

such an investigation, the Board's rules of practice for transportation accident hearings in 49 CFR part 845 shall apply.

(b) The Board shall conduct an investigation under the Act when:

(1) The casualty involves a Coast Guard and a non-public vessel and at least one fatality or \$75,000 in property damage; or

(2) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty involves a public and a non-public vessel and at least one fatality or \$75,000 in property damage; or

(3) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions.

[CGD 82-034, 47 FR 45882, Oct. 14, 1982]

§ 4.40-20 Cause or probable cause determinations from Board investigation.

After an investigation conducted by the Board under § 4.40-15, the Board determines cause or probable cause and issues a report of that determination.

§ 4.40-25 Coast Guard marine casualty investigation for the Board.

(a) If the Board does not conduct an investigation under § 4.40-15 (a), (b) (2) or (3), the Coast Guard, at the request of the Board, may conduct an investigation under the Act unless there is an allegation of Federal Government misfeasance or nonfeasance.

(b) The Board will request the Coast Guard to conduct an investigation under paragraph (a) of this section within 48 hours of receiving notice under § 4.40-10(c).

(c) The Coast Guard will advise the Board within 24 hours of receipt of a request under paragraph (b) of this section whether the Coast Guard will conduct an investigation under the Act.

[CGD 82-034, 47 FR 45882, Oct. 14, 1982]

§ 4.40-30 Procedures for Coast Guard investigation.

(a) The Coast Guard conducts an investigation under § 4.40-25 using the

procedures in 46 CFR 4.01-1 through 4.23-1.

(b) The Board may designate a person or persons to participate in every phase of an investigation, including on scene investigation, that is conducted under the provisions of subpart 4.40-25 of this part.

(c) Consistent with Coast Guard responsibility to direct the course of the investigation, the person or persons designated by the Board under paragraph (b) of this section may:

(1) Make recommendations about the scope of the investigations.

(2) Call and examine witnesses.

(3) Submit or request additional evidence.

(d) The Commandant provides a record of the proceedings to the Board of an investigation of a major marine casualty under paragraph (a) of this section.

(e) The Board, under the Act, makes its determination of the facts, conditions, circumstances, and the cause or probable cause of a major marine casualty using the record of the proceedings provided by the Commandant under paragraph (d) of this section, and any additional evidence the Board may acquire under its own authority.

(f) An investigation by the Coast Guard under this section is both an investigation under the Act and under 46 U.S.C. Chapter 63.

[CGD 76-149, 42 FR 61200, Dec. 1, 1977, as amended by CGD 95-028, 62 FR 51195, Sept. 30, 1997]

§ 4.40-35 Records of the Coast Guard and the Board.

(a) Records of the Coast Guard made under § 4.40-30 are available to the public under 49 CFR part 7.

(b) Records of the Board made under §§ 4.40-20 and 4.40-30 are available to the public under 49 CFR part 801.

PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION

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AUTHORITY: 46 U.S.C. 2103, 7101, 7301, 7701; 49 CFR 1.46.

SOURCE: CGD 82-002, 50 FR 32184, Aug. 9, 1985, unless otherwise noted.

Subpart A—Authority and Purpose

§ 5.1 Authority for regulations.

(a) The basic authority governing administrative actions against a person's license, certificate or document is set forth in title 46 U.S.C. chapter 77. The Administrative Procedure Act, title 5 U.S.C. section 551, *et seq.*, requires hearings held in conjunction with these administrative actions to be presided over by an Administrative Law Judge.

(b) Title 46, U.S.C., section 7704 requires revocation of a license, certificate or document of any person who has been shown at a hearing to be a user of or addicted to the use of a dangerous drug or to have been convicted of violating a dangerous drug law of the United States, District of Colum-

bia, or any state or territory of the United States.

§ 5.3 Purpose of regulations.

The regulations in this part establish policies and procedures for administrative actions against mariners' licenses, certificates or documents issued by the Coast Guard.

§ 5.5 Purpose of administrative actions.

The administrative actions against a license, certification 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.

Subpart B—Definitions

§ 5.11 Commandant.

For the purpose of this part, *Commandant* means the Commandant of the Coast Guard. In subparts I, J, and K of this part, the term Commandant includes the Vice Commandant of the Coast Guard acting on behalf of the Commandant in any proceeding involving final agency action on a petition to reopen a hearing or an appeal from a decision of an Administrative Law Judge not involving an order of revocation.

§ 5.13 Coast Guard District.

A *Coast Guard District* is a geographical area as described in 33 CFR part 3 which is under the command of a Coast Guard officer designated by the Commandant as the Coast Guard District Commander.

§ 5.15 Investigating Officer.

An *investigating officer* is a Coast Guard official designated by the Commandant, District Commander, or the Officer In Charge, Marine Inspection, for the purpose of conducting investigations of marine casualties or matters pertaining to the conduct of persons issued a license, certificate or document by the Coast Guard. An Officer in Charge, Marine Inspection is an investigating officer without further designation.

§ 5.19 Administrative Law Judge.

(a) An *Administrative Law Judge* shall mean any person designated by the Commandant pursuant to the Administrative Procedure Act (5 U.S.C. 556(b)) for the purpose of conducting hearings arising under 46 U.S.C. 7703 or 7704.

(b) The Commandant has delegated to Administrative Law Judges the authority to admonish, suspend with or without probation or revoke a license, certificate or document issued to a person by the Coast Guard under any navigation or shipping law.

§ 5.23 Charge.

(a) A *charge* is the designation in general terms of an act or offense within the purview of 46 U.S.C. 7703 or 7704. A charge must be supported by one or more *specifications*. Under no circumstances does a *charge* constitute evidence nor may any inference be drawn from the fact that the holder of a license, certificate or document has been the subject of a *charge*.

(b) A charge must be stated as one of the following:

- (1) Misconduct;
- (2) Negligence;
- (3) Incompetence;
- (4) Violation of law or regulation;
- (5) Conviction for a dangerous drug law violation, use of a dangerous drug, or addiction to the use of dangerous drugs.

§ 5.25 Specification.

A *specification* sets forth the facts which form the basis of a *charge* and enables the respondent to identify the act or offense so that a defense can be prepared. Each specification shall state:

- (a) Basis for jurisdiction;
- (b) Date and place of act, or offense; and
- (c) The facts constituting the alleged act or offense.

§ 5.27 Misconduct.

Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources.

It is an act which is forbidden or a failure to do that which is required.

§ 5.29 Negligence.

Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

§ 5.31 Incompetence.

Incompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.

§ 5.33 Violation of law or regulation.

Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the *charge* shall be *violation of law or violation of regulation*. The *specification* shall state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

§ 5.35 Conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs.

Where the proceeding is based exclusively on the provisions of title 46, U.S.C. 7704, the *charge* will be *conviction for a dangerous drug law violation or use of dangerous drugs or addiction to the use of dangerous drugs*, depending upon the circumstances. The *specification* will allege jurisdiction by stating the elements as required by title 46, U.S.C. 7704, and the approximate time and place of the offense.

Subpart C—Statement of Policy and Interpretation

§ 5.51 Construction of regulations.

The regulations in this part shall be construed so as to obtain a just, speedy, and economical determination of the issues presented.

§ 5.53 Initiating suspension and revocation proceedings.

Suspension and revocation proceedings are initiated upon service of charges preferred by an investigating officer.

§ 5.55 Time limitations for service of charges and specifications.

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

(1) When based exclusively on 46 U.S.C. 7704, service shall be within 10 years after the date of conviction, or at anytime if the person charged is a user of or addicted to the use of a dangerous drug.

(2) For one of the misconduct offenses specified in § 5.59(a) or § 5.61(a), service shall be within five years after commission of the offense alleged therein.

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

(b) When computing the period of time specified in paragraphs (a) (2) and (3) of this section there shall be excluded any period or periods of time when the respondent could not attend a hearing or be served charges by reason of being outside of the United States or by reason of being in prison or hospitalized.

