea-Land Expedition set forth a written record of the incident documented in the second charge, specifications 1, 2, and 3. This record, made near the time of the incident, is a hearsay exception under Rule 803. Therefore, the ALJ's decision on the second charge, specifications 1, 2, and 3 were not based on hearsay alone.

Next Appellant argues the second charge, specifications 1, 2, and 3 were based on contradictory testimony of all the witnesses. When, as in this case, an ALJ must determine what events occurred from the different testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible. See Appeal Decisions 2344 (KOHAJDA); 2340 (JAFFE); 2333 (AYALA); 2302 (FRAPPIER). I have consistently refused to reweigh conflicting evidence if the findings of the ALJ can reasonably be supported. Here, the record contains ample evidence that the ALJ's finding that charge 2, specifications 1, 2, and 3 were proven was

supportable. For example, all of the eyewitnesses indicated that, during the incident in question, they could smell alcohol on the breath of the Appellant. See Tr. 174, 318, 343, May 22, 1997. Further, a majority of witnesses testified that his reactions and speech appeared slow and slurred when they awakened him after he failed to respond to an engine room alarm. See Tr. 175, 344, May 22, 1997. The ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. See Appeal Decisions 2522 (JENKINS); 2519 (JEPSON); 2516 (ESTRADA); 2503 (MOULDS); 2492 (RATH). The findings of the ALJ are supported in the record and there is no reason to believe the ALJ's decision was improper or unsupportable in the record.

VII

Appellant's seventh argument is that the ALJ erred when he found proved the second charge, specifications 4, 8, and 10, based on unauthenticated hearsay exhibits and statements made by the Coast Guard I.O.'s interpretation of certain exhibits. Appellant contends that he was not the criminal defendant referred to on the court records captioned "Indictment/Criminal Information," from the Criminal Court of Baltimore. He states that the record only identified the defendant as "Charles Shepherd" and did not provide a social security number, date of birth, or middle initial.

Whether or not the court record pertained to Appellant is a question of fact to be resolved by the ALJ. Only when the finding of the ALJ is unreasonable based on the evidence, will I disturb it. See Appeal Decisions 2388 (MANLEY); 02333 (AYALA); 2302 (FRAPPIER). The ALJ's decision in this case was certainly not unreasonable. Prior to this case, I have held that identification by name only was enough to prove identity in court records. More evidence may be required in some cases where there is evidence to show that a respondent and the person in the conviction are not the same. See Appeal Decision (MANLEY). The "Indictment/Criminal Information" sheets (See I.O's Exhibit 22) state Appellant's name and case numbers. These directly correspond with the name and case numbers on the "Maryland Court System Case History – Microfilm" (See I.O.'s Exhibit 22) which indicate Appellant's name, race, date of birth, and an address. The address on I.O's Exhibit 22 further corresponds with the address on Appellant's Seaman's Certificate Application (See I.O.'s Exhibit 21). Therefore, the ALJ was reasonable in concluding that the individual referred to on the court record was Appellant.

Next, Appellant argues that the ALJ based his decision on the second charge, specifications 4, 8, and 10, on hearsay documents and unsworn and unsubstantiated statements of the I.O. Under 46 CFR § 5.527 strict adherence to the rules of evidence observed in courts is not required in these administrative proceedings. Nevertheless, court records are an exception to the hearsay rule under rule 803. As far as the statements made by the I.O., a brief review of the record indicates that the I. O. was not interpreting the court records but was pointing out items on the court records and

making the ALJ aware of them. See Tr. 54-68, June 27 hearing. The I.O.'s statements constituted assistance in finding items on the court records and not interpretations that amounted to testimony by the I.O. In addition, there is nothing in the record to indicate that the ALJ relied entirely on the I.O.'s assistance and not on his own evaluation. In fact, the ALJ found at least one of the specifications (e.g., second charge, specification five) not proved based on his own independent assessment of the documentary evidence contained in the record.

VIII

Appellant's eighth argument is that the ALJ erred when he found proved the second charge, specifications 4, 8, and 10 based on Appellant's prior probation before judgment decisions. Appellant states that the fourth charge, specification 2 was dismissed by the ALJ because the specification was premised upon a probation before judgment under Maryland Code 27 § 641 and, therefore, is not considered a conviction. Appellant states that the second charge, specifications 4, 8, and 10 were also based on probation before judgments under Maryland Code Article 27 § 292. Therefore, Appellant believes the ALJ should have been consistent with his decision regarding the fourth charge, specification 2 by dismissing the second charge, specifications 4, 8, and 10.

