SERVED: July 28, 2011

NTSB Order No. EM-209

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of July, 2011

ROBERT J. PAPP, JR., Commandant, United States Coast Guard, Appellee, v. ERIC N. SHINE, Appellant.	Docket ME-183

OPINION AND ORDER

Appellant, proceeding pro se, seeks review of the Vice Commandant's[1] decision on appeal (CDOA) 2689,[2] dated

[1] The Commandant has delegated to the Vice Commandant the authority to take final action in suspension and revocation proceedings.

[2] Appellant also seeks review of CDOAs 2661 and 2644, dated December 27, 2006 and February 2, 2004, respectively. We will address these CDOAs below.

September 30, 2010, which affirmed a decision and order issued by Coast Guard Administrative Law Judge (ALJ) Walter J. Brudzinski on November 13, 2008, following an evidentiary hearing held on May 20-23, 2008.[3] By that decision, the law judge denied appellant's appeal of the Coast Guard's March 6, 2003 complaint, specifically finding appellant medically incompetent to hold a certificate due to a major depressive disorder and a psychiatric condition under 46 U.S.C. § 7703[4] and 46 C.F.R. § 5.61.[5] The law judge ordered revocation of appellant's license and any other merchant mariner credentials issued by the Coast Guard. After careful review of the entire record, we deny appellant's appeal.[6]

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[3] Copies of the decisions of the Vice Commandant and law judge are attached.

[4] Section 7703 provides that a license, certificate of registry, or merchant mariner document may be suspended or revoked if the holder, while acting under authority of that license, commits as act of incompetence.

[5] Section 5.61 provides that an investigating officer may seek revocation of a license, certificate, or document when incompetence is proven.

[6] Appellant requested oral argument pursuant to 49 C.F.R. § 825.25(a). In reviewing the more than 20,000 pages of pleadings, transcripts, and briefs in this case, we find no good cause exists to grant oral argument in this case. Additionally, we partially granted appellant's motion to extend the page limit of his brief, allowing him to submit 50 pages.

Facts

This case proceeded to hearing after 5 years of highly contested litigation that included several hundred filings, an interlocutory appeal to the Commandant, and an appeal to the Commandant from a granting of summary judgment, which ultimately resulted in a remand to the law judge for a hearing. The law judge's decision and order (D&O), attached hereto, contains a detailed summary of the testimony and evidence presented at the hearing. As we find no basis to challenge the law judge's findings of fact, this opinion and order only includes a summary of the evidence as necessary to resolve the appeal before us.

On June 1, 2000 and July 5, 2001, the Coast Guard issued appellant merchant mariner credentials. Coast Guard Exhibit (CG Exh.) 2. From March 6 to June 11, 2001, appellant served as a third engineer and second engineer aboard the Steamship (SS) MAUI, operated by Matson Navigation. Chief Engineer Cecil Ray supervised appellant aboard the SS MAUI. Mr. Ray received his merchant mariner license after graduating from the Coast Guard Academy in 1970 and had extensive experience managing people. Mr. Ray testified he had daily interactions with appellant while appellant was aboard the SS MAUI, and found him extremely difficult to manage. Mr. Ray eventually had appellant

discharged from the SS MAUI for cause.[7] Appellant's performance rating aboard the SS MAUI cited him as being "totally unreasonable." CG Exh. 5.

From December 2, 2001 to January 5, 2002, appellant served as a third engineer aboard the Motor Vessel (M/V) PRESIDENT JACKSON, operated by American Ship Management. First Engineer Allen Hochstetler supervised appellant aboard the M/V PRESIDENT JACKSON. Mr. Hochstetler testified appellant would often argue with him about how to perform a task and would not follow orders. Eventually, as he was afraid for appellant's safety and the safety of others aboard the ship, Mr. Hochstetler assigned appellant menial and time-consuming welding tasks to keep appellant occupied. After experiencing numerous problems with appellant's behavior, Mr. Hochstetler submitted an email to the ship's captain explaining that appellant's behavior caused him to "fear for the safety of [his] being and [his] livelihood" and requested he be relieved of duty rather than supervise appellant on the next voyage. CG Exh. 12. Several other crewmembers also filed complaints about appellant's behavior. As a result, the master discharged appellant from the M/V PRESIDENT JACKSON, noting in the ship's log,

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[7] Maston Navigation later rescinded the discharge for reasons unknown to Mr. Ray.