§ 5.57 Acting under authority of license, certificate or document.

(a) A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is:

- (1) Required by law or regulation; or
- (2) Required by an employer as a condition for employment.

(b) A person is considered to be acting under the authority of the license, certificate or document while engaged in official matters regarding the license, certificate or document. This includes, but is not limited to, such acts as applying for renewal of a license, taking examinations for upgrading or endorsements, requesting duplicate or replacement licenses, certificates or documents, or when appearing at a hearing under this part.

(c) A person does not cease to act under the authority of a license, certificate or document while on authorized or unauthorized shore leave from the vessel.

§ 5.59 Offenses for which revocation of licenses, certificates or documents is mandatory.

An Administrative Law Judge enters an order revoking a respondent's license, certificate or document when—

(a) A charge of misconduct for wrongful possession, use, sale, or association with dangerous drugs is found proved. In those cases involving marijuana, the Administrative Law Judge may enter an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by the respondent and that the respondent has submitted satisfactory evidence that he or she is cured of such use and that the possession or association will not recur.

(b) The respondent has been a user of, or addicted to the use of, a dangerous drug, or has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved. A conviction becomes final when no issue of law or fact determinative of the respondent's guilt remains to be decided.

§ 5.61 Acts or offenses for which revocation of licenses, certificates, or documents is sought.

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

- (1) Assault with a dangerous weapon.
- (2) Misconduct resulting in loss of life or serious injury.
- (3) Rape or sexual molestation.

- (4) Murder or attempted murder.
- (5) Mutiny.
- (6) Perversion.
- (7) Sabotage.
- (8) Smuggling of aliens.
- (9) Incompetence.
- (10) Interference with master, ship's officers, or government officials in performance of official duties.
- (11) Wrongful destruction of ship's property.

(b) An investigating officer may seek revocation of a respondent's license, certificate or document when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the license, certificate or document would be clearly a threat to the safety of life or property, or detrimental to good discipline.

§ 5.63 Standard of proof.

In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters. This includes *admitted* or *no contest* answers.

§ 5.65 Commandant's decisions in appeal or review cases.

The decisions of the Commandant in cases of appeal or review of decisions of Administrative Law Judges are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority.

§ 5.67 Physician-patient privilege.

For the purpose of these proceedings, the physician-patient privilege does not exist between a physician and a respondent.

§ 5.69 Evidence of criminal liability.

Evidence of criminal liability discovered during an investigation or hearing conducted pursuant to this part will be referred to the Attorney General's local representative or other appro-

priate law enforcement authority having jurisdiction over the matter.

§ 5.71 Maritime labor disputes.

Under no circumstances will the Coast Guard exercise its authority for the purpose of favoring any party to a maritime labor controversy. However, if the situation affecting the safety of the vessel or persons on board is presented, the matter shall be thoroughly investigated and when a violation of existing statutes or regulations is indicated, appropriate action will be taken.

Subpart D—Investigations

§ 5.101 Conduct of investigations.

(a) Investigations may be initiated in any case in which it appears that there are reasonable grounds to believe that the holder of a license, certificate or document issued by the Coast Guard may have:

(1) Committed an act of incompetency, misconduct, or negligence while acting under the authority of a license, certificate or document;

(2) Violated or failed to comply with subtitle II of title 46, U.S.C., a regulation prescribed under this subtitle, or any other law or regulations intended to promote marine safety or to protect the navigable waters, while acting under the authority of a license, certificate or document;

(3) Been convicted of a dangerous drug law violation, or has been a user of, or addicted to the use of, a dangerous drug, so as to be subject to the provisions of 46 U.S.C. 7704.

(b) In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation under this part or part 4 of this title may be used against that person in a proceeding under this part, except for impeachment.

§ 5.103 Powers of investigating officer.

During an investigation, the investigating officer may administer oaths, issue subpoenas in accordance with subpart F of this title, and require persons having knowledge of the subject matter of the investigation to answer questions.

§ 5.105 Course of action available.

During an investigation, the investigating officer may take appropriate action as follows:

- (a) Prefer charges.
- (b) Accept voluntary surrender of a license, certificate or document.
- (c) Accept voluntary deposit of a license, certificate or document.
- (d) Refer the case to others for further action. The investigating officer may refer the case to the Commandant or to an Officer in Charge, Marine Inspection, at any port for completion of administrative action if an adequate basis for action is found and the person under investigation and/or witnesses are not locally available.
- (e) Give a written warning. The investigating officer may give a warning to any person holding a license, certificate or document. Refusal to accept the written warning will normally result in a withdrawal of the warning and the preferral of charges. An unrejected warning will become a part of the person's record.
- (f) Close the case.

§ 5.107 Preparation and service of charges and specifications.

- (a) When preferring charges, the investigating officer prepares charges and specifications, together with a notice of the time, date and place of the hearing.
- (b) The original of the charges and specifications and the notice of the time, date and place of hearing are served upon the respondent, either by personal service or certified mail, return receipt requested; restricted delivery (receipt to be signed by the addressee only).
- (c) Service will be made sufficiently in advance of the time set for the hearing so as to give the respondent a reasonable opportunity to prepare a defense.
- (d) At the time of service, whether personal or by certified mail, the respondent will also be advised with respect to:
 - (1) The nature of suspension and revocation proceedings and the possible results thereof;
 - (2) The right to have representation by counsel at the hearing, and that

counsel may be, but need not be, a lawyer;

- (3) The right to have witnesses, records or other evidence subpoenaed and that
- (4) Failure to appear at the time, date and place specified may result in the hearing being in his absence.
- (e) If the alleged act involves mental incompetence, it is recommended to the respondent, at the time of service of charges, that he procure counsel.
- (f) If the alleged act involves mental or physical incompetence, the respondent is advised that evidence of medical examination may be submitted.

Subpart E—Deposit or Surrender of License, Certificate or Document**§ 5.201 Voluntary deposits in event of mental or physical incompetence.**

- (a) A holder may deposit a license, certificate, or document with the Coast Guard in any case where there is evidence of mental or physical incompetence. A voluntary deposit is accepted on the basis of a written agreement, the original of which will be given to the holder, which specifies the conditions upon which the Coast Guard will return the license, certificate, or document to the holder.
- (b) Where the mental or physical incompetence of a holder of a license, certificate, or document is caused by use of or addiction to dangerous drugs, a voluntary deposit will only be accepted contingent on the following circumstances:
 - (1) The holder is enrolled in a bona fide drug abuse rehabilitation program;
 - (2) The holder's incompetence did not cause or contribute to a marine casualty;
 - (3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, State or local government investigation; and
 - (4) The holder has not voluntarily deposited or surrendered a license, certificate, or document, or had a license, certificate, or document revoked for a drug related offense on a prior occasion.
- (c) Where the mental or physical incompetence of a holder of a license, certificate, or document is caused by

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use or addiction to alcohol, a voluntary deposit will only be accepted contingent on the following circumstances:

(1) The holder is enrolled in a bona fide alcohol abuse rehabilitation program;

(2) The holder's incompetence did not cause or contribute to a marine casualty; and

(3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, State, or local government investigation.

(d) Where the conditions of paragraphs (b) and (c) of this section are not met, the holder may only surrender such license, certificate, or document in accordance with § 5.203.

[CGD 84-099, 52 FR 47535, Dec. 14, 1987]

§ 5.203 Voluntary surrender to avoid hearing.

(a) Any holder may surrender a license, certificate or document to the Coast Guard in preference to appearing at a hearing.

(b) A holder voluntarily surrendering a license, certificate or document shall sign a written statement containing the stipulations that:

(1) The surrender is made voluntarily in preference to appearing at a hearing;

(2) All rights to the license, certificate or document surrendered are permanently relinquished; and,

(3) Any rights with respect to a hearing are waived.

