

**STATEMENT OF WILLIAM HEWIG, ESQ.  
TO THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON COAST GUARD AND MARITIME AFFAIRS  
ON THE  
REVIEW OF THE COAST GUARD'S ADMINISTRATIVE LAW SYSTEM  
  
JULY 31, 2007**

**Mr. Chairman and Members of the Subcommittee:**

My name is William Hewig. I am a Principal in the Boston, Massachusetts, law firm Kopelman & Paige. I also serve as a counsel for Coast Guard and legal aid matters for the International Organization of Masters, Mates & Pilots (MM&P). I have represented, and continue to represent merchant marine officers represented by the MM&P in matters before the Coast Guard and Coast Guard Administrative Law Judges.

**I. INTRODUCTION**

This paper will discuss the details of two Coast Guard license cases to illustrate two problems recently encountered with the Coast Guard's administrative law system, and which may relate to questions recently raised about the integrity of the system by retired administrative law judge Jeffie L. Massey. The two problems to be discussed are the appearance of and probable existence of bias on the part of an administrative law judge ("ALJ"), and a stated policy on the part of another ALJ not to grant discovery.

**II. DISCUSSION**

The Coast Guard Vice Commandant has recognized the necessity and importance of a neutral judge.<sup>1</sup> In the McDonald case, the first case discussed, the ALJ below appeared to be anything but neutral as the following narrative will show.

Dominic McDonald, a licensed American merchant marine officer, took a voluntary pre-employment drug screening test on July 31, 2000.<sup>2</sup> Although he tested negative on all five major drug groups, his creatinine<sup>3</sup> level was measured at 3 mg/dL, below the regulatory minimum of 5 mg/dL then in effect,<sup>4</sup> and because of that the Coast Guard automatically deemed his specimen substituted and charged him with misconduct.<sup>5</sup>

At the administrative hearing conducted at Houston, Texas on May 16-18, 2001,<sup>6</sup> McDonald introduced a wealth of evidence that he was not a drug user and that his urine had not been substituted: his specimen was the proper color and proper temperature;<sup>7</sup> he had been properly monitored by the collector at the sampling center, who testified that McDonald did not carry any foreign substances into the sampling area, did not do anything he was not supposed to do while drawing the sample; he followed all rules for the testing procedure;<sup>8</sup> he tested negative for all five drug groups;<sup>9</sup> he had never tested positive in any prior drug screening test;<sup>10</sup> his own family doctor, whom he had known well for eight (8) years, testified that he was “absolutely not” a drug user;<sup>11</sup> a Substance Abuse Professional (a counselor known as a “SAP”) testified that, in his opinion, it was “pretty obvious” that McDonald had a “very low probability” of having a substance dependence disorder;<sup>12</sup> he had never had any civilian substance abuse convictions including DWI;<sup>13</sup> he did not in any way substitute or adulterate his urine specimen;<sup>14</sup> the test was in all respects totally voluntary, and he could in fact have returned to work without the test;<sup>15</sup> and finally a medical toxicological expert testified that prescription medications being taken by McDonald at the time of the voluntary drug screening test could, with a reasonable degree of medical certainty, have caused a condition called “water loading”, which could have resulted in a lowering of McDonald’s creatinine level to 3 mg/dL by natural causes.<sup>16</sup>

All of the above evidence was, in effect, un rebutted by any qualified witness called by the Coast Guard,<sup>17</sup> yet the ALJ found against McDonald based predominantly on a misplaced reliance on the validity of the test score.<sup>18</sup> That misplaced reliance is not however the main focus here; the main focus here is a procedure so apparently replete with bias on the part of the ALJ that it denied McDonald justice for over five years. The focus here is a procedure that certainly appeared to have been both abused and broken. And if the serious charges raised by Judge Massey are correct, this case may be the barometer of an entire system that is broken by design. A few egregious examples from the McDonald case will suffice to illustrate the point.

An apparent bias on the part of the ALJ was written in longhand throughout his Decision and Order. This is obvious, first, by examining his treatment of the various witnesses. All of the Coast Guard’s witnesses found themselves awash in a sea of praise: Patricia Rodriguez, who authenticated the drug testing custody and control forms, and briefly discussed the testing procedure, did so “credibly”;<sup>20</sup> Dr. Katsuyama, a Medical Review Officer who never interviewed McDonald, did not even testify at the hearing, and whose only probable role was to apply a rubber stamp to a photocopied form, was praised to skies as a “trained and experienced