> Eric Shine, 3rd Assistant Engineering Officer has been insubordinate and intimidating crew and officers of this vessel. Eric Shine has exhibited confrontational, unprofessional and aggressive behavior. Eric Shine has failed to follow lawful orders and making [sic] threats of litigation against several officers and the company.
>
> The above offenses represent misconduct and therefore, Eric Shine is hereby discharged for cause. Mr. Shine's continued presence aboard the vessel creates an un-seaworthy condition.

CG Exh. 19 at 21.

In addition to calling Messrs. Ray and Hochstetler as witnesses, the Coast Guard called Doctor (Captain) Arthur French, III, as an expert witness. Dr. French, though not a psychologist or psychiatrist, was the Chief of the Medical Evaluations Branch at the National Maritime Center and throughout his 24-year medical career worked extensively with psychological disorders as an emergency room doctor and as a flight surgeon. In preparation for the hearing, Dr. French reviewed all of appellant's medical records. He noted appellant filed workers' compensation disability claims after being discharged from the M/V PRESIDENT JACKSON, claiming he suffered from severe depression or a mood disorder. See CG Exh. 24, 25, and 70. He also noted that in January 2003, appellant was hospitalized. As part of the intake diagnosis, the treating doctor noted, "bipolar manic/depressive disorder not otherwise specified. Most recently depressed with mood congruency in the

form of paranoid delusions" and went on to state that the "patient was encouraged to undergo personality testing to rule out narcissistic/paranoid personality traits." CG Exh. 71 at 1. Dr. French explained that a doctor provides a "rule out" diagnosis when the doctor has insufficient information to make a diagnosis, but suspects such a diagnosis. After listening to the testimony of Messrs. Ray and Hochstetler, Dr. French testified that appellant's behavior aboard the SS MAUI and M/V PRESIDENT JACKSON was consistent with the diagnoses of major depression and personality disorders he observed in appellant's medical records. Specifically, he stated appellant's continual argumentativeness, inflexibility, and inability to follow orders all were characteristics indicative of these personality disorders. Dr. French also noted appellant's behavior at the hearing was consistent with the diagnoses in appellant's medical records.

In concluding his testimony, Dr. French stated he would not find appellant competent to hold merchant mariner credentials. He based this conclusion on a review of appellant's medical records, the testimony of Messrs. Ray and Hochstetler regarding appellant's behavior aboard the ships, and on personally observing appellant's erratic behavior during the hearing.

Procedural history

As a result of the incidents involving appellant aboard the SS MAUI and the M/V PRESIDENT JACKSON, the Coast Guard opened an investigation and, ultimately, issued a complaint to revoke appellant's merchant mariner credentials on March 6, 2003. The complaint alleged appellant acted under the authority of his credentials while serving on the SS MAUI and the M/V PRESIDENT JACKSON. CG Ex. 1 at 1. It further alleged appellant "is medically incompetent [to hold credentials] due to a depressive disorder, or other psychiatric condition." CG Exh. 1 at 2.

Appellant, initially represented by counsel, appealed.[8] The case was assigned to Administrative Law Judge Parlan McKenna. Judge McKenna issued three orders requiring appellant to submit to a psychological evaluation by an independent doctor, dated July 30, 2003, August 4, 2003, and September 8, 2003. Appellant refused to comply with these orders and instead submitted to an evaluation by a doctor of his choosing.

Through counsel, appellant filed a motion requesting Judge McKenna recuse himself, which the law judge denied on November 20, 2003. Appellant, pro se, subsequently filed a 48-

[8] Appellant was represented by counsel from two different law firms during the proceedings before Judge McKenna. Both attorneys moved to withdraw during the course of the proceedings.

page motion (including 3 volumes of 64 attachments) in an interlocutory appeal of the denial to the Commandant. The Vice Commandant issued CDOA 2644 on February 2, 2004, finding the recusal issue not ripe for review.[9]

On February 20, 2004, Judge McKenna granted the Coast Guard's contingent motion for summary judgment. In granting summary judgment, the law judge largely relied on appellant's refusal to submit to the psychological evaluation in drawing a negative inference regarding appellant's competency. Appellant, who then proceeded pro se, appealed Judge McKenna's decision to the Commandant.[10]

In CDOA 2661, dated December 27, 2006, the Vice Commandant vacated the summary judgment decision and remanded the case for a hearing. In that decision, the Vice Commandant noted the case presented an issue of first impression for the Coast Guard regarding the standard of review for a law judge to apply in granting a motion for summary judgment. The Vice Commandant found the law judge needed to hold a hearing to review the Coast Guard's evidence as well as the contrary evidence presented by

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[9] See 33 C.F.R. § 20.204(b)(2) which states, "[i]f an ALJ denies a motion to disqualify herself or himself, the moving party may, according to the procedures in subpart J of this part, appeal to the Commandant once the hearing has concluded" [emphasis added].