(c) A voluntary surrender of a license, certificate or document to an investigating officer in preference to appearing at a hearing is not to be accepted by an investigating officer unless the investigating officer is convinced that the holder fully realizes the effect of such surrender.

§ 5.205 Return or issuance of a license, certificate of registry, or merchant mariners document.

(a) A person may request the return of a voluntarily deposited license, certificate, or document at any time, provided he or she can demonstrate a satisfactory rehabilitation or cure of the condition which caused the incompetence; has complied with any other conditions of the written agreement executed at the time of deposit; and

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complies with the physical and professional requirements for issuance of a license, certificate, or document.

(b) Where the voluntary deposit is based on incompetence due to drug abuse, the deposit agreement shall provide that the license, certificate, or document will not be returned until the person:

(1) Successfully completes a bona fide drug abuse rehabilitation program;

(2) Demonstrates complete non-association with dangerous drugs for a minimum of six months after completion of the rehabilitation program; and

(3) Is actively participating in a bona fide drug abuse monitoring program.

(c) Where the voluntary deposit is based on incompetence due to alcohol abuse, the deposit agreement shall provide that the license, certificate, or document will not be returned until the person:

(1) Successfully completes a bona fide alcohol abuse rehabilitation program; and

(2) Is actively participating in a bona fide alcohol abuse monitoring program.

(d) The voluntary surrender of a license, certificate, or document is the equivalent of revocation of such papers. A holder who voluntarily surrenders a license, certificate, or document must comply with provisions of §§ 5.901 and 5.903 when applying for the issuance of a new license, certificate, or document.

[CGD 84-099, 52 FR 47535, Dec. 14, 1987]

Subpart F—Subpoenas

§ 5.301 Issuance of subpoenas.

(a) Every subpoena shall command the person to whom it is directed to appear at a specified time and place to give testimony or to produce books, papers, documents, or any other evidence, which shall be described with such particularity as necessary to identify what is desired.

(b) The investigating officer may issue subpoenas for the attendance of witnesses or for the production of books, papers, documents, or any other relevant evidence needed by the investigating officer or by the respondent.

(c) After charges have been served upon the respondent the Administrative Law Judge may, either on the Administrative Law Judge's own motion or the motion of the investigating officer or respondent, issue subpoenas for the attendance and the giving of testimony by witnesses or for the production of books, papers, documents, or any other relevant evidence.

§ 5.303 Service of subpoenas on behalf of the respondent.

Service of subpoenas issued on behalf of the respondent is the responsibility of the respondent. However, if the Administrative Law Judge finds that the respondent or respondent's counsel is physically unable to effect the service, despite diligent and bona fide attempts to do so, and if the Administrative Law Judge further finds that the existing impediment to the service of the subpoena is peculiarly within the authority of the Coast Guard to overcome, the Administrative Law Judge will have the subpoena delivered to an investigating officer participating in the case for the purpose of effecting service.

§ 5.305 Quashing a subpoena.

(a) Persons subpoenaed to appear in person or produce evidence at a hearing may, prior to or during the hearing, apply in writing to the Administrative Law Judge conducting the hearing requesting that the subpoena be quashed or modified.

(b) Upon receipt of any application requesting quashing or modification of a subpoena the Administrative Law Judge notifies the party for whom the subpoena was issued. The Administrative Law Judge may quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or may deny the request.

§ 5.307 Enforcement.

Upon application and for good cause shown, or upon its own initiative, the Coast Guard will seek judicial enforcement of subpoenas issued by investigating officers or Administrative Law Judges. This is done by making application to the United States District Court, through the office of the appro-

priate U.S. Attorney, to issue an order compelling the attendance of, and/or giving of testimony by, witnesses, or for the production of books, papers, documents, or any other relevant evidence.

§ 5.309 Proof of service.

(a) The person serving a subpoena shall make a written statement setting forth the date, time and manner of service and shall return such report with or on a copy of the subpoena to the investigating officer or Administrative Law Judge who issued it. In case of failure to make service of a subpoena, the person assigned to serve such subpoena shall make a written statement setting forth the reasons the subpoena was not served. The statement should be placed on the subpoena or attached to it and returned to the investigating office or Administrative Law Judge who issued the subpoena.

(b) When service of a subpoena is made by certified mail with return receipt to be signed by the addressee only, the person mailing the subpoena shall make a written statement on a copy of the subpoena or attached to it, setting forth the date, time and location of the post office where mailed, the post office number assigned thereto. If delivered, the receipt requested shall be returned, by the person receiving the receipt, to the investigating officer or Administrative Law Judge who issued the subpoena. In case the subpoena is not delivered, any information reported by the post office regarding non-delivery shall be given to the investigating officer or Administrative Law Judge who issued the subpoena.

Subpart G—Witness Fees

§ 5.401 Payment of witness fees and allowances.

(a) Duly subpoenaed witnesses, other than Federal government employees, may apply for payment of their attendance as witnesses at an investigation or hearing conducted pursuant to this part by submitting a request for payment (Standard Form 1157) accompanied by any necessary receipts.

(b) Fees and allowances will be paid as provided by 28 U.S.C. 1821, except

that a person called to testify as an expert witness may be paid a higher fee to be fixed by the District Commander.

[CGD 82–002, 50 FR 32184, Aug. 9, 1985; 50 FR 35228, Aug. 30, 1985]

Subpart H—Hearings

§ 5.501 General.

(a) A hearing in a suspension and revocation proceeding conducted under 46 U.S.C. chapter 77, is the adjudication of the case. It is presided over and is conducted under the exclusive control of an Administrative Law Judge in accordance with applicable requirements in 5 U.S.C. 551, *et seq.* (Administrative Procedure Act), and the regulations in this part. The Administrative Law Judge shall regulate and conduct the hearing in such a manner so as to bring out all the relevant and material facts, and to insure a fair and impartial hearing.

(b) The Administrative Law Judge shall be governed by 5 U.S.C. 557(d)(1) of the Administrative Procedure Act regarding *ex parte* communications relative to these proceedings.

(c) With the consent of the investigating officer and respondent, the Administrative Law Judge may hold a prehearing conference for the settlement or simplification of the issues involved in the case. A prehearing conference may be requested by the investigating officer, respondent, or the Administrative Law Judge and is subject to the following provisions:

(1) The Administrative Law Judge sets the time and place for the conference, or conference telephone call. The conference shall not be convened unless both the investigating officer and the respondent or their authorized representative are present.

(2) Admissions or statements made at a conference are not admissible in evidence at a hearing for any reason.

(3) The Administrative Law Judge, in his opening statement at the hearing, shall enter into the hearing record the time, date, place, and persons present at any prehearing conference held.

(4) If the investigating officer and the respondent agree at the prehearing conference to stipulate to facts or amend the charge sheet, either may introduce the stipulation at the hearing

which, upon the consent of the other, will become a part of the hearing record.

(d) The procedures below are usually followed:

(1) Administrative Law Judge's opening statement.

(2) Appearances of persons at the hearing.

(3) Verification of currently valid license, certificate and/or document held by respondent.

(4) The Administrative Law Judge advises the respondent of his or her rights.

(5) Exclusion of witnesses from the hearing room.

(6) Preliminary motions, objections and/or corrections to the charges and specifications.

(7) A reading of the charges with respondent's answer.

(8) Opening statement of investigating officer.

(9) Opening statement by or on behalf of the respondent or statements in mitigation if the respondent has admitted to the charge and specification or has answered *no contest*.

(10) Submission of evidence.

(11) Argument by the investigating officer and argument by or on behalf of the respondent.

(12) The investigating officer and respondent are given the opportunity to submit proposed findings and conclusions.

(13) The Administrative Law Judge renders findings and conclusions.

(14) Submission of prior record of the respondent and evidence in aggravation or mitigation.

(15) The Administrative Law Judge renders an order.

(16) The Administrative Law Judge serves complete written decision.

(17) The Administrative Law Judge advises the respondent of the right to appeal.

