

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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	
	:	NO. 2731
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
<u>Issued to: MARCUS PAUL McLIN</u>	:	

APPEARANCES

For the Government:
Ms. Lineka Quijano, Esq.
CWO Chrisina L. Jeanes, USCG

For the Respondent:
Marcus Paul McLin, *pro se*

Administrative Law Judge:
Dean C. Metry

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

On April 11, 2019, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a bench decision, finding proved against Respondent Marcus Paul McLin one charge of misconduct, for possession of synthetic urine in violation of Texas state law, and one charge of use of a dangerous drug. The ALJ found not proved three other charges: one charge of violation of regulation, for consuming an intoxicant while on watch (in violation of 33 CFR § 95.045(c)), and two misconduct charges, for possession of a controlled substance in violation of state and federal law. The ALJ revoked Respondent's merchant mariner credential (MMC), the mandatory sanction when a mariner is found to be a user of a dangerous drug. On April 12,

2019, the ALJ issued a written Order memorializing his bench decision. The Coast Guard appeals.

FACTS

At all relevant times Respondent was the holder of a merchant mariner credential. [Tr. Day Three at 6.] On March 8, 2019, Respondent was in command of the towing vessel RYAN BAKER II, a position requiring him to hold a master's license. [*Id.* at 6-7.] The RYAN BAKER II is a vessel subject to inspection under Chapter 33 of Title 46, U.S.C. [*Id.* at 5.]

On the afternoon of March 8, 2019, Coast Guard and local law enforcement officers boarded the RYAN BAKER II, underway and pushing barges, in San Antonio Bay, near Victoria, Texas. [Tr. Day Three at 7.] San Antonio Bay is part of the navigable waters of the United States. [Tr. Day One at 44.] On March 8, the crew of the vessel consisted of Respondent and two deckhands. [Tr. Day Three at 7.]

The boarding party discovered, in various compartments of the RYAN BAKER II, methamphetamine, assorted drug paraphernalia, and several vials of synthetic urine. [Tr. Day Three at 7.] A vial of synthetic urine was found in Respondent's stateroom. [*Id.*] No other contraband was discovered in spaces under the exclusive control of Respondent. [*Id.*]

During the boarding, Respondent acknowledged that the synthetic urine found in his cabin belonged to him, and stated that he used synthetic urine in Coast Guard drug tests, in order to disguise his undiagnosed "borderline diabetes."¹ [Tr. Day Three at 7.] Respondent also told law enforcement that he had last smoked methamphetamine approximately four months earlier. [*Id.*] Both of these statements were recorded by the body camera of the local law enforcement officer to whom they were made, and those recordings are part of the record in this case. [*See id.* at 8; CG Ex. 16.]

¹ Federally mandated merchant mariner drug tests screen only for five categories of dangerous drugs. 49 CFR § 40.85. The ALJ, alluding to the standard five-drug panel, and the lack of any evidence presented in support of Respondent's claimed medical condition, commented doubtfully on Respondent's proffered explanation for why he would use synthetic urine in a required urine test. [Tr. Day Three at 8-9.]

Methamphetamine (or methamphetamine residue) was found in the staterooms of both deckhands. [Tr. Day One at 152-53; 208-09.] Both deckhands told boarding officers that Respondent had provided them with methamphetamine, and that Respondent was himself a user of methamphetamine. [Tr. Day Three at 9-10.]

At the conclusion of the boarding, pending arrival of a relief crew, Respondent was directed to hold the vessel and barges stationary against the bank of the waterway overnight. [Tr. Day One at 45.] Respondent's credential was retained by the Coast Guard boarding team. [*Id.* at 46.]

PROCEDURAL HISTORY

The Coast Guard filed a Temporary Suspension Complaint against Respondent's credential on March 9, 2019, under the procedures for expedited suspension and revocation actions provided at 33 CFR §§ 20.1201 *et seq.*² The Complaint includes five charges: (1) misconduct, for possession of a controlled substance in violation of 21 U.S.C. § 844(a); (2) misconduct, for possession of a controlled substance in violation of Texas Health and Safety Code § 481.102; (3) misconduct, for possession of a substance or device to falsify drug tests results in violation of Texas Health and Safety Code § 481.133(a); (4) violation of law or regulation, for consuming intoxicants on watch in violation of 33 CFR § 95.045(c);³ and (5) use of a dangerous drug.