[10] Appellant's counsel formally moved to withdraw on April 12, 2004.

appellant's expert witness, to properly resolve whether appellant suffered from a major depressive disorder or psychiatric condition.

Immediately following the remand, Judge McKenna recused himself. Administrative Law Judge Brudzinski subsequently was assigned the case on January 30, 2007. Because of the large number of filings and the length of those filings in this case, Judge Brudzinski held a prehearing conference on October 23, 2007, to resolve several outstanding motions.[11] On February 26, 2008, Judge Brudzinski ordered appellant to submit to a psychological examination. Appellant, once again, refused to undergo an examination.

The case proceeded to hearing on May 20-23, 2008. At the hearing, the Coast Guard called the 3 witnesses, as summarized above, and introduced 71 exhibits. Appellant did not call any witnesses or testify on his own behalf at the hearing. He introduced 2 exhibits into evidence and started to introduce an additional 178 exhibits, but later withdrew them.

The law judge permitted the parties to file post-hearing briefs. Appellant filed a 173-page post-hearing brief with 18 attachments in 3 volumes totaling several thousand pages,

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[11] Prior to the remand, there were 179 filings in this case. Post remand, there were another 73 filings. Numerous filings were over 100 pages in length; several filings were over 1000 pages in length.

which included a 161-page affidavit from appellant. The Coast Guard did not submit a post-hearing brief.

On November 13, 2008, Judge Brudzinski issued his D&O. In addressing appellant's issues on appeal, the law judge noted,

> [D]ue to the convoluted nature of most of [appellant's] arguments, it would have been within the power of the undersigned to dismiss such arguments outright as being not probative and without merit. However, the undersigned has attempted to decipher [appellant's] arguments. After reviewing the transcript in-depth and upon studying [appellant's] 170 post-hearing brief topics, the undersigned determined [appellant's] arguments fall within five (5) general categories.

D&O at 26. The law judge denied appellant's appeal, finding the Coast Guard proved appellant was acting under the authority of his credentials while aboard the SS MAUI and M/V PRESIDENT JACKSON, and was incompetent. He concluded appellant "is suffering from mental impairments of sufficient disabling character to support a finding that he is not competent to perform safely his duties aboard a merchant vessel." D&O at 39. Therefore, Judge Brudzinski ordered revocation of appellant's merchant mariner license and any other credentials issued by the Coast Guard.

Appellant subsequently appealed the law judge's decision to the Commandant, filing a 534-page brief with well-over 1000 pages of attachments weighing nearly 22 pounds. On appeal, appellant purported to raise 149 issues. The Vice Commandant

affirmed the law judge's decision on September 30, 2010. In reaching her decision and analyzing the issues, the Vice Commandant noted:

> To ascertain [appellant's] salient arguments has proven a painstaking and arduous task, given the sheer volume of [appellant's] post D&O-filed pleading and his almost complete failure to clearly present the basis for appeal or to cite to portions of the record supporting his issues as required by 33 C.F.R. § 20.1003(a)(1) … [Appellant] has filed a multitude of ambiguous pleadings, leaving it to the undersigned to attempt to identify the issues suitable for review. A laborious assessment of [appellant's] filing has resulted in identifying the following twelve issues for consideration on appeal. Any other issues, points of discussion, or questions raised by [appellant], not enumerated below, are beyond the scope of appealable issues … and are deemed immaterial, irrelevant or unduly repetitious and are hereby denied.

CDOA at 7.