MRO who has testified before me in many prior cases. I find his reports as an MRO credible and reliable.”<sup>21</sup> Even the Coast Guard’s exhibits found themselves the object of lavish praise. Three exhibits, nos. 9, 10, and 11, consisting of two memoranda and a journal article,<sup>22</sup> the latter probably produced in violation of the nation’s copyright laws<sup>23</sup> were offered by the Coast Guard to support its claim that no human urine specimen could fall outside the 5 mg/dL cutoff. The article (Exhibit 10), according to the ALJ “proved that the cutoff requirement was established by DHHS in careful and deliberate consultation” with the Department of Transportation “only after an extensive review and study of...forensic toxicology literature.”<sup>24</sup> Elsewhere in his Decision, the ALJ praised the article as “scientifically or medically valid and reliable”, language that was merely lifted verbatim from the documents themselves.<sup>25</sup> In a further indication of apparent bias, the ALJ sustained McDonald’s objections to admissibility of Exhibit 10, but then improperly relied upon it in his Decision and Order under the totally inapplicable theory of “judicial notice”<sup>26</sup> These are not the acts of a neutral judge.

In contrast to the flowing rivers of praise for the Coast Guard’s witnesses and exhibits, McDonald’s witnesses were treated with nearly universal derision. Dr. Anthony Colucci, the medical expert who testified that medication and water loading could indeed create a 3 mg/dL creatinine level by natural causes, came in for particularly harsh abuse: he provided “totally unsupported opinion testimony”; he gave a “paid expert’s unsupported opinion”; he relied on a “so-called study”; and this main battery salvo by the ALJ: “this scientist was paid thousands of dollars to testify on Respondent’s side of the case. His credibility is found questionable.”<sup>27</sup> Ordinary and minor matters were seized upon by the ALJ and crafted into fatal flaws. When McDonald told his SAP that he took no drugs, thinking the question meant illegal drugs rather than prescription drugs, the ALJ arbitrarily but predictably debunked the SAP’s opinion. This was completely inexplicable because the misunderstanding was easily cured at the hearing,<sup>28</sup> and especially considering the fact that McDonald had never denied taking prescription drugs – indeed, that fact was the main cornerstone of his defense.

In another, and more telling example of apparent bias, the ALJ misrepresented the SAP’s evidence, then used that misrepresentation to deride the credibility of both the SAP and McDonald. Included in the SAP’s screening interview was a “defensiveness” component. The SAP, who was a licensed Substance Abuse Counselor, a certified Employee Assistance Professional and held both a Bachelor’s and Master’s degrees in relevant fields of discipline, conducted a face to face interview with McDonald, and concluded that McDonald’s

“defensiveness” component was “low-medium”. The SAP explained at the hearing, in testimony that was un rebutted, that this was understandable, expected and normal because “people are always scared about being there because, of course, many times their job is resting on the results of this test.”<sup>29</sup> The SAP later stated his professional conclusion that McDonald was “being very honest,...open and cooperative.”<sup>30</sup>

Without any justification, without any contrary or rebuttal evidence, and without any logical explanation whatsoever, the ALJ misrepresented the SAP’s testimony completely:

“this SAP failed to consider that Respondent McDonald scored fairly high...on the ‘defensiveness’ component...Respondent’s elevated defensiveness scores...calls into serious question the veracity and credibility of his responses to this SAP...”<sup>31</sup> (emphasis added)

In one sweeping but unsupported conclusion, the ALJ struck a triple blow for the Coast Guard by judicial fiat; he converted a “low-medium” defensiveness score to a “fairly high” score (despite the inconvenient fact that no such evidence existed anywhere on the record), and he then proceeded to rely on his own misrepresentation of the testimony to disparage the credibility of both the SAP and McDonald. This is not the act of a neutral judge. But this act of bias on the part of the ALJ is nothing compared to his handling of Coast Guard witness George Ellis.

George Ellis is certainly no stranger to Coast Guard administrative law hearings involving drug screening tests. As the President of Greystone Health Sciences Corp., a beneficiary of many no-doubt lucrative contracts with agencies of the United States government,<sup>32</sup> Ellis routinely testifies at drug hearings in the limited areas of medical review officer responsibilities, federal regulations and guidelines relating to the MRO, and interpreting laboratory test results.<sup>33</sup> At the time, Ellis had neither an M.D. or a Ph.D.; his highest education was a Bachelor’s Degree in Psychology from Read College in Portland, Oregon.<sup>34</sup> In this hearing, Ellis was called by the Coast Guard for the limited purpose of testifying as an expert in “federal regulations and guidelines relating to the MRO and laboratory responsibilities.”<sup>35</sup> The ALJ was not however content to let Mr. Ellis’ testimony be so confined. Over specific objections by McDonald’s counsel, the ALJ (not the Coast Guard I.O.) asked repeated questions of Ellis calling for medical or scientific opinion testimony to which Ellis had earlier admitted he was not qualified to give.<sup>36</sup> Disregarding the minor detail of his lack of qualifications, and skillfully led in direct examination by the ALJ, Ellis testified on the record and under oath to the following medical or scientific facts: (1) the same scientific principles spelled out in the older 1998 articles and memoranda introduced as exhibits 9, 10 and 11 were still valid in the year