On March 12, 2019, the ALJ convened a telephonic pre-hearing conference. [See March 14, 2019 Order Memorializing Pre-Hearing Conference.] *Pro se* Respondent entered an Answer

² Ordinarily, mariners retain their credentials during pending suspension and revocation actions, until formal issuance of an order of suspension or revocation by an ALJ. See 46 CFR § 5.521. The cited temporary suspension regulations permit the Coast Guard to suspend a mariner's credential without hearing for up to 45 days, in limited circumstances, including where there is probable cause to believe that the mariner has performed a safety-sensitive function in violation of law or regulation relating to drug use. 33 CFR § 20.1201. In temporary suspension cases, expedited procedures provide that hearing shall be convened as soon as practicable, and that the presiding ALJ shall issue a decision and order no later than 45 days after filing of the complaint. 33 CFR § 20.1208. The Coast Guard investigating officer in this case invoked temporary suspension because evidence gathered during the March 8 boarding indicated that Respondent had used methamphetamine while in command of the RYAN BAKER II. [Tr. Day One at 46-47.]

³ "While on board a vessel inspected, or subject to inspection, . . . a crewmember (including an officer) . . . Shall not consume any intoxicant while on watch or duty . . ."

at that time, admitting all jurisdictional allegations and denying all substantive allegations underlying the five charges leveled by the Complaint. [*Id.* at 2.]

Hearing was convened on April 9, 2019. The Coast Guard case included the testimony of the RYAN BAKER II's two deckhands, and that of two local law enforcement officers who participated in the March 8 boarding. Respondent did not testify on his own behalf.

After two days of hearing, the ALJ issued his opinion from the bench on April 11, 2019. That opinion found proved the third charge, for possession of a substance or device to falsify drug test results in violation of state law, and the fifth charge, for use of a dangerous drug. The ALJ found not proved the remaining charges of drug possession and drug use on watch. The ALJ then revoked Respondent's merchant mariner credential, the mandatory sanction for use of a dangerous drug. An Order memorializing the bench decision was issued on April 12, 2019.

The Coast Guard appealed, and filed a brief perfecting that appeal on July 1, 2019. Respondent has not filed any appellate brief in this matter. This appeal is now properly before me.

BASES OF APPEAL

The Coast Guard raises the following issues on appeal:

- I. *The ALJ's bench decision did not adequately set out the reasons and bases for his findings, in violation of 33 CFR § 20.902.*
- II. *The ALJ abused his discretion by finding the first, second, and fourth charges not proved.*

REMEDY

Before considering the issues on appeal, it is necessary to discuss what outcome the Coast Guard seeks from this appeal. As noted, the ALJ imposed the mandatory, and maximum, sanction of revocation. The Coast Guard now asks for remand, for further proceedings with respect to the first, second, and fourth charges. [CG Appellate Brief at 15.] The Coast Guard argues that such further proceedings will "correct deficiencies in the extant case." [*Id.*]

As noted, the imposed sanction of revocation is the maximum sanction in these administrative proceedings. 46 U.S.C. §§ 7703, 7704. There is no precedent for a Coast Guard appeal where the maximum sanction has already been imposed.⁴ Given the remedial purpose and administrative nature of these suspension and revocation proceedings, is it appropriate to entertain a Coast Guard appeal where revocation has already been imposed, and the only remedy sought is a modification of the ALJ's findings?

“[A]dministrative actions against a license, certificate, merchant mariner credential, endorsement, or document are remedial and not penal in nature. These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR § 5.5. The regulations governing these actions “shall be construed so as to obtain a just, speedy, and economical determination of the issues presented.” 46 CFR § 5.51.

Here, as the Coast Guard acknowledges, “The safety threat Mr. McLin posed to the maritime transportation system was resolved through the revocation of his MMC.” [CG Appellate Brief at 13.] Nevertheless, the Coast Guard now asks for remand, for further deliberations by the ALJ. That suggested course of action is contrary to the aims of speedy and economical determination in these administrative actions. “A party’s mere displeasure with some or all of an ALJ’s findings is not, of itself, a proper ground for appeal, even if that party is the Coast Guard. If the issue in dispute had no effect on the outcome of the case, there is no issue for appeal.” *Appeal Decision 2729 (COOK)* at 16 (2020). This is true whether the finding at issue is one of the findings of fact setting forth the course of events or is an ultimate finding on a charge.⁵

