UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	ON APPEAL
	:	NO. 2722
MERCHANT MARINER CREDENTIAL	:	
Issued to: JEFFREY JOHN BADUA, JR.	:	

APPEARANCES

For the Government:
Jennifer Mehaffey, Esq.
LCDR Alex Satchel, USCG
LT Lisa Liu, USCG

For Respondent:
Ted H.S. Hong, Esq.

Administrative Law Judges:
Bruce T. Smith
Brian J. Curley

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5, and 33 CFR Part 20.

By an Order dated November 5, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard denied the motion of Respondent Mr. Jeffrey John Badua, Jr., to reopen Respondent's case and amend the Settlement Agreement then in force between Respondent and the Coast Guard, for lack of good cause.

Respondent appeals.

FACTS & PROCEDURAL HISTORY

At all relevant times, Respondent held a Merchant Mariner Credential (MMC) issued by the United States Coast Guard. On February 27, 2018, Respondent took a required pre-employment drug test, pursuant to 46 CFR Part 16. The urine sample provided by Respondent tested positive for hydromorphone. Respondent maintains that the positive result was the result of a one-time, inadvertent use of another person's prescription medication.

The Coast Guard issued its Complaint against Respondent's MMC on April 13, 2018. On April 30, 2018, the Coast Guard and Respondent entered into a Settlement Agreement, and on May 7, the Coast Guard filed a motion for approval of that agreement. On May 8, 2018, a Coast Guard ALJ issued a Consent Order approving the terms of the Settlement Agreement.

On September 10, 2018, Respondent, through counsel, filed a "Motion to Reopen and Amend the Settlement Agreement" (petition to reopen). The Coast Guard opposed this motion. After full briefing, a Coast Guard ALJ issued an Order denying the petition on November 5, 2018.

Respondent filed notice of appeal from that Order on December 10, 2018. The ALJ Docketing Center responded to that Notice with a letter informing Respondent that his appeal was untimely. On March 12 of this year Respondent was granted leave to proceed with his appeal. [Decision of the Vice Commandant on Motion to File Late Notice of Appeal.]

Respondent perfected his appeal by filing an appellate brief on January 2, 2019. The March 12 order, allowing Respondent's appeal to proceed, gave the Coast Guard thirty-five days in which to file its Reply Brief. That deadline was twice extended, to June 11 and then to July 9, 2019, upon unopposed Coast Guard motions.

On June 20, 2019, the Coast Guard served Respondent with a Notice of Failure to Complete Settlement Agreement. Under the terms of the Settlement Agreement, Respondent had

ten days in which to request an ALJ hearing on the Notice of Failure. On July 9, 2019, the Coast Guard filed its appellate Reply Brief, which, in addition to addressing Respondent's bases of appeal from the ALJ Order, argued that Respondent's appeal had been rendered moot by the Notice of Failure.

On July 18, 2019, Respondent filed a "Motion to Enforce Settlement Agreement and For an Order to Show Cause Why Complainant United States Coast Guard Should Not Be Held in Contempt," urging that Respondent had complied with the terms of the Settlement Agreement, and requesting sanctions against the Coast Guard.

On July 19, 2019, the record, including the briefs of the parties, was forwarded for appellate review. This appeal is properly before me.

BASIS OF APPEAL

The Respondent appeals from the ALJ's Order of November 5, 2018, on the basis that the ALJ's failure to reopen, where Respondent had shown good cause, was an abuse of discretion. Respondent argues that he demonstrated good cause to reopen on three grounds: (A) change in fact, as supported by evidence showing that he is not a user of dangerous drugs; (B) error in law, by approval of a settlement prior to a substance abuse professional (SAP) evaluation; and (C) public policy, where Respondent agreed to settle only under Coast Guard duress.

OPINION

I.

Mootness

Before turning to analysis of Respondent's appeal, it is appropriate to address the Coast Guard's suggestion that superseding events have rendered Respondent's appeal of the ALJ Order moot. Namely, on June 20, 2019, Respondent was served with a Notice of Failure to Complete Settlement Agreement, informing him that his MMC had been permanently revoked as a result of his failure to comply with the terms of the Settlement Agreement. As provided for by the Settlement Agreement, Respondent had ten days in which to request a hearing before the ALJ to

contest the Coast Guard's Notice of Failure to Complete Settlement Agreement. According to the Coast Guard's Reply Brief, no such request was timely made. The Coast Guard argues that, consequently, the stay of revocation provided by the Settlement Agreement is lifted, Respondent's MMC is revoked, the Settlement Agreement is no longer in effect, and this Appeal should be dismissed as moot.