(18) The Administrative Law Judge declares that the hearing is closed.

§ 5.503 Record of the hearing.

(a) The Administrative Law Judge designates an official reporter for the hearing. The reporter shall prepare the record of the hearing, including the transcript if so directed by the Administrative Law Judge.

(b) The testimony and exhibits presented, together with all papers, requests, and rulings filed in the proceedings constitute the record of the hearing.

§ 5.505 Public access to hearings.

All hearings conducted pursuant to this part are open to the public, including representatives of the press, except when the Administrative Law Judge finds that the subject matter to be, or being, brought out in the evidence concerns classified material relating to national security, or when other circumstances exist which have been held to warrant a limitation or exception to the right of a public hearing in a United States District Court.

§ 5.507 Disqualification of Administrative Law Judge.

(a) In any suspension and revocation proceeding conducted under this part, the Administrative Law Judge may withdraw voluntarily from a particular case for reasons of a possible conflict of interest. In such event, the Administrative Law Judge shall immediately notify the Commandant of the desire to withdraw and the reasons therefor.

(b) In any case the investigating officer or the respondent may, in good faith, request the Administrative Law Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the Administrative Law Judge's disqualification shall file with the Administrative Law Judge a timely affidavit or statement sworn to before a Coast Guard officer or other official authorized to administer oaths, setting forth in detail the facts alleged to constitute the grounds for disqualification. The investigating officer or the respondent may present testimony of witnesses or, at minimum, an offer of proof to support these grounds. The Administrative Law Judge rules whether or not disqualification is warranted.

(c) If the person seeking disqualification takes exception to the Administrative Law Judge's ruling, that person may appeal such ruling to the Commandant. When such appeal is made, the Administrative Law Judge immediately forwards the affidavit or sworn statement with the decision thereon to

the Commandant. The Administrative Law Judge may proceed with the hearing unless it can be shown that a delay in the hearing pending a determination of the appeal will not be detrimental to the matters being adjudicated. The Administrative Law Judge ensures that all matters relating to such claims of disqualification appear affirmatively in the record.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 97-057, 62 FR 51042, Sept. 30, 1997]

§ 5.509 Opening the hearing.

The Administrative Law Judge opens the hearing at the time and place specified in the notice, administers all necessary oaths, and causes a complete record of the proceedings to be kept. The time and place of opening the hearing may be changed by the Administrative Law Judge by written notice served on the investigating officer and the respondent, either on the Administrative Law Judge's own motion or upon application of the investigating officer or respondent. Such change must be consistent with the rights of the respondent to a fair, impartial and timely hearing and the availability of witnesses.

§ 5.511 Continuance of a hearing.

The Administrative Law Judge may, either on the Administrative Law Judge's own motion or the motion of the investigating officer or respondent, continue the hearing from day to day or adjourn such hearing to a later date or to a different place by announcement at the hearing or by other appropriate notice. When determining whether to grant a continuance, the Administrative Law Judge gives careful consideration to the future availability of witnesses, the schedule of the vessel or vessels on which the respondent and/or witnesses may be employed, and to the nature of the charge and gravity of the offense.

§ 5.513 Appearances.

The appearances of the investigating officer and respondent and their representatives are entered in the record.

§ 5.515 Failure of respondent to appear at hearing.

(a) In any case in which the respondent, after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, the hearing may be conducted *in absentia*.

(b) The Administrative Law Judge ensures that the record contains the facts concerning the service of the charges, specifications and notice of hearing.

§ 5.517 Witnesses excluded from hearing room.

After appearances are entered and prior to proceeding with the hearing, all witnesses are excluded from the hearing room. The Administrative Law Judge may order witnesses to be separated from each other while waiting to testify or admonish them to not discuss the case among themselves or with any other person, with the exception of the investigating officer, the respondent or the respondent's counsel.

§ 5.519 Rights of respondent.

(a) The Administrative Law Judge advises the respondent, on the record, of the right to:

- (1) Be represented by professional counsel, or any other person desired;
- (2) Have witnesses and relevant evidence subpoenaed;
- (3) Examine witnesses, cross-examine witnesses, and introduce relevant evidence into the record; and
- (4) Testify or remain silent.

§ 5.521 Verification of license, certificate or document.

(a) The Administrative Law Judge shall require the respondent to produce and present at the opening of the hearing, and on each day the hearing is in session thereafter, all valid licenses, certificates, and/or documents issued by the Coast Guard to the respondent. In the event that the respondent alleges that such license, certificate or document has been lost, misplaced, stolen, destroyed, or is otherwise beyond his ability to produce, the respondent shall execute a lost document affidavit (Form CG-4363). The Administrative

Law Judge shall warn the respondent that a willful misstatement of any material item in such affidavit is punishable as a violation of a Federal criminal statute. (See 18 U.S.C. 1001).

(b) When a hearing is continued or delayed, the Administrative Law Judge returns the license, certificate, or document to the respondent: unless a prima facie case has been established that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a definite danger to public health, interest or safety at sea.

[CGD82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 97-057, 62 FR 51042, Sept. 30, 1997]

§ 5.523 Motions or objections.

Any motion or objection shall be heard and disposed of, on the record, by the Administrative Law Judge.

§ 5.525 Correction or amendment of charges and/or specifications.

(a) The Administrative Law Judge examines the charges and specifications to determine their correctness as to form and legal sufficiency.

(b) The Administrative Law Judge may, either on the Administrative Law Judge's own motion or motion by either the investigating officer or respondent, amend the charges and specifications to correct harmless errors by deletion or substitution of words or figures as long as a legal charge and specification remains.

(c) When errors of substance are found in charges and specifications, the Administrative Law Judge shall allow that the defective charge or specification be withdrawn without prejudice to the service of a new charge and specification in the matter. The investigating officer may then prepare and serve a new charge and specification.

§ 5.527 Answer.

(a) The Administrative Law Judge reads each charge and specification to the respondent and obtains a specific answer to each charge and specification. If the respondent fails to answer a charge or specification, the Administrative Law Judge enters a denial and proceeds with the hearing.

(b) A specific answer shall be one of the following:

- (1) Deny;
- (2) No contest; or
- (3) Admit.

(c) For purposes of proceedings under this part, an admission or *no contest* answer is sufficient to support a finding of *proved* by the Administrative Law Judge.

(d) When the hearing is conducted *in absentia*, the Administrative Law Judge enters a denial to all charges and specifications.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 97-057, 62 FR 51042, Sept. 30, 1997]

§ 5.529 Opening statement of investigating officer.

(a) If a denial is entered, the investigating officer makes a brief statement outlining the matters expected to be proved.

(b) If the respondent admits the truth of the charges and specifications or answers *no contest*, the opening statement of the investigating officer shall contain a summary of the evidence upon which the charges and specifications are based.

§ 5.531 Opening statement by or on behalf of the respondent.

The respondent or the respondent's counsel is afforded an opportunity to state what is intended to be established. This may be waived or deferred at the option of the respondent.

§ 5.533 Presentation of case where there is an admission or no contest answer.

(a) If the respondent admits to any charge and specification or answers *no contest*, evidence in mitigation may be presented, and the investigating officer may present a prima facie case and evidence in aggravation even in those cases where revocation is mandatory.

(b) Should the respondent's presentation be inconsistent with an admission or answer of *no contest*, the Administrative Law Judge will reject the answer, enter a denial and continue with the hearing.

§ 5.535 Witnesses.

(a) All witnesses are sworn, duly examined, and may be cross examined. A witness on the stand may be questioned at any time by the Administrative Law Judge.

(b) The person who calls a witness shall begin direct examination by identifying the witness.

(c) Witnesses may be called to establish matters of aggravation or matters of mitigation.

(d) Any witness may have the benefit and advice of personal counsel, but such counsel shall not otherwise participate in the hearing.

(e) Any attempt to coerce or induce a witness to testify falsely is an offense under federal law which may be punishable by fine or imprisonment or both. (See 18 U.S.C. 1505.)