⁴ The Coast Guard has previously appealed from orders of revocation, in *Appeal Decisions 2698 (HOCKING)*, 2012 WL 2252257, *aff’d*, NTSB Order No. EM-212, 2012 WL 7658422; 2655 (*KILGROE*), 2006 WL 1519582, *aff’d*, NTSB Order No. EM-203, 2006 WL 3695735; and 2638 (*BARRETTA*), 2002 WL 32061809. However, in *HOCKING* and *KILGROE*, the Coast Guard properly (although unsuccessfully) appealed from partial orders of revocation, where ALJs had revoked one, but not all, of the respondent mariners’ credentials. In *BARRETTA*, the Coast Guard successfully appealed from a conditional order of revocation that had improperly allowed the respondent to continue using her credential while pursuing cure from use or addiction to a dangerous drug.

⁵ The Coast Guard also seeks further details from the ALJ to “provide an articulation of principles for Coast Guard investigating officers to follow when conducting marine personnel investigations and preparing for and presenting the complainant’s case at suspension and revocation hearings.” [CG Appellate Brief at 15.] But the purpose of an ALJ’s decision is not to provide a tutorial to investigating officers.

The National Transportation Safety Board (NTSB) considered a similar situation in civil aviation credentialing, in *Administrator v. Kraft*, NTSB Order No. EA-4812, 2000 WL 21040. In *Kraft*, the respondent had stipulated agreement as to some, but not all, of the charges laid against him by the Federal Aviation Administration (FAA), and stipulated his agreement that revocation was the proper sanction. An ALJ had consequently entered judgment on the pleadings, revoking respondent's airman's certificate. The FAA objected to entry of judgment on the pleadings, arguing that it was entitled to a full hearing, to prove the elements of the remaining charges that respondent had not stipulated to.⁶ The NTSB rejected the FAA's appeal, ratifying the respondent's assertion that "the purpose of an administrative enforcement proceeding is not to determine the validity of every allegation of impropriety but, rather, to determine if an airman possesses the care, judgment, and responsibility to hold an airman's certificate." EA-4812 at 4-5, 2000 WL 21040 at 1.

Consistent with the remedial purpose of these proceedings, set out at 46 CFR § 5.5, and regulatory mandate for speedy and economical determinations, at § 5.51, the Coast Guard ordinarily should not appeal from ALJ orders that impose the maximum sanction of revocation, so that no increase in sanction is possible – an appeal without an object.

OPINION

I.

The ALJ's bench decision did not adequately set out the reasons and bases for his findings, in violation of 33 CFR § 20.902.

The Coast Guard asserts that the ALJ failed to articulate the basis for his conclusions, as required by 33 CFR § 20.902. [CG Appellate Brief at 5.] Specifically, the Coast Guard objects to the ALJ's failure to make explicit credibility findings as to the testimony of the RYAN BAKER II's two deckhands. [*Id.* at 10-13.] Both deckhands testified that Respondent possessed

⁶ The FAA argued that full litigation of each charge was necessary to maintain accurate records of the respondent's violation history, a history that would be relevant to possible future reissuance of respondent's certificate. EA-4812 at 4-5, 2000 WL 21040 at 1-2. The analogous argument is not raised by the Coast Guard here. Any potential positive effect, in a future application for reissuance, that Respondent may derive by virtue of this revocation being ordered based on two charges found proved, rather than a possible five, is too conjectural and attenuated a consequence to be given serious consideration.

and used methamphetamine during the voyage interrupted by the March 8, 2019 boarding. The Coast Guard reasons that the ALJ erred by concluding to the contrary, and finding three charges not proved, without explicitly discrediting the deckhands' testimony.

33 CFR § 20.902(a)(1) provides, "After closing the record of the proceeding, the ALJ shall prepare a decision containing . . . A finding on each material issue of fact and conclusion of law, and the basis for each finding . . ." As noted, this hearing was conducted under the expedited procedures for temporary suspension cases, provided at 33 CFR §§ 20.1201 *et seq.* On appeal, the Coast Guard observes that no prior appeal decision has explicitly addressed whether these requirements apply to decisions issued in expedited hearing cases. [CG Appellate Brief at 7 n.2.]