I find that Respondent's Appeal was not mooted by operation of the Notice of Failure. It would be highly inappropriate to find Respondent's appeal moot by the operation of the very Settlement Agreement whose terms he seeks to modify through his petition to reopen and this appeal of the ALJ's denial of that petition.

I also reject Appellee's argument for mootness for the following reasons.

On two occasions, the Coast Guard requested extensions of the appellate briefing schedule. The first motion for extension, filed May 8, 2019, noted that "it is possible Respondent may have completed the terms of the Settlement Agreement by June 4, 2019. . . . A determination on the status of the Agreement may resolve the controversy at issue and render the basis of this appeal moot." The second motion for extension, filed June 6, 2019, explained that the Coast Guard was in receipt of partial documentation of Respondent's compliance with the Settlement Agreement, and "the Coast Guard has reason to believe Respondent is acting in good faith in obtaining the remaining documentation and will submit the required information to the Coast Guard as soon as received. Once received, the Coast Guard anticipates filing a Notice of *Completion* of the Settlement Agreement with the Court, which, if granted, will resolve the controversy and render the basis of this appeal moot." (Emphasis added.) Both motions for extension were unopposed, and both were granted.

Having obtained these extensions, the Coast Guard now files its delayed Reply Brief and argues that, because of Respondent's alleged failure to comply with the terms of the Settlement Agreement, Respondent's appeal of the ALJ Order denying his petition to reopen the case and amend that Settlement Agreement should be dismissed as moot. It is assumed that the Coast Guard requested these extensions in good faith, and believed, at the time of filing, that

Respondent had a genuine chance to satisfy the Settlement Agreement provisions, entitling him to the return of his MMC, and obviating the need for any further adjudication. Nevertheless, to dismiss this appeal as moot would, in effect, reward the Coast Guard for "running out the clock," by requesting briefing extensions until such time as the appeal would be rendered moot.

Further, while it appears from the case file that, as of the filing of the Coast Guard's Reply Brief on July 9, 2019, no response had been made to the Notice of Failure, a response was made on July 18, 2019. The Coast Guard argues that, in the absence of a timely written request for hearing on the Notice of Failure, Respondent's credential is revoked and the settlement agreement is no longer in effect. However, Respondent's July 18 Motion disputes this interpretation. The legal effects of the Notice of Failure and Respondent's latest Motion are questions for the ALJ and not in the first instance on appeal. To hold Respondent's appeal mooted by the Notice of Failure would be to accept prematurely the Coast Guard's assertion as to legal effect of that notice, an issue which, as evidenced by Respondent's latest Motion, is clearly in dispute.

In any event, as will be seen, Respondent's appeal fails on its merits.

II.

Was the ALJ's refusal to reopen an abuse of discretion?

Under 33 CFR § 20.904(a), a Coast Guard ALJ "may, for good cause shown . . ., reopen the record of a proceeding to take added evidence." The "good cause" standard is provided at § 20.904(c), which provides, "The ALJ may reopen the record of a proceeding if he or she believes that any change in fact or law, or that the public interest, warrants reopening it." It will be noted that both subsections use explicitly discretionary language: the ALJ *may* reopen. Accordingly, the ALJ's decision not to reopen the proceedings is reviewed under the highly deferential abuse of discretion standard:

> A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion . . . [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions,

is without evidentiary support.

Appeal Decision 2610 (BENNETT) at 20, 1999 WL 33595178 at 11 (quoting 5 Am. Jur. 2d "Appellate Review" § 695 (1997)), *aff'd,* NTSB Order No. EM-187, 2000 WL 967428. *See also Appeal Decision 2702 (CARROLL)* at 3, 2013 WL 7854263 at 2 (quoting *BENNETT*).

The question on appeal is whether the ALJ's denial of Respondent's petition to reopen was an abuse of discretion. Respondent asserts three distinct grounds for reopening, and contends that the ALJ's rejection of each argument was such an abuse of discretion.