(f) Upon motion by the investigating officer or respondent, the Administrative Law Judge may order that testimony of a witness be taken by telephone conference call, when testimony would otherwise be taken by deposition. The telephone conference will be arranged so that all participants can listen to and speak to each other in the hearing of the Administrative Law Judge. The Administrative Law Judge insures that all participants in the telephone conference are properly identified to allow a proper record to be made by the reporter. Participants shall speak clearly and avoid extraneous conversation. Telephone conferences are governed by the procedural rules and decorum observed during in-person proceedings.

(g) A witness may be subpoenaed to testify by telephone conference. The subpoena in such instances is issued under the procedures in subpart F.

§ 5.537 Evidence.

(a) In these proceedings, strict adherence to the rules of evidence is not required. However, the Federal Rules of Evidence, as amended, shall be the primary guide for evidentiary matters, where applicable.

(b) Rules 410, 606, 706, and 1101 of the Federal Rules of Evidence shall not be applicable to these proceedings.

(c) In conducting a hearing the Administrative Law Judge will extend reasonable latitude to the respondent

who does not have professional counsel to represent him. Investigating officers and counsel should be required to conform to rules of evidence to a greater degree than respondents without counsel.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 97-057, 62 FR 51042, Sept. 30, 1997]

§ 5.539 Burden of proof.

The investigating officer has the burden of proof.

§ 5.541 Official notice by Commandant and Administrative Law Judge.

(a) In addition to other rules providing for judicial notice, the Commandant and the Administrative Law Judges will consider the following without requiring the investigating officer or the respondent to submit them in evidence:

(1) *Federal Law.* The Constitution; Congressional Acts, Resolutions, Records, Journals and Committee Reports; Decisions of Federal Courts; Executive Orders and Proclamations; and rules, regulations, orders and notices published in the FEDERAL REGISTER.

(2) *State law.* The Constitution and public laws of each State.

(3) *Governmental organizations.* The organization, territorial limitations, officers, departments, and general administration of the Government of the United States, its States, territories, possessions and the Commonwealth of Puerto Rico.

(4) *Commandant's decisions.* The Commandant's decisions in all appeal and review cases under this part. (See § 5.65.)

(b) Matters officially noticed by the Commandant or the Administrative Law Judge are specified on the record. The investigating officer and the respondent shall be afforded an opportunity, on the record, to rebut such matters.

§ 5.543 Certification of extracts from shipping articles, logbooks, etc.

(a) In addition to other rules providing for authentication and certification, extracts from records in the custody of the Coast Guard, shipping articles, and logbooks, may be identified and authenticated by certification

of an investigating officer or custodian of such records, or by any commissioned officer of the Coast Guard.

(b) Certification must include a statement that the certifying individual has seen the original and compared the copy with it and found it to be a true copy. The individual so certifying shall sign name, rank or title, and duty station.

§ 5.545 Weight of entries from logbooks.

(a) An entry in an official logbook of a vessel concerning an offense enumerated in 46 U.S.C. 11501, made in substantial compliance with the procedural requirements of 46 U.S.C. 11502, is admissible in evidence and constitutes prima facie evidence of the facts recited.

(b) An entry in any logbook kept on a vessel may be admitted into evidence as an exception to the hearsay rule, under the Federal Rules of Evidence, as a record of a regularly conducted activity.

(c) An entry in any logbook made in compliance with the procedural requirements of 46 U.S.C. 11502 may be given added weight by the Administrative Law Judge.

§ 5.547 Use of judgment of conviction.

(a) A judgment of conviction by a Federal court is conclusive in proceedings under this part concerning incidents described in 46 U.S.C. 7703, where acts or offenses forming the basis of the charges in the Federal court are the same.

(b) Where the acts involved in a judgment of conviction of a State court are the same as those involved in proceedings under this part concerning incidents described in 46 U.S.C. 7703, the judgment of conviction is not conclusive of the issues decided. However, such judgment of conviction is admissible in evidence and constitutes substantial evidence adverse to the respondent.

(c) The judgment of conviction for a dangerous drug law violation by a Federal or State court is conclusive in proceedings under this part. If as part of a state expungement scheme the respondent pleads guilty or no contest or is required by the court to attend

classes, make contributions of time or money, receive treatment or submit to any manner of probation or supervision or forego appeal of the trial court finding, the respondent will be considered, for the purposes of 46 U.S.C. 7704, to have received a final conviction. A later expungement of the record will not be considered unless it is proved that the expungement is based on a showing that the court's earlier *conviction* was in error.

(d) The respondent may not challenge the jurisdiction of a Federal or State court in proceedings under 46 U.S.C. 7703 and 7704.

§ 5.549 Admissibility of respondent's Coast Guard records prior to entry of findings and conclusions.

(a) The prior disciplinary record of the respondent is admissible when offered by the respondent.

(b) In addition to the use of a judgment of conviction as provided in § 5.547, the prior record of the respondent, as defined in § 5.565, is admissible when offered by the investigating officer for the limited purposes of impeaching the credibility of evidence offered by the respondent regarding a disciplinary record.

§ 5.551 Admissions by respondent.

No person shall be permitted to testify with respect to admissions made by the respondent during or in the course of an investigation under this part or part 4 of this title except for the purpose of impeachment.

§ 5.553 Testimony by deposition.

(a) Testimony may be taken by deposition upon application of either party or upon the initiative of the Administrative Law Judge. The application of a party must be in writing and must contain the reasons for the deposition, the name and whereabouts of the witness and an approximate date, time and place for the deposition hearing. The applicant may request that it be by oral examination, or upon written interrogatories, or a combination thereof. The deposition may be taken before any person authorized to administer oaths.

(b) Upon good cause appearing therefor, the Administrative Law Judge en-

ters and serves upon the parties an order designating the person before whom the deposition is to be taken, together with such other information, directions and orders as will enable the person so designated to obtain the testimony of the deponent. The Administrative Law Judge issues a subpoena in accordance with subpart F of this part which, along with his order and a list of interrogatories and cross-interrogatories, if any, is forwarded to the person designated to take the deposition. This person shall have the subpoena served upon the witness.

(c) The investigating officer and respondent and/or their representatives may attend the taking of a deposition.

(d) After the deposition has been taken and transcribed it is presented to the witness for examination, correction and signature unless such a procedure is waived by the deponent, on the record. The person taking the deposition shall certify to the signature of the witness. If, for any reason, the deposition or interrogatory is not signed by the witness, the person taking the deposition shall recite (under oath) thereon the reason it is not signed.

(e) A deposition upon oral examination may be taken by telephone conference upon such terms, conditions, and arrangements as are prescribed in the order of the Administrative Law Judge.

(f) The testimony at a deposition hearing may be recorded on videotape, upon such terms, conditions, and arrangements as are prescribed in the order of the Administrative Law Judge, at the expense of the party requesting the recording. The video recording may be in conjunction with an oral examination by telephone conference held pursuant to paragraph (e) of this section. After the deposition has been taken, the person taking the deposition shall immediately seal the videotape in an envelope, attaching thereto a statement identifying the proceeding and the deponent and certifying as to the authenticity of the deposition, and return the videotape by accountable means to the Administrative Law Judge. Such deposition becomes a part of the record of proceedings in the

same manner as a transcribed deposition. The videotape, if admitted in evidence, will be played during the hearing and transcribed into the record by the reporter.

(g) The Administrative Law Judge rules on the admissibility of the deposition or any part thereof and on any objections.

§ 5.555 Treatises.

(a) Treatises, periodicals, or pamphlets relating to nautical practices are admissible in evidence without the use of expert witnesses.

(b) The Administrative Law Judge evaluates such materials based on the facts and circumstances of the case. The materials may not be considered conclusive of an issue.

§ 5.557 Medical examination of respondent.

(a) In a hearing in which the physical or mental condition of the respondent is in controversy, the Administrative Law Judge may order the respondent to submit to a medical examination.