33 CFR § 20.902(a)(1) incorporates the standards required of all formal administrative adjudications, provided at 5 U.S.C. § 557(c): "All decisions, including initial, recommended, and tentative decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

Expedited proceedings are, like all suspension and revocation proceedings, formal administrative adjudications. The expedited procedures in temporary suspensions alter the timeline, but not the substance, of procedural requirements laid out in 33 CFR Part 20. § 20.1208(c) provides, in an expedited hearing case, "The ALJ may issue his or her decision as an oral decision from the bench. Alternatively, he or she may issue a written decision. He or she shall issue the decision 45 days or less after the temporary suspension." Nothing in this language exempts temporary suspension decisions from the requirements of § 20.902. Decisions in temporary suspension cases must conform to the § 20.902 standard.

Having clarified the applicability of 33 CFR § 20.902 to expedited hearing cases, the question remains: in this case, did the ALJ's bench decision adequately identify the basis for its findings and conclusions, as required by that section?

In the bench decision of April 11, 2019, the ALJ summarized the deckhands' testimony thus:

[Clifton] Wiederhold spoke as to his role on the ship and the fact that they were boarded on or about March 8, 2019 and that when questioned about where he obtained methamphetamine found in his room indicated that they had come from the Captain, Captain McLin.

Similarly, Jesse Bergara was interviewed and gave much the same testimony about where he obtained the narcotic substances from in addition to the fact that he saw Respondent use methamphetamine while the ship was foundered and awaiting change of crew.

[Tr. Day Three at 9-10.] The deckhands' testimony was the only direct evidence tending to prove Respondent's possession and use of methamphetamine onboard the RYAN BAKER II. No directly contradictory testimony or evidence was offered.⁷

The ALJ went on to conclude:

Count one, the Court finds that under the required standard to be applied the evidence does not convince me by a preponderance of the evidence that Respondent possessed methamphetamines, a controlled substance while onboard the Ryan Baker II.

Count two, the Court finds that by the required standard to be applied, the evidence does not convince me by a preponderance of the evidence that the Respondent possessed methamphetamine onboard the Ryan Baker II.

* * *

Count four, the Court finds that by the required standard to be applied, the evidence does not convince me by preponderant evidence that the Respondent used methamphetamine[,], a controlled substance[,], while onboard the Ryan Baker II.

[Tr. Day Three at 10-11.]

Reading the bench decision as a whole, it is evident that the ALJ did not credit the deckhands' testimony as to Respondent's possession and use of methamphetamine onboard the

⁷ As noted, Respondent did not testify in his own defense. However, the video recording of the March 8, 2019 boarding, admitted as CG Exhibit 16, does include several statements by Respondent that implicitly contradict the deckhands' hearing testimony, notably at 1:36:27, when Respondent states that he last used methamphetamine four to five months earlier, a statement that conflicts with the deckhands' testimony regarding their observations of Respondent's more recent drug use.

RYAN BAKER II. The three charges that relied principally on the deckhands' testimony were found not proved, and the two charges where Respondent had admitted the essential elements on camera were found proved.

To discount the deckhands' testimony was well within the ALJ's discretion. "It is the function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct." *Appeal Decision 2116 (BAGGETT)* at 6, 1978 WL 198999 at 3 (citing *Appeal Decision 2097 (TODD)* at 4, 1977 WL 188267 at 2).

Here, the Coast Guard argues that the ALJ erred in discounting the deckhands' testimony without issuing specific credibility findings.

Appellate authorities rely, absent exceptional circumstances, on the credibility determinations of the hearing-level adjudicator. When an ALJ must determine what events occurred, based upon the conflicting testimony of several witnesses, explicit credibility findings may be required for meaningful appellate review. *See Appeal Decision 2614 (WALLENSTEIN)* at 4, 2000 WL 33965627 at 4 ("the [ALJ] is required to resolve serious conflicts in testimony that exist on the record and issue specific credibility findings") (citing *Appeal Decision 2492 (RATH)* at 6, 1989 WL 1126149 at 4 ("[ALJ]'s failure to issue credibility findings renders his determination(s) based on conflicting testimony inherently incredible.")). In those circumstances, if an ALJ fails to make specific credibility findings, ambiguity as to the basis for each finding of fact and conclusion of law may result. If an ALJ makes a finding as to a disputed factual issue without acknowledging evidence that contradicts that finding, a question may arise as to whether the ALJ fulfilled the duty to review all the evidence. Such ambiguity as to why and how an ALJ reached a given result frustrates meaningful appellate review. ALJs are well-advised to be explicit in their credibility determinations, whenever ambiguity may thereby be avoided.