Issues on appeal

Appellant now appeals to this Board. Much like appellant's briefs to the law judge and Vice Commandant, we find it extremely difficult to ascertain appellant's issues on appeal. Despite appellant's repeated use of the phrase "CMDT erred CFR 825.15" throughout his brief, we find appellant's brief does not generally comport with the requirements of 49 C.F.R. §§ 825.15 and 825.20. However, after a painstaking and laborious review of appellant's brief subsequent to reviewing the entire record, we have identified eight general issues for consideration on appeal. Appellant contends the Board has

jurisdiction to review all 3 CDOAs—2689, 2661, and 2644—and that the Coast Guard lacked jurisdiction over this case. He alleges both law judges were biased and should have recused themselves from his case. Appellant claims the excessive delays and length of time it has taken to process this case have prejudiced his due process rights. He also claims the Coast Guard violated his due process rights since the Coast Guard did not provide him with counsel. He believes the law judge erred in ordering him to submit to a medical evaluation. He further asserts the law judge improperly admitted the Coast Guard's evidence while erroneously excluding his evidence and witnesses. Finally, appellant alleges the law judge's D&O is not supported by reliable, probative, and substantial evidence. The Coast Guard contests each of these arguments and urges us to affirm the Vice Commandant's appeal decision.

While we anticipate, based upon appellant's briefs to the Vice Commandant and to this Board, appellant will contend our analysis overlooks numerous issues raised in his appeal, we hold that any other issues purportedly raised in appellant's brief and not specifically addressed in this opinion and order are either subsumed by the issues listed above or are deemed denied as immaterial, irrelevant or unduly repetitious.

Jurisdiction of the Board

Appellant seeks de novo review by the Board of CDOAs 2689, 2661, and 2644. In CDOA 2689, the Vice Commandant affirmed Judge Brudzinski's D&O; in CDOA 2661, the Vice Commandant vacated Judge McKenna's decision granting summary judgment for the Coast Guard and remanded the case for a hearing; and in CDOA 2644, the Vice Commandant dismissed, without prejudice, appellant's interlocutory appeal regarding the recusal of Judge McKenna as not ripe.

While we reviewed the entire record, including the filings and rulings relevant to CDOAs 2661 and 2644, as part of our de novo review of this case, we lack jurisdiction to review CDOAs 2661 and 2644 in this appeal. Under our Rules of Practice, "[a] party may appeal from the Commandant's decision sustaining an order of revocation … by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision."[12] Accordingly, appellant only timely appealed CDOA 2689 to the Board.

Furthermore, we note CDOA 2644 is moot. In his interlocutory appeal, appellant sought Judge McKenna's recusal from the case. Judge McKenna recused himself after the

[12] See 49 C.F.R. § 825.5(a).

Commandant vacated his order and remanded the case. The Coast Guard's procedural rules permit the Commandant to remand a case to a Coast Guard administrative law judge: "[t]he Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings."[13] In CDOA 2661, the Vice Commandant found error; thus, appellant was the prevailing party. Therefore, our jurisdiction concerning this appeal is limited to reviewing CDOA 2689.

Jurisdiction of the Coast Guard

In his filings, at the hearing, and in his briefs to the law judge, the Commandant, and to us, appellant repeatedly has argued the Coast Guard lacks jurisdiction over his case. His arguments widely vary. Among his arguments, he claims the Shipping Commissioner's Act of 1871 [sic] should apply to the proceedings.[14] Appellant also contends he is a civilian and the Coast Guard subjected him to an unlawful military tribunal. At the same time, he claims he is a lieutenant in the Navy being

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[13] 33 C.F.R. § 20.1004(a).

[14] The Shipping Commissioners Act of 1872 was a United States law that governed mariners serving in the U.S. Merchant Marine. It has been superseded since 1872. The current rules governing merchant mariners are contained in Titles 33 and 46 of the Code of Federal Regulations.

subject to a military proceeding under the Uniform Code of Military Justice, by the Coast Guard, which is not a military branch of service. He asserts the Coast Guard is subjecting him to posse comitatus.[15] He claims the case is barred under double jeopardy. And repeatedly, he argues the proceedings were criminal; thus, he contends the Federal Rules of Evidence and the Federal Rules of Criminal Procedure should have applied. We find all these arguments without merit.

The Coast Guard clearly had jurisdiction over appellant's revocation proceedings. Appellant held merchant mariner credentials issued by the Coast Guard. See CG Exh. 2; see also Answer at 2 (Apr. 9, 2003). Congress gave the Secretary of the Department of Homeland Security "general superintendence over the merchant marine of the United States and of merchant marine personnel … In the interest of marine safety and seamen's welfare, the Secretary shall enforce this subtitle."[16] The Secretary delegated this authority to the Commandant of the United States Coast Guard.[17] Congress specifically gave the Secretary jurisdiction over merchant mariner licenses, certificates of registry, and documents. In relevant part, the

[15] 18 U.S.C. § 1385 (the Posse Comitatus Act prohibits members of the military from exercising state law enforcement powers on non-federal property within the United States).