A. *New evidence demonstrates Respondent was not a "user of a dangerous drug," a material change in fact, providing good cause to reopen*

An ALJ may reopen a hearing if he or she believes that a change in fact so warrants. 33 CFR § 20.904. An ALJ should deny a petition to reopen "unless the new evidence is shown to have a direct, material, and noncumulative bearing upon the issues presented." *Appeal Decision 2538 (SMALLWOOD)* at 9, 1992 WL 12008771 at 6 (quoting *Appeal Decision 797 (WEINER)*, 1955 WL 46681 at 5). Granting a petition to reopen is only proper where the new evidence "would likely result in an outcome favorable to [petitioner]." *Appeal Decision 2610 (BENNETT)* at 20, 1999 WL 33595178 at 11 (citing *Appeal Decision 2357 (GEESE)* at 7, 1984 WL 564470 at 5, *aff'd,* NTSB Order No. EM-119, 1985 WL 71196). While *BENNETT* and *GEESE* reference prior versions of the rules of procedure in suspension and revocation proceedings, the quoted standards remain valid under the currently-effective procedural rules at 33 CFR Part 20. [1]

[1] In 1999, the Coast Guard substantially revised and reorganized the rules of procedure applicable in suspension and revocation proceedings. *See* Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard, 64 Fed. Reg. 28054 (May 24, 1999). The 1999 rulemaking was intended to update, streamline, and standardize rules of evidence and procedure in Coast Guard administrative proceedings. The absence of regulatory provisions substantially similar to those in effect at the times of the *SMALLWOOD*, *BENNETT* and *GEESE* decisions does not invalidate their holdings.

Moreover, in judicial review of administrative proceedings, courts "generally uphold a federal agency's decision not to reopen a record or hearing based on changed circumstances or newly available information unless it 'clearly appear[s] that the new evidence would compel or persuade . . . a contrary result.'" *City of Fall River, Mass. v. F.E.R.C.*, 507 F.3d 1, 8 (1st Cir. 2007) (quoting *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 98 n. 6 (D.C.Cir.1983)). *See also Conservation Law Foundation v. F.E.R.C.,* 216 F.3d 41, 49 n.11 (D.C. Cir. 2000) (same); *Rocky Mountain Power Co. v. Fed. Power Comm'n*, 409 F.2d 1122, 1128 n.21 (D.C. Cir. 1969) ("The test of materiality, for purposes of this section [pertaining to additional evidence] is strict: does it 'clearly appear that the new evidence would compel or persuade to a contrary result . . . .'" (quoting *Louisville Gas & Elec. v. FPC*,

An ALJ's determination as to whether newly proffered evidence provides good cause to reopen is an exercise of discretion, and on appeal, that determination "will not be interfered with unless there is a clear abuse of discretion." *SMALLWOOD* at 9, 1992 WL 12008771 at 6.

In short, Respondent's petition to reopen on the basis of changed fact should be granted only if the alleged changed fact, and the evidence supporting it, has a direct, material, and noncumulative bearing on the issue presented—whether the Settlement Agreement should be amended—and if this new evidence would probably result in an outcome more favorable to Respondent. The ALJ's rejection of this petition will only be reversed for a clear abuse of discretion.

Respondent submitted two pieces of new evidence: (1) a written declaration by his mother, to the effect that the drug intake resulting in his positive test result was a one-time, inadvertent occurrence, which happened when she handed him the wrong bottle of cough syrup, and (2) a SAP's written opinion that Respondent was a "one-time user" who did not need to complete the aftercare program of NA/AA meetings prescribed in the Settlement Agreement, and who should be returned to "safety sensitive duties." Both of these new pieces of evidence go toward Respondent's argument that he is not a "user of dangerous drugs," as defined, and, he argues, provide good cause to reopen the matter and amend the Settlement Agreement.

The petition under review is a petition to reopen and modify the Settlement Agreement. Respondent is not, at this juncture, seeking relief from the Settlement—he wishes the Settlement to remain effective and enforceable, so that, upon a showing that he has complied with the Settlement's terms, he will be entitled to the return of his credential. Respondent wishes to retain the terms of the Settlement beneficial to his interests—the stay of revocation pending

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129 F.2d 126, 134 (6th Cir.), cert. denied 318 U.S. 800 (1942))); Wright & Miller, 32 Federal Practice & Procedure, "Judicial Review of Administrative Action" § 8254 (2019) ("A party must show more than mere change of circumstances or some new evidence in order to justify reopening or reconsideration. The party must show that these conditions may affect the outcome if a second proceeding were held." (Footnote omitted)).