2000; (2) the scientific test results set forth in exhibits 9, 10, 11, were valid and credible; and (3) Prozac, antihistamines, and other medications mentioned by McDonald do not effect creatinine levels in a drug screening urine sample.<sup>37</sup> When McDonald's counsel objected, again, that Ellis was not qualified to give medical opinion testimony, the ALJ said: "Well yes, we have established that, but I'll allow his testimony."<sup>38</sup> And the ALJ, of course, relied on this testimony in finding against McDonald.<sup>39</sup>

Administrative Law Judges are undoubtedly endowed with broad discretionary powers, but the power to turn a sow's ear into a silk purse is not one of them. Whatever else he might have been, George Ellis was no medical expert. In leading an examination that knowingly euded medical opinion testimony from a witness who admitted freely that he was not qualified to give it, the ALJ became not only a zealous advocate for the Coast Guard, but on the Coast Guard's behalf, the ALJ became an accessory to a fraud committed against himself. This is hardly the act of a neutral judge.

The three-day hearing transcript contained many more incidents of apparent bias on the part of the ALJ. It was impossible to read the hearing transcript in its totality and come to the conclusion that the ALJ was neutral. This case could, of course, simply be an aberration; but if the serious charges recently raised by Judge Massey are correct, this case suddenly begins to look like the rule, not the exception.

A brief post-script to this case is needed in order to comprehend the full magnitude of the injustice done in the McDonald case. Two years after the decision, in 2003, the Department of Transportation changed its regulations. It concluded that creatinine levels of 3 mg/dL COULD in fact occur naturally in some persons, particularly in response to medications.<sup>40</sup> The Coast Guard's "careful and deliberate consultations" and its "extensive reviews and studies" were, in the end, wrong; and the "totally unsupported opinion testimony" based on a "so-called study" by McDonald's "paid expert" was, in the end, right. And although the Vice Commandant, during the course of the appeal, had all of this information at his fingertips, he did not see fit to set the matter right.<sup>41</sup> It took a suit in federal court before justice was finally done, five years after the fact, accompanied by agreement by the Coast Guard to pay \$10,000 towards McDonald's attorneys fees.<sup>42</sup> Such is the cost of judicial bias to our society in terms of both time and treasure.

We will now turn to the matter of discovery. In a recent misconduct claim, the Coast Guard Complaint raised factually complex, and in some cases, vaguely-stated claims of sexual harassment against a licensed officer. In an initial telephone conference call with the Coast

Guard and the ALJ, I told the ALJ that because of what I believed were several statute of limitations problems, raised by the charges in the Complaint, I intended to ask for discovery. In response the ALJ stated, in effect: “I do not allow discovery. It turns my cases into a circus. If problems arise at the hearing, I will grant relief on the ‘back side’.” The ALJ then ordered the Coast Guard to release its witness statements, but rather than clearing up the issues, those statements only further complicated them.<sup>43</sup>

When in 1998 the Coast Guard sought to amend its Suspension and Revocation (“S&R”) rules of procedure, its Notice of Proposed Rulemaking stated that the new discovery rules it wanted would “save time, effort, and money for all parties who are or may become involved in Coast Guard actions.”<sup>44</sup> In her Memorandum dated March 31, 2005, Judge Jeffie J. Massey noted that the Coast Guard applied the concept of “economy” only to itself, not to the respondents.<sup>45</sup> That, if true, would be clearly contrary to the Coast Guard’s stated purpose for amending its discovery rules in 1998. And of course any policy by an ALJ that discovery will not be allowed at all is contrary to the Coast Guard’s regulations which, on their face at least, permit discovery.<sup>46</sup>

In the last case discussed, economy – for all sides – would have been well served by allowing discovery tailored to the statute of limitations issue. Reducing the issues for trial is always an act of economy – for both sides as well as the judge. Reducing or clarifying issues, and full disclosure of evidence, also serves the valuable and economic purpose of permitting a full and fair evaluation of a case for purposes of settlement. Hiding discoverable evidence from the opponent promotes distrust, discourages settlements, and leads to “trial by surprise,” which all agree does not promote the ends of justice.<sup>47</sup>

The ALJ who informed me that he does not allow discovery may have been acting on his own personal initiative, or he may have been a part of a broader design, as suggested by Judge Massey. Either way, it is a violation of the letter of the rules themselves, and in the end, neither justice nor economy are served.