[16] 46 U.S.C. § 2103.

[17] See Department of Homeland Security Delegation No. 0170.1.

statute states, "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder … (4) has committed an act of incompetence relating to the operation of a vessel."[18]

Congress also specified that merchant marine suspension and revocation hearings would be governed by administrative procedures.[19] We find the Coast Guard properly conducted these proceedings under the Administrative Procedure Act and the applicable Coast Guard regulations governing suspension and revocation proceedings.[20] The record clearly establishes the proceedings were not conducted as military tribunals, as proceedings under the Uniform Code of Military Justice, or in any other manner alleged by appellant. Furthermore, because the proceedings were administrative, the Federal Rules of Evidence and of Criminal Procedure were inapplicable here.[21] Likewise, the doctrine of double jeopardy is inapplicable in cases subject to our review.[22]

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[18] 46 U.S.C. § 7703(4).

[19] 46 U.S.C. § 7702(a).

[20] See generally 5 U.S.C. §§ 551-559 and 33 C.F.R. §§ 20.101-809.

[21] See Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995).

[22] See generally, Administrator v. Sardina, NTSB Order No. EA-4605 (1997).

Bias and recusal of the law judges

Appellant contends Judge Brudzinski and Judge McKenna should have recused themselves. Among other contentions, appellant argues Judge Brudzinski was biased because he was a former Coast Guard officer and a former prosecutor. Appellant further believes Judge Brudzinski was biased because he refused to vacate every order issued by Judge McKenna. Finally, he states Judge Brudzinski referred to appellant's "disease" during the hearing, indicating the law judge prejudged the outcome of the case.

We have held the standard of review for determining judicial bias is not simply whether actual bias or prejudgment had been demonstrated, but also whether the circumstances presented an unacceptable appearance concerning the law judge's impartiality.[23] In closely examining the entire record in this case, we find no evidence of actual bias or prejudgment nor do we find the appearance of bias.

Any issue involving Judge McKenna's alleged bias became moot in January 2007 when he sua sponte recused himself from the case under 33 C.F.R. § 20.204(b). Additionally, we note the record up to the point of Judge McKenna's recusal provides no evidence of any bias—actual or otherwise—on Judge McKenna's

[23] Commandant v. Dresser, NTSB Order No. EM-195 at 3 (2003); see also 28 U.S.C. § 455(a).

part. The record establishes he was an impartial arbiter in this case.[24]

Appellant produced no evidence that Judge Brudzinski's prior work as a Coast Guard officer and prosecuting attorney biased him against appellant. We likewise find no merit in appellant's argument that Judge Brudzinski erred by not vacating every prior order and ruling of Judge McKenna. Most of Judge McKenna's rulings concerned discovery issues and requests for extensions of time. Additionally, regardless of the prior rulings, appellant continued to re-litigate most issues raised before Judge McKenna with Judge Brudzinski. Therefore, Judge Brudzinski's ruling, with regard to Judge McKenna's prior rulings, was reasonable under the circumstances.

Finally, appellant claims Judge Brudzinski prejudged his case by referring to appellant as having a "disease" at one point during the hearing. We find no merit to this claim. While Judge Brudzinski appeared frustrated at times during the

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[24] Judge McKenna granted numerous extensions of time for appellant. He permitted appellant to release his first counsel and gave appellant time to obtain new representation. He ordered an in-person preconference hearing. He gave appellant three opportunities to comply with his order for a mental health examination. Overall, the chronology of the pleadings shows Judge McKenna ruled on the motions in a timely manner after providing both parties with opportunity to respond. Furthermore, appellant does not articulate how Judge Brudzinski's failure to vacate all of Judge McKenna's orders caused appellant to suffer prejudice.

hearing, as noted on the record, and made comment about appellant's disease at one point,[25] the record is devoid of evidence supporting a finding that the law judge harbored any actual or appearance of bias toward appellant or that the law judge prejudged the case. A review of the transcript clearly shows the law judge presided over a particularly difficult hearing. Appellant acted in an extremely disruptive manner throughout the hearing. During the course of the 4-day hearing, appellant objected over 400 times, and he continually interrupted the law judge, the Coast Guard attorney, and the witnesses. Appellant commented to the law judge that he "was not a real judge" so appellant did not have to respect him. He continued interrupting the proceedings despite repeated attempts by the law judge to control the situation. Immediately prior to the law judge making the comment about appellant's "disease,"

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[25] At this point in the record, the law judge remarked,

> I missed that last bit of testimony because of the disruptive behavior of [appellant] … If the hearing is frustrating and I can't hear anything—I'm letting this go to let the record reflect how disruptive this is. If I can't hear anything then I'm going to have to have [appellant] removed from the courtroom. I've given him warning, after warning, after warning, after warning, and he still does not understand. Perhaps it's the disease. Perhaps it's a combination of a lot of things. I don't know. He just is constantly interrupting … I have never ever seen such disruptive behavior.