These review standards are consistent with *SMALLWOOD*'s admonition that an ALJ should deny a petition to reopen "unless the new evidence is shown to have a direct, material, and noncumulative bearing upon the issues presented" and *BENNETT*'s and *GEESE*'s proviso that a petition to reopen is only proper where the new evidence would likely result in an outcome favorable to a petitioner.

demonstration of cure—and unilaterally strike a Settlement term he views as detrimental to his interests—paragraph 2(d) of the Agreement, which requires that Respondent attend, for at least one year, and at least twice a month, "a substance abuse monitoring program (such as AA/NA)."

When parties to an adversarial litigation arrive at a contracted settlement agreement, that contract relieves the trier of fact of the necessity of determining whether the burdened party (here, the Coast Guard) has met its burden of proof. Respondent now tries to re-litigate a factual element of the Coast Guard's case that was never litigated in the first instance, because Respondent agreed to concede all the factual elements of the case against him, in exchange for a stay of revocation, and the promised opportunity to demonstrate cure and regain his credential. He asserts, "Respondent's one-time drug intake was not wrongful (e.g. unknowing ingestion), and the positive urinalysis is not a drug abuse incident." [Respondent's Appellate Brief at 9.] This statement could be part of an Answer to the Complaint, and his new evidence might support it, but the contention is inconsistent with the current attempt to amend the Settlement Agreement, which Respondent entered into instead of filing an Answer.

In the Settlement Agreement, Respondent admitted the factual allegations of the Complaint. Included in the factual allegations is this statement: "Respondent has been the user of a dangerous drug as described by 46 USC 7704(c)."[2] If Respondent wishes to retract his admission of dangerous drug use, he cannot do so by means of an oblique effort to modify the settlement's contracted terms of performance. Respondent's admission is a principal term of the Settlement Agreement. In order to retract that admission, Respondent must petition to reopen the proceedings in order to (1) void the Settlement Agreement rather than amend it, and (2) proceed to a hearing. To date, he has not sought a hearing. Evidence that Respondent *was not* a user of dangerous drugs cannot support this petition to reopen and amend the Settlement Agreement when one of the central terms of that Settlement is Respondent's admission that he *was* a user.

Respondent insists that, because he was not a user of dangerous drugs, he is not subject to

[2] Effective August 18, 2018, this subsection was re-designated as 46 U.S.C. § 7704(b). Pub.L. 115-232, Div. C, Title XXXV, § 3545(b), Aug. 13, 2018, 132 Stat. 2326. This opinion cites to the currently effective subsection, except in direct quotation.

the cure guidelines set forth in *Appeal Decision 2535 (SWEENEY)*, 1992 WL 12008768, *rev'd on other grounds*, NTSB Order No. EM-165, 1992 WL 113488. But if *SWEENEY* does not apply to Respondent, there is no Settlement Agreement, or, put another way, so long as we have an effective Settlement Agreement resolving a charge brought under the authority of 46 U.S.C. § 7704, the *SWEENEY* precedent controls. Later decisions, including *Appeal Decisions 2634 (BARRETTA)*, 2002 WL 32061809, and *2638 (PASQUARELLA)*, 2003 WL 1891872, make it clear that, in mandatory revocation cases under § 7704(b), an ALJ has no discretion to return a mariner to work until the requirements of cure have been satisfied.

So long as the Settlement Agreement is in effect, Respondent's admission of dangerous drug use is in effect. In the face of that admission, neither the declaration of Respondent's mother that she inadvertently handed him a bottle of prescription cough medicine, nor the SAP's return-to-work letter, which asserts Respondent is not a user of dangerous drugs, can have any material impact on this case, nor can they result in any outcome more favorable to Respondent.

Neither item of new evidence provides good cause to reopen the Settlement Agreement. The ALJ's conclusions were based on sound law, and his refusal to reopen to admit new evidence and consider changed facts was no abuse of discretion.