### **III. CONCLUSIONS – POLICY CONSIDERATIONS**

#### **(a) General Conclusions:**

In Appeal Decision 2649, the Coast Guard Vice Commandant addressed the respondent’s constitutional claims by stating that “Respondent’s due process rights have been safeguarded within the Coast Guard’s administrative process;...”<sup>48</sup> No reasonable observer can look at the

totality of the Dominic McDonald case and conclude that his due process rights were “safeguarded” by the treatment he received at the hands of the Coast Guard’s “administrative process.” In the same decision, the Vice Commandant then went on to state that the record “clearly indicates that Respondent has been afforded the right to appear before a neutral trier of fact...” (emphasis added). Once again, it is difficult to understand how anyone looking at the totality of the McDonald case could conclude that the ALJ in that case was neutral. The United States District Court for the Southern District of Texas, Houston Div., into which the McDonald case got appealed, did not think so either. That is why the Coast Guard ended up paying \$10,000 in attorney fees to settle the case.

A system that produces such a result as the McDonald case is broken. A system which permits (if not outright encourages) an ALJ to advance his own discovery policy contrary to publicly stated policy and rules is also a system broken. And, considering that the results reached in both cases are completely consistent with the serious charges of ex parte agency interference raised by Judge Massey, it is our duty to ask whether this is in fact a system broken by intent, and if so, how it can be fixed.

(b) Policy Considerations:

(1) S&R Administrative Law Judges Must Be Truly Independent:

Merchant Marine licenses and documents are livelihoods. They are mortgage payments, college tuition payments and food on the table. It is absolutely essential to the integrity of the Coast Guard’s regulatory and supervisory powers over the industry that the ALJs who preside over this segment of Coast Guard authority be truly independent from any control, supervision or interference by the Coast Guard. The alternative, as the Coast Guard unhappily found out in the McDonald case, is not only legally unacceptable, but also expensive. The fox should no longer be allowed to guard the hen house.

It is important to note that the ALJ and appeals system that covers the Federal Aviation Administration and employees under its jurisdiction, primarily dispatchers and pilots, is a good example of a system that is set-up to ensure that the process is not under the command and control of the Federal agency that made the initial decision. In this case, after the FAA issues a decision affecting a dispatcher or pilot, the affected individual files his appeal with a National Transportation Safety Board (NTSB) ALJ, not with an FAA ALJ. In addition, after the

ALJ issues a decision, either the FAA or the individual is entitled to file an appeal to the full 5-Member NTSB, not with the FAA itself.

This system should be looked at as a model of how an ALJ and appeals process should be set-up. It serves as a good example of a system that operates at an appropriate arms-length distance from the involved Federal agency, and does as much as possible to ensure that only those individuals having no direct relationship to or involvement with the agency will be hearing appeals and deciding the fate of the affected worker.

(2) Discovery Should Be Freely Granted Upon A Showing of Cause:

The Coast Guard's rules as currently written permit this, but the practice in many cases does not. Judge Massey correctly recognized that discovery does serve economy.<sup>49</sup> I urge the subcommittee to be guided by her insights, and to consider crafting amendments to the rules to guarantee a right of limited or tailored discovery for good cause shown.

(3) Medical and Scientific Cases Should Be Determined On A Case By Case Basis And Not By Arbitrary Cut-Off Criteria:

The United States Supreme Court has recognized that "scientific conclusions are subject to perpetual revisions."<sup>50</sup> The Coast Guard recognized that also, when it amended its 1998 creatinine cut-off criteria from 5 mg/dL down to the current level of 2 mg/dL<sup>51</sup>. But although the regulations have been amended, the problem persists: it is still an absolute minimum, precluding a case by case determination.<sup>52</sup> The Coast Guard knows how to do better. In circumstances where the Coast Guard declines to renew a mariner's license for medical reasons, the Coast Guard historically has relied upon guidelines allowing a case by case determination.<sup>53</sup> I urge the Subcommittee to propose an amendment to the current regulation, 49 CFR §40.93, to make the cut-off criteria a rebuttable presumption. It is not just common sense and justice that are at stake here; it is also, as the Coast Guard learned the hard way in the McDonald case, an issue of economy.

Thank you for your sincere concern for the welfare of America's merchant mariners, as well as for the honor and the integrity of the Administrative Law system set up to oversee their affairs.