Probation before judgment after a plea of not guilty is not a conviction. See Appeal Decision 1105 (HILTON). In HILTON, the Appellant contended that under Annotated Code of Maryland Article 27 § 641 he "was not convicted when placed on 'probation before a verdict' after a plea of not guilty." I agreed with Appellant. Specifically, I determined that this was not a conviction "[S]ince the probation was imposed after a plea of *not guilty* [emphasis added] and the Order for Probation was signed by the Judge in Appellant's case, it is not possible to logically conclude that this was a case of probation 'after conviction.' The result would not necessarily be the same if a person were placed on probation before a verdict after a plea of *guilty* [emphasis added] or nolo contendre." Id.

The situation in HILTON is analogous to the probation before judgment determination underlying the ALJ's finding on the fourth charge, specification 2. Appellant received probation before judgement after a plea of not guilty for assault. (See I.O.'s Exhibit 25). In accordance with HILTON, the ALJ was correct in determining that this was not a conviction.

Appellant contends that the ALJ was inconsistent when he subsequently determined the probation before judgments relating to the second charge, specifications 4, 8, and 10 to be convictions. The ALJ was correct in his decision but incorrect in his application of 46 CFR § 5.547(c). That regulation applies to 46 USC § 7704 – Dangerous drugs as grounds for revocation. The second charge is not a charge relating to dangerous drugs but a misconduct charge. Therefore, 46 CFR 5.547(c) should not have been applied.

However, the judgments are still convictions for purposes of the second charge, specifications 4, 8, and 10, because the Appellant pleaded guilty to the charges that form the basis of those specifications. (See I.O.'s Ex. 22). This use of judgments of conviction (pursuant to guilty pleas) is explicitly provided for throughout the regulations governing licensing of maritime personnel, marine investigations and certification of seamen. For example, the regulations prohibiting the Coast Guard from issuing a merchant mariner's document to an individual who has been convicted by a court of record of a violation of the dangerous drug laws of the United States stipulate that a judgment pursuant to a plea of guilty or no contest constitutes a conviction as that term is used throughout that Part. See 46 CFR § 12.01-6. (I note that the same language also appears in 46 CFR
§§ 5.547(c) and 10.103, indicating a consistent treatment of this issue throughout the regulations.) This approach also finds support in earlier decisions I have issued. See HILTON, *supra*. Thus, I hold that the judgment of conviction by a Federal or State court for a dangerous drug law violation constitutes a conviction for the purposes of a charge of misconduct. I hold further that a Federal or State court action which is based on a plea of guilty or no contest or which involves a deferred adjudication or the imposition of a requirement to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forego appeal of a trial court's conviction will similarly be considered to be a conviction for the purposes of proving a charge of misconduct. Therefore, in this case the ALJ's probation before judgment determination relating to the fourth charge, specification 2 was not inconsistent with his probation before judgment determination relating to the second charge, specifications 4, 8, and 10. The state court's probation determination in the former instance was based on a judgment rendered after a plea of not guilty whereas the court's determinations in the latter instances were based on judgments entered after guilty pleas.

IX

Appellant's ninth argument contends that the fourth charge, specification 1, alleged by the Coast Guard is premature. Appellant asserts that this specification would prevent the issuance or renewal of Appellant's license and document because of Appellant's DUI conviction and, therefore, this allegation cannot form the basis of a charge until Appellant seeks to have his license and document renewed.

Appellant's understanding of the fourth charge, specification 1, is incorrect. This specification charges Appellant with a violation of law as described "by section 205(a)(3)(A) of the National Driver Register Act of 1982, 49 USC § 30304, an offense described in 46 USC § 7703(3)" which reads:

> A license, certificate of registry, or merchant mariner's document issued by the

> Secretary may be suspended or revoked if the holder - (3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982.

One of the offenses listed under this section is operating a motor vehicle under the influence of alcohol. See 49 USC § 30304(a)(3)(A). The statute which charge four, specification 1, is premised on makes no mention of preventing the issuance or renewal of license as Appellant contends. Instead, the statute states that one's license and/or merchant mariner's document can be suspended or revoked if convicted of an offense within the three-year period preceding the initiation of a suspension and revocation proceeding. 46 USC § 7703(3). Clearly, this applies to Appellant because of his DUI conviction on December 6, 1995. Appellant was convicted of the offense within the three-year period prior to his suspension and revocation hearing, therefore, the Coast Guard's specification is not premature and Appellant's argument must fail.

X

Appellant's tenth argument is that the ALJ erred when he imposed sanctions on Appellant which exceeded guidelines set forth in Appeal Decision 2535 (SWEENEY).

Appellant asserts that "the ALJ's order violated the second rule on cure set down in SWEENEY" because the order stated that the one year non-association period began on the date of the ALJ's decision and order (December 8, 1997) instead of on the date of completion of the in-patient rehabilitation program (April 27, 1997).