B. *Approval of the Settlement Agreement prior to SAP evaluation was an error in law, providing good cause to reopen.*

Respondent asserts that ALJ approval of the Settlement Agreement, prior to examination by a SAP, was an error in law providing good cause to reopen and amend the Settlement. To support this argument, Respondent chiefly cites to 49 CFR Part 40, the Department of Transportation's Procedures for Transportation Workplace Drug and Alcohol Testing Programs. Respondent insists that 40 CFR Subpart O grants SAPs "the sole and exclusive authority to set the terms and conditions of treatment plans, including therapy and counseling" and the "exclusive regulatory authority to change *any* terms and conditions of *any* agreement." [Respondent's Appellate Brief at 8] (emphases added). In Respondent's view, ALJ approval of a Settlement Agreement whose terms stipulate certain benchmarks of treatment and rehabilitation was a usurpation of the SAP's authority under Subpart O, and an error of law justifying

reopening and amendment of the Settlement Agreement.

Respondent's citations to Subpart O do not support his broad assertions as to the authority of the SAP in Coast Guard-administered procedures. The cited regulations apply to the return-to-duty process for transportation workers in safety-sensitive positions; they do not apply to a Settlement Agreement in a suspension and revocation proceeding under 46 U.S.C. § 7704.

The mandatory language of 46 U.S.C. § 7704(b) provides, "If it is shown that a holder [of a merchant mariner's document] has been a user of, or addicted to, a dangerous drug, the . . . . merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." This statutory mandate is given effect by 46 CFR § 5.59(b), which stipulates revocation of the credential of a mariner shown to be a user of dangerous drugs. 46 CFR § 5.901(d) establishes that a mariner whose credential has been revoked for dangerous drug use may demonstrate "cure" by showing he or she: "(1) Has successfully completed a bona fide drug abuse rehabilitation program; (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the rehabilitation program and; (3) Is actively participating in a bona fide drug abuse monitoring program." Reinstatement of the mariner's eligibility to hold a credential can only be achieved through that showing of cure.

46 CFR Part 16 regulates chemical testing in the maritime industry. Portions of DOT chemical testing regulations are incorporated into Part 16 by reference. *See* 46 CFR § 16.113. However, 49 CFR Part 40's regulation of SAPs and the Return-to-Duty Process, in Subpart O, does not supersede Suspension & Revocation Proceedings under 46 U.S.C. § 7704.[3]

[3] In 2001, after a significant update to 49 CFR Part 40, the Coast Guard issued, on an expedited schedule, revisions to harmonize 46 CFR Part 16 with the revised Part 40. Rules and Regulations, DOT, Coast Guard: Chemical Testing, 66 Fed. Reg. 42964 (Aug. 16, 2001). Among the revisions to Part 16 was the addition of the DOT-mandated minimum of six follow-up tests after a return to work, at 46 CFR § 16.201(f): "This new requirement will be in addition to all other Coast Guard requirements for rehabilitation and education following a positive drug test." *Id.* at 42966. This regulatory history demonstrates that the Coast Guard was well aware of the relationship between 46 CFR Part 16 and 49 CFR Part 40. Where elements of Part 40, such as Subpart O, are not incorporated into Part 16, it is not by oversight or omission. Subpart O governs a return to work, but a credentialed mariner cannot return to work upon a credential at all without first completing all aspects of any Suspension and Revocation Proceeding that was commenced.

"If an individual holding a credential fails a chemical test for dangerous drugs, the individual . . . is subject to suspension and revocation proceedings against his or her credential under 46 CFR part 5." 46 CFR § 16.201(c). Notably, 46 CFR § 16.201(e) provides, "An individual who has failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f)[4] of this section *and* 46 CFR Part 5, if applicable, have been satisfied." (Emphasis added.) 46 CFR Part 5 governs Suspension & Revocation Proceedings like this one.[5] Hence, any Suspension & Revocation Proceeding under 46 U.S.C. § 7704 proceeds to its resolution before an individual may return to duty.[6]

The Settlement Agreement, in paragraph 9, recognizes the separation between its provisions and those of Subpart O: "The parties understand that the Department of Transportation requires Return-to-Duty Tests that are separate from and in addition to any testing required by this agreement. . . . These rules are found at 46 CFR 16.201 and 49 CFR Part 40, Subpart O." Because Respondent was a credentialed mariner at the time of his positive drug test, he faces two legal obstacles to his return to work: the suspension and revocation proceedings authorized by 46 U.S.C. § 7704 *and* the DOT and Coast Guard return-to-duty protocols.

The ALJ's Order considered and rejected Respondent's claim that entering into a Settlement Agreement prior to SAP evaluation was improper:

> The regulations Respondent relied on in support of this assertion establish SAPs have a role in the return to duty process for employees in safety sensitive positions that fail a drug test. However, they do not require the parties in a Coast Guard Suspension and Revocation proceeding to obtain a SAP's opinion prior to entering into a settlement agreement or provide SAPs with authority to modify a settlement agreement.