Tr. at 469-70.

appellant's behavior became so disruptive the law judge requested the presence of security in the courtroom.

Additionally, the law judge, considering appellant was pro se, spent 2 days of the hearing attempting to explain procedures to appellant and, to the extent permissible under the rules, trying to assist appellant in introducing his 178 exhibits. Although not required by the rules, the law judge permitted parties to submit post-hearing briefs, further demonstrating he provided appellant multiple opportunities to present his case. Nothing in the record before us suggests the law judge prejudged the case or based his decision on anything but the evidence adduced at the hearing, and thus, we find no reason for the law judge to have recused himself from the hearing. Given the circumstances, we find the law judge conducted the hearing as professionally as possible.

Case delays

Appellant claims a violation of his due process rights because of the excessive delays in processing this case. At the same time, he asserts the law judge erred in not giving him sufficient time to put together his exhibits for the hearing and we erred in not providing him more time to file his brief with the Board.

In examining appellant's claim that the Coast Guard violated his due process rights by causing excessive delay in

his case, we adopt the Coast Guard's analysis of determining due process violations with regard to delays.[26] Therefore, to determine if an appellant's due process right to timely action was violated, we will examine the length of delay, the reasons for the delay, any delay attributable to the appellant (e.g., whether the appellant asserted a right to timely processing), and the prejudice suffered by the appellant as a result of the delay.

Under 46 C.F.R. § 5.55, the Coast Guard must serve a complaint related to an act of incompetence within 5 years of the commission of the act. In this case, the alleged acts of incompetence occurred between March 6, 2001, and January 5, 2002. The Coast Guard served the complaint on March 6, 2003, which was in compliance with the 5-year time limit. During that timeframe from January 2002 to March 2003, the record shows the Coast Guard was working to obtain the various medical records and disability claims filed by appellant to support the complaint. Thus, this period of delay was not unreasonable.

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[26] See Appeal Decision 2064 (WOOD); Appeal Decision 1972 (SIBLEY). This test essentially mirrors the balancing test for determining speedy trial violations established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972). While Barker was a criminal case, other courts have applied similar balancing tests in examining appellate delays, see, e.g., Coe v. Thurman, 922 F.2d 528, 531-32 (9th Cir. 1990); and in examining delays by administrative agencies, see, e.g., Telecomm. Research and Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

From service of the complaint until the Vice Commandant issued CDOA 2689, over 7 years passed. However, during that period of time, the record contained over 250 filings totaling well over 15,000 pages, several transcribed prehearing conferences, and a 4-day hearing. Appellant filed three separate appeals with the Vice Commandant, one of which resulted in a remand for a hearing.

Under the circumstances of this case, we find no unreasonable delay in the processing of the case. Much of the delay in this case is attributable directly to appellant.[27] He filed numerous requests for extensions of time. He refused to comply with 4 orders to submit to mental health examinations. Appellant's filings, especially after he became pro se, were extremely lengthy and difficult to understand. The record clearly shows Judge McKenna and Judge Brudzinski both worked diligently to ensure appellant received a fair and complete hearing. Both conducted prehearing conferences on the record for the benefit of appellant. We find the law judges acted reasonably and timely in processing the case.

The Vice Commandant also had a herculean task in reviewing the record on appeal. In CDOA 2661, the Vice Commandant

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[27] We note appellant never asserted a right to timely processing; however, given the administrative nature of these proceedings and appellant's pro se status for much of the time, we decline to draw any negative inference from this fact.

remanded the case, ensuring appellant received a full hearing on the issue of his competency. The remand obviously caused further delay in this case, but also benefitted appellant and protected his due process rights. In CDOA 2689, the Vice Commandant thoroughly reviewed the extremely lengthy record and the law judge's D&O before issuing a detailed decision. Despite the passage of time, we find the overall processing of this case reasonable under the unique circumstances involved here.