(b) An examination ordered by an Administrative Law Judge will be conducted at government expense by a physician designated by the Administrative Law Judge.

(c) If the respondent fails, or refuses, to submit to an ordered examination such failure is accorded due weight in determining the facts alleged in the specifications.

§ 5.559 Argument.

After all the evidence has been presented, the investigating officer and the respondent may present oral or written argument.

§ 5.561 Submission of proposed findings and conclusions.

The Administrative Law Judge affords the investigating officer and the respondent reasonable opportunity to submit proposed findings and conclusions with supporting reasons. If either desires to submit such matter, the Administrative Law Judge fixes the time within which it shall be filed. Failure to comply within the time fixed by the Administrative Law Judge shall be regarded as a waiver of the right.

§ 5.563 Administrative Law Judge's findings and conclusions.

(a) The Administrative Law Judge renders ultimate findings and conclusions.

(b) A separate conclusion is made by the Administrative Law Judge on each charge and specification. A specification may be found *not proved*, *proved in part*, or *proved*. A charge may be found *not proved* or *proved*.

(c) The testimony and exhibits presented, together with all papers, requests, and rulings filed in the proceedings are the exclusive basis for the issuance of the Administrative Law Judge's findings and conclusions.

§ 5.565 Submission of prior record and evidence in aggravation or mitigation.

(a) Except as provided in § 5.547 and § 5.549, the prior record of the respondent may not be disclosed to the Administrative Law Judge until after conclusions have been made as to each charge and specification, and then only if at least one charge has been found proved. The prior record must include only information concerning the respondent and is limited to the following items less than 10 years old:

(1) Written warnings issued by Coast Guard investigating officers and accepted by the respondent;

(2) Final agency action on Coast Guard suspension and revocation hearings wherein one or more charges was found proved;

(3) Voluntary surrender agreements entered into by the respondent;

(4) Any final judgments of conviction in State or Federal courts;

(5) Final agency action resulting in civil penalties or warnings being imposed against the respondent in proceedings administered by the Coast Guard under 33 CFR 1.07; and,

(6) Any official commendatory information concerning the respondent of which the investigating officer is aware.

(b) The investigating officer may offer evidence and argument in aggravation of the charge or charges found proved.

(c) The respondent is allowed to comment on or offer evidence regarding prior maritime service including the

prior record introduced by the investigating officer and any commendatory information.

(d) The respondent may offer evidence and argument in mitigation of the charge or charges found proved.

(e) The investigating officer may offer evidence and argument in rebuttal of the evidence and argument introduced by the respondent in mitigation.

§ 5.567 Order.

(a) The Administrative Law Judge enters an order which recites the disposition of the case. When a charge has been found *not proved*, the order will state the charge is *dismissed* with or without prejudice. When a charge is found *proved*, the Administrative Law Judge may order an *admonition, suspension* with or without probation, or *revocation*.

(b) The order is directed against all licenses, certificates or documents, except that in cases of negligence or professional incompetence, the order is made applicable to specific licenses, certificates or documents. If the Administrative Law Judge determines that the respondent is professionally incompetent in the grade of the license, certificate or document held, but is considered competent in a lower grade, the license, certificate or document may be revoked and the issuance of one of a lower grade ordered.

(c) An order must specify whether the license, certificate or document affected is:

- (1) Revoked;
- (2) Suspended outright for a specified period after surrender;
- (3) Suspended for a specified period, but placed on probation for a specific period; or
- (4) Suspended outright for a specified period, followed by a specified period of suspension on probation.

(d) The order will normally state, *that the license, certificate or document is to be surrendered to the Coast Guard immediately*, if the order is one of revocation or includes a period of outright suspension. In cases involving special circumstances, the order may provide for surrender on a certain date.

(e) The time of any period of outright suspension ordered does not commence until the license, certificate or docu-

ment is surrendered to the Coast Guard. The time of any period of suspension on probation begins at the end of any period of outright suspension or the effective date of the order if there is no outright suspension.

§ 5.569 Selection of an appropriate order.

(a) This section addresses orders in a general manner. The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.

(b) Except for acts or offenses for which revocation is mandatory, factors which may affect the order include:

- (1) Remedial actions which have been undertaken independently by the respondent;
- (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and
- (3) Evidence of mitigation or aggravation.

(c) After an order of revocation is entered, the respondent will be given an opportunity to present relevant material on the record for subsequent consideration by the special board convened in the event an application is filed in accordance with subpart L of this part.

(d) Table 5.569 is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits. The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for *failure to obey a master's written instructions*. An order within the range would not be considered excessive. Mitigating or aggravating factors may

make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

TABLE 5.569—SUGGESTED RANGE OF AN APPROPRIATE ORDER

Type of offense	Range of order (in months)
Misconduct:	
Failure to obey master's/ship officer's order.	1-3.
Failure to comply with U.S. law or regulations.	1-3.
Possession of intoxicating liquor.	1-4.
Failure to obey master's written instruction.	2-4.
Improper performance of duties related to vessel safety.	2-5.
Failure to join vessel (required crew member).	2-6.
Violent acts against other persons (without injury).	2-6.
Failure to perform duties related to vessel safety.	3-6.
Theft	3-6.
Violent acts against other persons (injury).	4-Revocation.
Use, possession, or sale of dangerous drugs.	Revocation (Note: see § 5.59).
Negligence:	
Negligently performing duties related to vessel navigation.	2-6.
Negligently performing non-navigational duties related to vessel safety.	1-3.
Neglect of vessel navigation duties.	3-6.
Neglect of non-navigational safety related duties.	2-4.
Incompetence	The only proper order for a charge of incompetence found proved is revocation.
Violation of Regulation:	
Refusal to provide specimens for required chemical test..	12-24.
Dangerous drugs (46 U.S.C. 7704).	The only proper order for a charge under 46 U.S.C. 7704 found proved is revocation.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 86-067, 53 FR 47079, Nov. 21, 1989]

§ 5.571 Delivery of decision.

(a) Whenever possible, the Administrative Law Judge's decision is delivered in writing to the respondent or to the respondent's authorized representative at the final hearing session. If it is not possible for the Administrative Law Judge to deliver a complete written decision at the final session of the hearing, an oral decision is rendered on the record, with a written order pre-

pared and served on the respondent or the respondent's authorized representative. The decision, including the order, is effective upon service of the written order.

(b) If a complete written decision is not delivered at the final hearing session, the Administrative Law Judge prepares and has served on the respondent or the respondent's authorized representative a complete written decision within 30 days, when possible, after completion of the hearing. This delivery may be by personal service or certified mail, return receipt requested. The signed acknowledgment of personal service or the return receipt becomes a part of the hearing record.

(c) As used in this section, the phrase, *authorized representative* means any person who has been authorized by the respondent, as shown by the hearing record, to receive service and take an appeal on behalf of the respondent.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985; 50 FR 35228, Aug. 30, 1985]

§ 5.573 Notification of right to appeal.

The respondent is advised by the Administrative Law Judge of the right to appeal in accordance with subpart J of this part.

§ 5.577 Modification of Administrative Law Judge's decision and order.

(a) After an Administrative Law Judge renders the decision and order, it may be modified or changed pursuant to procedures set forth in paragraph (b) of this section, in subpart I of this part for reopening of hearings; in subpart J of this part for appeals; or in subpart K of this part for review of Administrative Law Judge's decision by the Commandant. In the absence of any such actions, the decision of the Administrative Law Judge is final.

(b) When the proceeding is based on a conviction for a dangerous drug law violation, rescission of the order affecting the license, certificate or document will not be granted, unless the applicant submits a specific court order to the effect that the conviction has been unconditionally set aside for all purposes. An order of revocation will not be rescinded as the result of any law which provides for a subsequent conditional setting aside, modification or

expungement of the court conviction in the nature of granting of clemency or other relief after the conviction has become final, without regard to whether punishment was imposed.