[Order at 6] (citation omitted).

The ALJ's refusal to apply the return-to-duty regulations to this suspension and

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[4] § 16.201(f) requires that, to return to work after a positive drug test, an "MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work."

[5] If the individual does not have a MMC, 46 CFR Part 5 is not applicable.

[6] If the Suspension & Revocation Proceeding ended in outright revocation, of course the individual must comply with 46 CFR Part 5, Subpart L, as well as the relevant provisions of 46 CFR Parts 10 and 12, to obtain a new MMC, before returning to any duty requiring a credential.

revocation proceeding was entirely correct. Approval of a suspension and revocation settlement agreement prior to SAP evaluation is not an error of law, and the refusal to reopen this matter on the basis of this purported error was no abuse of discretion.

C. *Respondent signed the Settlement Agreement under duress, contrary to law and public policy, providing good cause to reopen.*

Respondent asserts that the ALJ's Order upholding the Settlement Agreement below is contrary to public policy, because Respondent signed the Settlement Agreement only under Coast Guard duress. Respondent states that the Coast Guard investigating officer (IO) "threatened . . . that if he did not sign, he would lose his license to sail permanently." [Respondent's Appellate Brief at 12].

To establish duress, Respondent must show that the Coast Guard made an improper threat and that this threat left Respondent with no reasonable alternative but to agree to the Settlement Agreement. *Appeal Decision 2619 (LEAKE)* at 5, 2000 WL 34229418 (citing *Restatement 2d of Contracts*, § 175(1)).

Respondent alleges that, following his positive drug test, the Coast Guard IO told him "that he would have three (3) choices to choose from . . . and that Respondent should choose the suspension and not fight it, because no one ever wins and Respondent would risk losing his license to sail permanently." [Respondent's Appellate Brief at 13.] Consequently, "Respondent, under duress and in fear of losing his license to sail, signed the settlement agreement, without advice of counsel and without fully understanding the full intent of the agreement." [*Id.* at 13-14.][7]

[7] Respondent now maintains that, at the time of his signature, he "did not realize that by signing the settlement agreement, he was admitting to the allegations in the complaint," and that, by signing the agreement, he would be forced to abide by its terms. [Resp. App. Brief at 14.] He also states that "the parties did not have a meeting of the minds when signing the settlement agreement." [Resp. App. Brief at 13.] These statements suggest the outlines of a challenge to the Settlement Agreement's validity on the basis of unilateral mistake or lack of competence to contract (theories that are otherwise unsupported), but they do not support Respondent's duress theory, nor his underlying petition to reopen and amend the Settlement Agreement. *See* Part II (A) of this opinion, *supra*, for an explanation of why direct attacks on the validity of the Settlement do not support Respondent's current effort to reopen and amend that Agreement.

Accepting, *arguendo*, that the IO told Respondent his chances of success at a hearing were slim, this was not an improper threat. In *Appeal Decision 2703 (WEBER)*, 2013 WL 7854264, the appellant mariner appealed the ALJ's refusal to recuse himself. There, the appellant argued that the ALJ should be disqualified for his attempt to "coerce" the appellant to enter into a settlement agreement:

> The ALJ admonished the Respondent that the Respondent needed to understand the realistic options available to the Respondent. The ALJ explained the "realistic options"; it is easier to go thru the process of taking a plea agreement and go thru the re-licensing procedure, that the process is fundamentally easier, and that the remedial proceedings are established for the good order of mariner operations.

WEBER at 11, 2013 WL 7854264 at 8. On appeal, the allegations of improper ALJ conduct were dismissed:

> The fact that the ALJ encouraged Respondent to consider the Coast Guard's settlement offer does not show a bias or prejudice against Respondent
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> . . . . .
>
> As a practical matter, no doubt the Coast Guard makes settlement offers in order to achieve a predictable result and avoid the expense of a hearing, among other things.
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> * * *
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> In this case, the ALJ had . . . the Complaint and Respondent's Answer to provide him a feel for the case before the pre-hearing conference and the discussion of settlement and Respondent's "realistic options." Respondent had admitted to providing a urine specimen and the Coast Guard had alleged that standard scientific drug testing had established that the specimen was positive for marijuana metabolites. Therefore, the ALJ had a proper basis for his comments on Respondent's "realistic options," . . . .