This case is not so complicated. As noted, the two deckhands' statements represented the *only* direct evidence as to essential elements of the three charges found not proved. No directly conflicting evidence was presented by Respondent. There is no ambiguity. The ALJ considered,

but did not credit, the deckhands' statements, as was his prerogative as the hearing-level trier of fact. The record is complete and adequate for this appellate review.

II.

The ALJ abused his discretion by finding the first, second, and fourth charges not proved.

The Coast Guard argues that the ALJ erred in finding the charges of drug use and possession onboard the RYAN BAKER II not proved, in light of the “[o]verwhelming [a]mount of [u]ncontroverted [e]vidence [p]resented by the Coast Guard.” [CG Appellate Brief at 9.] This argument is unconvincing.

As already described, the testimony of the two RYAN BAKER II deckhands was the only direct evidence of Respondent’s alleged possession and use of methamphetamine while onboard the vessel.⁸ The burden of proof rests solely with the Coast Guard in this matter. The mere absence of evidence directly conflicting with the deckhands’ testimony does not establish proof of violation or misconduct by the preponderance of the evidence.

The Coast Guard presented two witnesses who testified as to Respondent’s commission of the acts alleged in the three charges found not proved. The ALJ did not consider the testimony of those two witnesses to be sufficient to prove those charges. The Coast Guard now asserts that the ALJ’s conclusions as to the dismissed charges were “clearly erroneous” and “an abuse of discretion.” [CG Appellate Brief at 11.] This boils down to nothing more than a credibility dispute. As is often repeated in these proceedings, and as acknowledged by the Coast Guard, “The ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence.” [*Id.* at 9 (quoting *Appeal Decision 2695 (AILSWORTH)* at 6, 2011 WL 6960129).]

It was no abuse of discretion to find these charges not proved, where the burden of proof lies with the Coast Guard, and the only direct evidence was the testimony of the two deckhands

⁸ The Coast Guard Appellate Brief, at 11, also cites the positive identification of the substance found in Mr. Wiederhold’s stateroom as methamphetamine as evidence in support of the charges of possession. The identification of methamphetamine in Mr. Wiederhold’s control may be generally corroboratory of Mr. Wiederhold’s testimony, but it does not directly go to show that *Respondent* possessed methamphetamine.

that they had obtained methamphetamine from Respondent, and observed Respondent use that drug, while onboard the RYAN BAKER II.

Moreover, the Coast Guard's notion that a finding of not proved must be supported by evidence is faulty. The Coast Guard has the burden of proof as to an allegation. Insufficiency of evidence to prove an allegation, as found by an ALJ in the role of factfinder, is a failure to meet that burden of proof. Such a finding is not of the same character as a finding of proved, or a finding of fact that supports a finding of proved. Given its negative character, it is not susceptible of being called "clearly erroneous" as that term is used as an appellate standard of review (discussed in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622-23 (1993), cited by the Coast Guard). If an ALJ commits an error of law in deciding whether evidence is admissible, the remedy might be a remand directing the ALJ to admit the evidence, followed by a re-weighting of all the evidence. The weighing of evidence itself, however, is entirely within the ALJ's prerogative.

In this case, the ALJ admitted the testimony of the deckhands, as is clear from his summary of their testimony.⁹ [Tr. Day Three at 9-10.] Thereafter, he weighed the evidence and found it insufficient to prove three of the charges.

⁹ The Coast Guard misconstrues the ALJ's recitation of the deckhands' testimony: "The Court's findings of fact regarding Mr. Wiederhold and Mr. Bergara's statements are 'reasonably supported' based on evidence presented by the Coast Guard, and, therefore, must be accepted." [CG Appellate Brief at 12.] The ALJ's summary of the deckhands' testimony, quoted in full at page 8 *supra*, was not a finding of fact, but a summation of the evidence. The ALJ's inclusion of the deckhands' testimony demonstrates that he did consider that evidence before finding the disputed charges not proved, but it does not imply that he endorsed the veracity of those statements. [See Tr. Day Three at 9-10.]

CONCLUSION

The ALJ's findings were neither erroneous nor an abuse of discretion. His decision complies with 33 CFR § 20.902, and he exercised his lawful discretion in assessing the credibility of the evidence presented.

ORDER

The ALJ's decision and order, issued from the bench on April 11, 2019, and memorialized by Order dated April 12, 2019, is **AFFIRMED**.

 ADM USCO

Signed at Washington, D.C. this 23 day of JULY, 2020.