Subpart I—Reopening of Hearings

§ 5.601 Petition to reopen hearing.

(a) A respondent may petition to reopen the hearing on the basis of newly discovered evidence or on the basis of being unable to present evidence due to the respondent's inability to appear at the hearing through no fault of the respondent and due to circumstances beyond the respondent's control.

(b) The filing of a petition does not stay an existing order of the Administrative Law Judge. However, if filed within 30 days after the effective date of the Administrative Law Judge's decision, it will toll or defer the running of the 30-day statutory period of appeal as provided in subpart J of this part until the Administrative Law Judge has acted on the petition.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985; 50 FR 35228, Aug. 30, 1985]

§ 5.603 Procedures for submitting petition.

(a) The procedures for submitting a petition based on newly discovered evidence are as follows:

(1) A petition to reopen the hearing may be submitted at any time prior to a final decision on appeal or within one year of the effective date of the Administrative Law Judge's decision.

(2) If an appeal to the Commandant from the Administrative Law Judge's decision has not been filed, the petition must be addressed to the Administrative Law Judge. If an appeal to the Commandant has been filed, the petition must be submitted to the Commandant.

(3) The petition must be in letter form, typewritten or written legibly, and shall contain:

(i) The name of the petitioner, the number and description of the license, certificate and/or document involved, nature of the charge, the decision rendered including the order, and the name of the Administrative Law Judge who heard the case;

(ii) A statement setting forth a description of the newly discovered evidence; and

(iii) A statement as to whether or not this additional evidence was known to the petitioner at the time of the hearing, and reasons why the petitioner, with due diligence, could not have discovered such new evidence prior to the completion of the hearing.

(b) The procedures for submitting a petition on the basis of inability to appear at the hearing are as follows:

(1) A petition to reopen the hearing may be submitted within 30 days of the effective date of the Administrative Law Judge's decision.

(2) If an appeal to the Commandant from the Administrative Law Judge's decision has not been filed, the petition must be addressed to the Administrative Law Judge. If an appeal to the Commandant has been filed, the petition must be submitted to the Commandant.

(3) The petition must be in letter form, typewritten or written legibly, and shall contain:

(i) The name of the petitioner, the number and description of the license, certificate and/or document involved, nature of the charge, the decision rendered including the order, and the name of the Administrative Law Judge who heard the case;

(ii) A statement setting forth a description of the evidence the petitioner would have offered at the hearing; and

(iii) A statement as to why the petitioner was unable to appear at the hearing including why the petitioner did not seek a change in the time or place for opening of the hearing.

§ 5.605 Action on petition.

(a) The Administrative Law Judge, or Commandant, as appropriate, forwards a copy of the petition to the investigating officer. The investigating officer is afforded a reasonable time within which to submit written comments as to the merits of the petition.

(b) The Administrative Law Judge, or the Commandant, renders a decision either granting or denying the petition. The decision on the petition will be based on a consideration of the petition, the record of the hearing, and the

investigating officer's comments, if any.

(c) If the Administrative Law Judge grants the petition, the hearing is reopened to allow the offer of the new evidence described in the petition.

(d) If the Commandant grants the petition, the case is remanded to the Administrative Law Judge with directions to reopen the hearing.

(e) When the petition is granted, the Administrative Law Judge withdraws the original decision and renders a new one based on the record of the original hearing and the new evidence received.

(f) The petition, the investigating officer's comments, the Administrative Law Judge's or Commandant's decision on the petition, and the additional evidence will be appended to the original hearing record.

§ 5.607 Appeal from action on petition.

(a) If the petition to reopen the hearing is denied by the Administrative Law Judge, the respondent may appeal to the Commandant within 30 days from the date of service of the denial of the petition. The review by the Commandant on this appeal will be limited to the issues raised by the petition. Other grounds on appeal must be in accordance with subpart J of this part.

(b) If the petition to reopen the hearing is granted and a previous finding of *proved* is affirmed by the Administrative Law Judge, the respondent may appeal the decision as provided for in subpart J of this part.

Subpart J—Appeals

§ 5.701 Appeals in general.

(a) A respondent against whom a finding of *proved* has been rendered may appeal such decision to the Commandant.

(b) The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. The only matters which will be considered by the Commandant on the appeal are:

- (1) Rulings on motions or objections which were not waived during the proceedings;
- (2) Clear errors on the record;
- (3) Jurisdictional questions.

(c) In the preparation of an appeal, the investigating officer's and the Administrative Law Judge's assistance to the appellant will extend only to the point of providing information as to the applicable regulations.

(d) If the respondent requests a copy of the transcript in the notice of appeal and the hearing was recorded or transcribed at government expense, the transcript will be provided upon payment of the fees prescribed in 49 CFR 7.95. If the services of a government contractor were utilized, the transcript must be obtained under the provisions of 49 CFR 7.99.

§ 5.703 Procedures for appeal.

(a) An appeal may be taken only by filing a written notice of appeal within 30 days after service of the complete written decision. This notice of appeal must be filed with the Administrative Law Judge who heard the case or with any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.

(b) The notice of appeal must:

- (1) Be typewritten or written legibly;
 - (2) Be addressed to the Commandant;
- and

(3) Set forth the name of the appellant, the number and description of the license, certificate and/or document involved, and the name of the Administrative Law Judge who heard the case.

(c) The completed appeal must be submitted to the Commandant, U.S. Coast Guard (G-MOA), 2100 2nd St. SW., Washington, DC, 20593 within sixty days after service of the complete written decision, or if a transcript was requested, within 60 days after receipt of the transcript. After this time has elapsed, anything received will not be considered as a part of the appeal record unless an extension of time has been granted in writing by the Commandant and the extended time limit has been met.

(d) The appeal must contain a brief or memorandum setting forth legal and other authorities relied upon. All grounds for appeal or exceptions to the Administrative Law Judge's decision must be described with particularity.

(e) No appeal will be accepted in the case of a revocation or outright suspension if the respondent has not complied

with the order of the Administrative Law Judge to deposit the license or document with the Coast Guard.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 95-072, 60 FR 50459, Sept. 29, 1995; CGD 96-041, 61 FR 50726, Sept. 27, 1996]

§ 5.705 Action on appeal.

(a) The Commandant may affirm, reverse, alter, or modify the decision of the Administrative Law Judge, or may remand the case for further proceedings. The Decision of the Commandant on Appeal is the final agency action in the absence of a remand.

(b) Failure to file a brief containing grounds and justification for relief sought on appeal of the Administrative Law Judge's decision will result in either:

(1) Termination of the case by written notice to the appellant or appellant's counsel that the decision of the Administrative Law Judge constitutes the final agency action on the merits of the case; or

(2) Consideration of the appeal on the merits of the case and publication of the Commandant's decision without prior notice to the appellant or appellant's counsel. This will only be done when some clear error appears in the record or when the case presents some novel policy consideration.

§ 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary license, certificate, or document.

(a) A person who has appealed from a decision suspending outright or revoking a license, certificate or document, except for revocation resulting from an offense enumerated in § 5.59, may file a written request for a temporary license, certificate or document. This request must be submitted to the Administrative Law Judge who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.

(b) Action on the request is taken by the Administrative Law Judge unless the hearing transcript has been forwarded to the Commandant, in which case, the request is forwarded to the Commandant for final action.

(c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary document or license may be denied for that reason alone.

(d) All temporary documents will provide that they expire not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary document expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.

(e) If the request for a temporary document is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.

(f) Copies of the temporary documents issued become a part of the record on appeal.

§ 5.709 Appeal cases remanded for further proceedings.

(a) When the Commandant renders a decision remanding a case for further proceedings, the remand is directed to the Administrative Law Judge. If a reopening of the former hearing or a new hearing is necessary, the Administrative Law Judge notifies the investigating officer and the respondent and sets a date for the hearing.