The second SWEENEY factor used to satisfy the definition of cure in cases where drug use is an issue provides:

> The respondent must have successfully demonstrated a complete non-association with drugs for a *minimum* [emphasis added] period of one-year following successful completion of the rehabilitation program. This includes participation in an active drug abuse-monitoring program which incorporates random, unannounced testing during that year.

SWEENEY requires a "minimum" of one-year of non-association with drugs following completion of the rehabilitation program. Clearly, this implies that an ALJ has discretion to extend the non-association period beyond one year. That is exactly what the ALJ did in the instant case. The ALJ was bound to impose a minimum of a one-year non-association period from the date of completion of rehabilitation but was free to extend that period beyond one year. Therefore, it was not improper for the ALJ to require Appellant to continue the non-association

period for a year from the date of his final decision and order.

XI

Appellant's eleventh and final argument is that his rights to fundamental fairness and due process were denied as a result of several of the I.O.'s actions.

First, Appellant argues that the I.O. did not provide Appellant with names of her witnesses and basic documentary evidence until nine days before the hearing. Generally, discovery is not available in administrative proceedings before federal agencies. The absence of discovery in such an administrative proceeding does not violate any procedural right due to the Appellant. See Frilette v. Kimberlin, 508 F.2d 205 (3d Cir. 1974), cert. denied, 421 U.S. 980 (1975). See also, McCelland v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979). "The Administrative Procedures Act contains no provision for pre-trial discovery in the administrative process and, of course, the provisions of the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings." Davis, Administrative Law Treatise 8.15. No right to discover the names of witnesses is contained in the statutory authority for these proceedings or in the implementing regulations. The I.O. had no legal obligation to inform appellant of the names of all witnesses to be called. See Appeal Decision 2040 (RAMIREZ). Therefore, there was no bad faith on the part of the I.O. when she did not provide the names of the witnesses or the documentary evidence until nine days before the hearing.

Notwithstanding the inapplicability of both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure the Appellant has failed to show that he was prejudiced as a result of the alleged untimely production of a witness list and basic documentary evidence. See McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (standard is whether non-production so prejudices a party as to deny him due process). Although Appellant now alleges denial of his due process rights as a result of the I.O.'s actions there is no indication that the fundamental fairness of the hearing was affected by the I.O.'s delivery of the witness list and evidence nine days before the hearing. At the May 22, 1997 hearing before the ALJ, for example, Appellant (through his attorney) answered negatively when the ALJ inquired as to whether the result of the delay was that he was not prepared. See Tr. 64, May 22, 1997. Instead, when the issue of a possible continuance was raised, Appellant insisted that he was ready to proceed to trial and that a continuance would unnecessarily burden him given the fact that he had already arranged for the presence of fact and expert witnesses. See Tr. 69-70, May 22, 1997. Further, as the ALJ noted at the hearing Appellant never raised the issue of delay with the ALJ prior to the hearing. See Tr. 72, May 22, 1997. In addition, the charges were served on Appellant well in advance of the hearing and that the charges and specifications provided ample indication to Appellant of the issues that would be in dispute at the hearing before the ALJ. At no time prior to the May 27, 1997 hearing did Appellant ever ask for a continuance. See Appeal Decision 2417

(YOUNG). Thus, Appellant cannot reasonably argue that the I.O.'s actions in furnishing the witness list and documentary evidence nine days before the first hearing substantially prejudiced him or otherwise constituted a denial of his due process rights.

Second, Appellant argues the I.O. tried to extort a stipulation from Appellant and that this action deprived Appellant of fundamental fairness, due process, a fair hearing, and justice. Although I may not agree with the choice of words used by the I.O. in her letter to Appellant's counsel (See Appellant's brief p. 29), they do not amount to actions which deprive Appellant of fundamental fairness, due process, a fair hearing, or justice. Therefore, the claim by Appellant that the I.O. acted in bad faith is unfounded. I concur with the ALJ's determination that the actions of the I.O. do not form a basis on which to dismiss the charges against the Appellant.

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 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 December 8, 1997 is AFFIRMED.

//S//

J. C. CARD
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 24th day of June, 1999.

[1] 46 CFR 5.55(a)(3) states:

a. The time limitations for service of various charges and specifications upon the holder of a license, certificate or document are as follows:

(3) For an act or offense not otherwise provided for, the service shall be within three years after the commission of the actor offense alleged therein.

[2]46 CFR 5.55(a)(2) states:

a. The time limitations for service of various charges and specifications upon the

holder of a license, certificate or document are as follows:
(2) For one of the misconduct offenses specified in § 5.59(a) or § 5.61(a), service shall be within five years after commission of the offense alleged therein.

46 CFR 5.61(a)(10) goes on to state:

a. An investigating officer seeks revocation of a respondent's license, certificate, or document when one of the following offenses is found proved:

(10) Interference with master, ship's officers, or government officials in

performance of official duties.