WEBER at 12-13, 2013 WL 7854264 at 8-9.

While the procedural posture in *WEBER* differed from this case—it affirmed an ALJ's refusal to recuse himself post-hearing, rather than considering whether a respondent showed good cause to reopen post-settlement—the opinion's discussion of realities surrounding settlements in suspension and revocation proceedings is instructive. Respondent's allegations as to the IO's actions, as a partisan representative of the Coast Guard, are substantially similar to the allegations as to the impartial ALJ's actions in *WEBER*. Accepting the facts as alleged, both the IO in this matter and the *WEBER* ALJ encouraged the mariner to accept a settlement, suggested settling was the "easier" option, and emphasized the risk of permanent revocation

should the mariner decline settlement. The only extent to which the IO's alleged remarks went beyond those of the *WEBER* ALJ was in telling Respondent "no one ever wins," in the context of mariners taking their dangerous drug cases to hearing.

Comments that do not establish bias on the part of a presiding, impartial ALJ will not amount to an improper threat when made by a partisan Coast Guard IO. There is nothing improper about the Coast Guard endeavoring to settle a complaint before hearing, and the IO's reference to the difficulties and risks of an adversarial hearing is not an improper threat.

This interpretation of Respondent's situation is consistent with judicial applications of the theory of duress to government settlement agreements. Courts have agreed that when the government, in good faith, warns a negotiating counterparty of its intention to take action that it has the legal right to take, there is no improper threat and no duress. *See, e.g., Trans-Sterling, Inc. v. Bible*, 804 F.2d 525 (9th Cir. 1986) (no duress where plaintiff casino owner relinquished multiple gaming licenses in settlement resolving enforcement action against one casino, after state gaming commission threatened enforcement actions against plaintiff's other casinos); *Goodpasture v. Tenn. Valley Auth.*, 434 F.2d 760, 763-64 (6th Cir. 1970) ("It is well settled that a statement by an agency possessing the power of eminent domain that it will exercise that power if a voluntary sale cannot be negotiated does not constitute duress"); *Du Puy v. United States*, 67 Ct. Cl. 348 (Ct. Cl. 1929) (no duress where taxpayer paid government to settle tax claims and avoid lawsuit, absent any showing of government bad faith). *See also In re Cross*, NTSB Order No. EA-3601, 1992 WL 155857 at 3 (June 12, 1992) ("Duress is not established by the facts that petitioner was interested in bringing the case to a conclusion . . . or that the FAA, a governmental body with greater resources, was the opposing party.").

In *Appeal Decision 2619 (LEAKE)*, 2000 WL 34229418, the respondent mariner challenged the validity of a settlement agreement reached with the Coast Guard as to charges of negligence, arguing he had entered into the agreement without the assistance of counsel, and under Coast Guard duress, "threaten[ed] with a significantly longer period of suspension if he contested the charges." *LEAKE* at 4, 2000 WL 34229418. The ALJ rejected this theory of duress, concluding that even if the Coast Guard made an improper threat, "Appellant has not

shown that there was an absence of a reasonable alternative to signing the [agreement]." *Id.* at 5. This conclusion was affirmed on appeal, approving the ALJ's conclusion that "[Appellant] had a clear alternative to signing the Joint Motion for Consent Order: not signing it and submitting the matter for adjudication." *Id.*

Respondent's allegations of duress are not distinguishable from *LEAKE*. The prospect of lawful revocation through administrative process cannot be considered an improper threat. Even if such a "threat" were improper, as in *LEAKE*, Respondent has failed to establish the lack of reasonable alternative—by his own admission, the IO told him "that he would have three (3) choices to choose from." [Respondent's Appellate Brief at 13]. Respondent could have proceeded to a hearing, but he instead chose to sign the Settlement Agreement. The record does not support Respondent's claim that he signed the Settlement Agreement under duress, and he has not demonstrated good cause to reopen the proceedings on that basis.

CONCLUSION

The ALJ's refusal to reopen Respondent's case was neither erroneous nor an abuse of discretion. Respondent has presented no cognizable basis for reopening or for revising the Settlement Agreement. No relief is warranted.

ORDER

The ALJ's Order dated November 5, 2018 is AFFIRMED.

[signature], ADM, USCG

Signed at Washington, D.C., this 21 day of OCT, 2019.