(b) If the hearing is reopened, the evidence in the prior hearing shall be evaluated together with the new evidence submitted.

(c) In a new hearing, the evidence in the prior hearing may be used for purposes of impeachment. Evidence in the prior hearing may be stipulated as a part of the record of the new hearing.

(d) The Administrative Law Judge renders either an entirely new decision or a decision incorporating by reference the original decision, as appropriate.

§ 5.711 Commandant's Decisions on Appeal.

(a) The Commandant's Decisions on Appeal are the final agency action taken in appeals under the suspension and revocation proceedings provided by this part. These Decisions are issued *seriatim* and are public records.

(b) The Commandant's Decisions on Appeal are available for reading purposes at Coast Guard Headquarters, Offices of District Commanders, and at Marine Safety Offices and Marine Inspection Offices. (See 33 CFR subpart 1.10.)

§ 5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of licenses, certificates, or documents are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.

(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances. Communications should be addressed to Commandant (G-L), U.S. Coast Guard, 2100 2nd St. SW., Washington, DC 20593.

(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated *of counsel*.

§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary document and/or license pending appeal to National Transportation Safety Board.

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Com-

mandant's opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary document or license may be denied for that reason alone.

(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).

(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary document and/or license as specified in the stay order. This document is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

Subpart K—Review of Administrative Law Judge's Decisions in Cases Where Charges Have Been Found Proved**§ 5.801 Commandant's review.**

Any decision of an Administrative Law Judge, in which there has been a finding of *proved*, may be called up for review by the Commandant without procedural formality.

§ 5.803 Record for decision on review.

The transcript of hearing, together with all papers and exhibits filed, shall constitute the record for consideration and review.

§ 5.805 Action on review.

(a) The Commandant may adopt in whole or in part the findings, conclusions, and basis therefor stated by the Administrative Law Judge, may make entirely new findings on the record, or may remand the case to the Administrative Law Judge for further proceedings.

(b) In no case will the review by the Commandant be followed by any order increasing the severity of the Administrative Law Judge's original order.

(c) The Decision of the Commandant on Review, shall be the final agency action in the absence of a remand.

§ 5.807 Commandant's Decision on Review.

The Commandant's Decisions on Review are available for reading purposes at Coast Guard Headquarters, at Offices of District Commanders, Marine Safety Offices and Marine Inspection Offices. (See 33 CFR subpart 1.10.)

Subpart L—Issuance of New Licenses, Certificates or Documents After Revocation or Surrender

§ 5.901 Time limitations.

(a) Any person whose license, certificate or document has been revoked or surrendered for one or more of the offenses described in § 5.59 and § 5.61(a) may, three years after compliance with the Administrative Law Judge's decision and order or the date of voluntary surrender, apply for the issuance of a new license, certificate or document.

(b) The three year time period may be waived by the Commandant upon a showing by the individual that, since the occurrence upon which the revocation or surrender was based, the individual has demonstrated his good character in the community for a period exceeding three years.

(c) Any person whose license, certificate or document has been revoked or surrendered for one or more offenses which are not specifically described in § 5.59 or § 5.61(a) may, after one year, apply for the issuance of a new license, certificate or document.

(d) For a person whose license, certificate, or document has been revoked or surrendered for the wrongful simple possession or use of dangerous drugs, the three year time period may be waived by the Commandant upon a showing that the individual:

- (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 com-

pletion of the rehabilitation program and;

(3) Is actively participating in a bona fide drug abuse monitoring program.

(e) For a person whose license, certificate or document has been revoked or surrendered for offenses related to alcohol abuse, the waiting period may be waived by the Commandant upon a showing that the individual has successfully completed a bona fide alcohol abuse rehabilitation program and is actively participating in a bona fide alcohol abuse monitoring program.

(f) The waivers specified under subparagraphs (d) or (e) of this section may only be granted once to each person.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 84-099, 52 FR 47535, Dec. 14, 1987]

§ 5.903 Application procedures.

(a) An application form for a new license, certificate or document may be obtained from any Officer in Charge, Marine Inspection.

(b) The completed application and letter must be addressed to the Commandant, U.S. Coast Guard, 2100 2nd St. SW., Washington, DC 20593, and must be delivered in person to the nearest Officer in Charge, Marine Inspection.

(c) The letter is an informal request for the issuance of a new license, certificate or document and should include the following:

(1) A letter from each employer during the last three years attesting to the individual's work record;

(2) Information supportive of rehabilitation or cure when the license, certificate or document was revoked because of incompetency or association with dangerous drugs; and

(3) Any other information which may be helpful in arriving at a determination in the matter.

(d) The Officer in Charge, Marine Inspection, forwards the letter and application, together with an evaluation and recommendation, to the Commandant.

§ 5.905 Commandant's decision on application.

(a) The applicant's letter and application form, as well as the evaluation

and recommendation, are referred to a special board appointed by the Commandant. The board examines all the material submitted with the application and such other information as may, in the judgment of the board, be considered appropriate. The board shall submit its findings and recommendation to the Commandant.

(b) The Commandant shall determine whether or not a new license, certificate or document will be issued. The applicant will be notified by letter of such determination.

PART 6—WAIVERS OF NAVIGATION AND VESSEL INSPECTION LAWS AND REGULATIONS¹

Sec.

- 6.01 Procedures for effecting individual waivers of navigation and vessel inspection laws and regulations.
- 6.04 Vessels requisitioned by the United States for emergency evacuation.
- 6.06 Vessels operated by or chartered to Military Sealift Command.
- 6.07 Chronological record of seaman's previous employment.

AUTHORITY: Act Dec. 27, 1950, Ch. 1155, secs. 1, 2, 64 Stat. 1120 (see 46 U.S.C. App. note prec. 1); 49 CFR 1.46.

§6.01 Procedures for effecting individual waivers of navigation and vessel inspection laws and regulations.

(a) It is hereby found necessary in the interest of national defense to waive compliance with the navigation and vessel inspection laws administered by the Coast Guard, as well as the regulations issued thereunder and published in 33 CFR chapter I or in this chapter, to the extent and in the manner and upon the terms and conditions as set forth in this section.

(b) An application requesting that a waiver be made effective with respect to a particular vessel may be made by any authorized representative of an agency of the United States Government or any other interested person (including the master, agent, or owner of the vessel involved). Except as provided in paragraph (d) of this section, the application shall be in writing. The application shall be delivered to the Coast Guard District Commander or to

his designated representative at the port or place where the vessel is located. In the case of a vessel in any foreign port or place, the application shall be made to the designated representative of the Commandant at such port or place, or if the Coast Guard has not established facilities in such port or place, to the nearest designated representative of the Commandant at a port or place where such facilities have been established. Every application shall contain a statement of the particular provisions of law with respect to which waiver of compliance is requested, a certification that the waiver of compliance with such laws with respect to the vessel involved is necessary in the interest of national defense and, an outline of the facts upon which such certification is based. The Coast Guard District Commander (or his designated representative or the designated representative of the Commandant, as the case may be) shall promptly examine every application for the purpose of determining whether the necessity for prompt action is such as to require that the waiver be made effective by him without reference to the Commandant. In any case in which it appears to the Coast Guard officer concerned that reference of the application to the Commandant for action would not delay the sailing of the vessel or otherwise be contrary to the interest of national defense, the application shall be so referred. In all other cases such Coast Guard officer shall give immediate consideration to the application and if he reaches the conclusion that the urgency of the situation outweighs the marine hazard involved, then such waiver shall be made effective in regard to such vessel to the extent and under the circumstances specified by him.

(c) The Coast Guard officer making such a waiver effective pursuant to paragraph (b) of this section shall immediately prepare, in triplicate, an order setting forth the name of the vessel involved, the laws (also regulations, if any) with respect to which the waiver is effective, the extent to which compliance with such laws (also regulations, if any) is waived, and the period for which the waiver shall be effective. If practicable, one copy of this

¹ This is also codified in 33 CFR part 19.