Even assuming the delay was excessive and unreasonable, we find appellant has shown no prejudice. Appellant cannot point to an unavailable witness or lost documentary evidence suffered as a result of the delay or any other type of prejudice. Overall, we conclude appellant's due process rights were not violated due to the processing time of this case.

Related to this issue, we also find no prejudice to appellant in the denial of extensions of time by the law judge and by the Board. Appellant requested a 2-week delay at the end of the Coast Guard's case to put together his exhibits for the hearing. As the law judge pointed out at the hearing, appellant had been on notice of the hearing date and therefore had sufficient time to organize his exhibits. As discussed below, the law judge repeatedly tried to accommodate appellant and assist him in introducing his exhibits but, in the end,

appellant refused to introduce the exhibits. Under the Board's rules, an appellant's brief is due to the Board within 20 days of filing a notice of appeal.[28] The Board granted appellant three 30-day extensions of time (90 days total). We find this to be more than a reasonable amount of time.

Right to counsel

Appellant contends his due process rights were violated because the Coast Guard should have provided him counsel. Appellant was represented by counsel until shortly after Judge McKenna granted summary judgment.[29]

While 33 C.F.R. § 20.301 provides that a party may be represented by counsel, suspension and revocation hearings are administrative proceedings, not criminal. Therefore, appellant has no right to government-provided counsel.[30] Appellant was aware of his right to hire counsel or designate a representative, but chose not to retain additional counsel to

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[28] 49 C.F.R. § 825.20(a).

[29] At various points in the record, appellant claimed his counsel did not represent him and was not authorized to act on his behalf but instead was hired by the shipping company and was being forced upon him.

[30] The 6th Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall … have the assistance of counsel for his defense." See Austin v. United States, 509 U.S. 602, 608 (1993); M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996); see also, Administrator v. Mize, NTSB Order No. EA-5580 (2011); Administrator v. Bakhit, NTSB Order No. EA-5489 (2009); Administrator v. Nadal, NTSB Order No. EA-5308 (2007).

assist in later proceedings.

Medical evaluation

Appellant argues the law judge violated his due process rights by ordering him to submit to a mental health evaluation prior to the hearing. On three occasions, Judge McKenna ordered appellant to submit to mental health evaluations, and on one occasion, Judge Brudzinski ordered a mental health evaluation. Appellant never complied with these orders.

In Coast Guard suspension and revocation hearings, 33 C.F.R. § 20.1313 provides, "[i]n any proceeding in which the physical or mental condition of the respondent is relevant, the ALJ may order him or her to undergo a medical examination. Any examination ordered by the ALJ is conducted, at Federal expense, by a physician designated by the ALJ." The central issue in this case involved appellant's competency to hold merchant mariner credentials. Under these circumstances, we find it appropriate for the law judge to order a mental health evaluation. The Vice Commandant overturned Judge McKenna's order granting summary judgment in which Judge McKenna drew a negative inference against appellant due to the lack of mental health examination. Overall, appellant does not explain how the law judge's order that he complete a mental health evaluation under 33 C.F.R. § 20.1313 violated his due process rights.

Evidence and witnesses

Appellant also contends the law judge's rulings on evidence and witnesses prejudiced him. Specifically, appellant argues the law judge improperly allowed the Coast Guard to introduce his medical records in violation of the physician-patient privilege. He asserts the medical records were unlawfully obtained and/or falsified by the Coast Guard. Additionally, he claims the law judge improperly excluded his documentary evidence and refused to issue subpoenas for his witnesses.

The physician-patient privilege does not apply for purposes of Coast Guard suspension and revocation proceedings.[31] Furthermore, we find no evidence the Coast Guard illegally obtained any document in this case. To the contrary, the record shows the Coast Guard issued lawful subpoenas for medical records and obtained other documents from public records.[32] Finally, the record is bereft of any evidence the Coast Guard falsified records; this is simply a baseless accusation by appellant.

We have long held law judges have significant discretion in overseeing testimony and evidence at hearings, and we typically

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[31] See 46 C.F.R. § 5.67.

[32] We also note Judge McKenna issued a protective order for the medical records.

review law judges' evidentiary rulings under an abuse of discretion standard, after a party can show that such a ruling prejudiced him or her.[33] In the instant case, appellant has neither established that the law judge abused his discretion, nor demonstrated the law judge's alleged errors resulted in prejudice.

Turning to appellant's own exhibits and witnesses, we find appellant's arguments on these issues meritless as well. The law judge spent nearly two days of the hearing attempting to assist appellant in introducing his exhibits and in understanding procedures. The Coast Guard offered to stipulate to the admission of all of appellant's documentary evidence. Tr. at 679. However, appellant ultimately refused to introduce all but two exhibits. He repeatedly started to introduce exhibits, but then withdrew documents, asserting an attorney-client privilege. In the end, he only introduced two exhibits

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[33] See generally Commandant v. Shea, NTSB Order No. EM-204 at 7 (2008). See also Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006), in which we held we will not overturn a law judge's evidentiary ruling unless we determine the ruling was an abuse of discretion); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010)). Cf. Administrator v. Ferguson, 352 Fed. Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (holding that law judge erred in curtailing cross-examination of FAA witness, because witness was central to Administrator's case and ruling was therefore prejudicial).

at the hearing; however, the law judge provided the parties with the opportunity to present post-hearing briefs. In his post-hearing brief, appellant attached over 1,000 pages of documents for the law judge's consideration.[34] We find the law judge gave appellant every opportunity to introduce his documentary evidence and appellant failed to avail himself of these opportunities; the law judge did not abuse his discretion and appellant cannot show he suffered prejudice.

Likewise, we find no basis in appellant's claims that the law judge denied him witnesses. The law judge repeatedly informed appellant he could testify in his own defense. Appellant chose not to testify. Tr. at 680, 683, 684, 711, 741, 743, 769. The law judge also offered appellant the opportunity to call witnesses. Tr. at 714, 725, 743, 865. Instead of calling witnesses, appellant argued the law judge improperly refused to issue subpoenas to his witnesses.

Under 33 C.F.R. § 20.608, any party may request the law judge to issue a subpoena for witnesses to testify; however, the rule requires a showing that the evidence be relevant to the hearing. Appellant requested the law judge subpoena 130 witnesses for his case—the list included Senator Dianne

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[34] It is not possible to determine from the record whether the documents attached to the brief were the same documents appellant was attempting to introduce at hearing.

Feinstein, Senator Barbara Boxer, Congressman Elijah Cummings, Admiral Thad Allen, and the law judge—but failed to proffer how these witnesses were relevant to the case. Therefore, the law judge refused to issue subpoenas.

Appellant made no attempt to call any witness, other than Cecil Ray, during his case. When he tried to call Mr. Ray, appellant could not articulate what new testimony he would elicit from Mr. Ray separate and apart from that obtained during cross-examination, so the law judge denied his request. In summary, the record establishes the law judge did not improperly prevent appellant from introducing documentary evidence or witness testimony at the hearing.

The law judge's D&O

Appellant generally attacks the law judge's D&O. He contends that each of the 53 findings of fact are erroneous; he claims the D&O contains hundreds of errors; and he states his incompetence was not proven by the Coast Guard's evidence.

Pursuant to the regulation implementing the Board's authority to review decisions of the Commandant, the Board will only consider whether:

> (a) A finding of material fact is erroneous;
>
> (b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;
>
> (c) A substantial and important question of law,

policy, or discretion is involved; or

(d) A prejudicial procedural error has occurred.[35]

On appeal to the Board, appellant raises essentially the same, mostly extraneous, non-substantive objections he presented to the Vice Commandant and the law judge. Based upon the evidence adduced at the hearing, the law judge's findings of fact were not erroneous. The record, developed through the testimony of the lay and expert witnesses along with the information from the medical records, unequivocally established appellant suffers from manic depression and bipolar disorder.[36] He exhibits characteristics of narcissistic, obsessive compulsive, and paranoid personality disorders. He refuses any treatment for these disorders. The record showed appellant's disruptive, erratic, and sometimes dangerous behavior aboard the SS MAUI and the M/V PRESIDENT JACKSON was the outward manifestation of his diseases and significantly affected the safety aboard both vessels. After a careful review of the Vice Commandant's CDOA as well as the law judge's D&O, we find both decisions comprehensively addressed all matters warranting discussion, as well as some that did not. Because we find none of appellant's

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[35] 49 C.F.R. § 825.15.

[36] We also note appellant's erratic and constantly disruptive behavior throughout the hearing further supported the Coast Guard's case regarding appellant's mental state and inability to perform his duties as a merchant marine.

contentions establishes reversible legal or factual error, we sustain the Vice Commandant's decision. As a result of the severity of these diseases, appellant is not competent to perform duties safely aboard a merchant marine vessel, and revocation is the appropriate sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied; and

2. The Vice Commandant's appeal decision affirming the law judge's decision and order is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.