UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	VICE COMMANDANT
LICENSE NO. 713770	:	
	:	ON APPEAL
	:	NO. 2628
	:	
Issued to: Thomas W. VILAS	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.[1] By a Decision and Order (D&O) dated November 22, 1999, an Administrative Law Judge (ALJ) of the United States Coast Guard at Alameda, California suspended Appellant's license for sixteen (16) months, ten (10) months **OUTRIGHT** and the remaining six (6) months remitted on eighteen (18) months probation after finding proved a charge of negligence, with one underlying specification alleging contributing to the grounding of the tank ship which he was piloting.

PROCEDURAL HISTORY

The hearing in this matter commenced in Alameda, California on December 16, 1997. Appellant appeared with counsel and "Denied" the charge and specification. Pursuant to stipulation of the parties, Appellant was allowed to call the Coast Guard Investigating Officer, LT Benjamin Benson, out of turn as a defense witness. Thereafter, in order to accommodate the parties, their counsel and the witnesses, the hearing re-convened on subsequent dates, as follows: January 14, 16; February 2; March 9-11, 13; May 29, and June 15-18, 1998. By Order dated January 12, 1999, the ALJ found the

[1] Since Appellant's hearing before the Administrative Law Judge, the procedural regulations for Coast Guard suspension and revocation hearings have been amended. See 64 Fed. Reg. 28075 (May 24, 1999), 46 C.F.R. Part 5 (1999 edition) 33 C.F.R. Part 20 (2000 edition). As Appellant's hearing occurred prior to the change in the regulations, this appeal is based on the procedural rules in place at the time of the hearing. Any reference in this opinion to the regulations contained in 46 C.F.R. Part 5 (§§ 5.1 – 5.905) is a reference to 46 C.F. R. Part 5 (1998 edition).

charge and specification proved. The sanction portion of the hearing was held March 9, 1999. Final briefs were submitted on May 6, 1999.

The parties introduced into evidence the testimony of fifteen (15) witnesses and seventy-two (72) exhibits.

The ALJ's D&O was served on Appellant on November 22, 1999. Appellant filed a notice of appeal on December 15, 1999. A copy of the transcript had already been received, and was used by the parties and the ALJ in preparing their post-hearing pleadings. Appellant was issued temporary licenses during his appeal, the last of which was issued on November 20, 2001, under the authority of 46 C.F.R. § 5.707. He perfected this appeal on January 20, 2000, by filing his brief. This appeal is properly before me.

While the appeal was pending, on April 17, 2000, Appellant filed a motion to supplement the record on appeal, seeking to attach a letter to the Commandant dated February 22, 2000, written by Mr. Patrick L. Johnson, Chief Executive Officer of Attransco, Inc., the owner of the M/V CHESAPEAKE TRADER, the vessel on which Appellant was serving as pilot at the time of the grounding. That motion was treated as a motion to file a supplemental brief with attachment pursuant to 33 CFR § 20.1003(c) and was granted on or about May 15, 2000.[2] The letter, identified as Exhibit 1 to the motion to supplement the record, contains Mr. Johnson's views on matters pertinent to Appellant's handling of the vessel on June 28, 1997, the date of the grounding here involved, and I have considered it in connection with this appeal.

APPEARANCE: Kelly, Gill, Sherburne & Herrera (Dennis Kelly, Esq. and Timothy Gill, Esq.) for Appellant. The Coast Guard Investigating Officers were LT Benjamin A. Benson, USCG and LT William L. Chaney, USCG.

[2] 46 C.F.R. Part 5 (1998) was silent on the subject of filing supplemental briefs, but 33 C.F.R. Part 20 authorizes such filings in the discretion of the Commandant. I have decided to exercise my discretion by applying 33 C.F.R.§ 20.1003(c) as stated.

CONTENTIONS OF THE PARTIES

This appeal arises out of a grounding by the M/V CHESAPEAKE TRADER, a loaded tanker, in the environmentally sensitive San Francisco Bay outside the dredged U.S. Army Corps of Engineers maintained ship channel. The principal factual issue in the case was where the grounding occurred. It was undisputed that the vessel grounded outside the dredged navigation channel; the parties differing on how far outside the dredged channel and whether the vessel had a right to be where it grounded. The government contended that, based on the evidence, the grounding occurred in, or at least so close to the dredge spoil area, which was marked on the navigation chart, that it was in an area where the vessel had no right to be. Respondent contended that the government did not carry its burden of proof. In the alternative, Respondent sought to show that the vessel grounded on an uncharted, unknown (and unknowable) shoal area close enough to the Corps maintained and marked channel to be where the vessel did have a right to be. The government relied on the well-established presumption of negligence that arises when a vessel grounds at a place where it has no right to be.

Respondent testified that his belief that it could not have been in the disposal area was based on his "seaman's eye" lining up the vessel with the channel buoys. He admitted that while it was true that the vessel was "slightly" out of the marked channel at the time of the grounding, the buoys were in alignment enough to tell him as a seaman that it was not in the disposal area.[3]

The captains of the two tugs that were alongside the vessel assisting it to turn in the channel supported Respondent's view that the vessel was not in the disposal area. Both tug captains' testimony was to the effect that they did not believe the CHESAPEAKE TRADER was any more than 200-300 feet off the Avon wharf, which would have put it approximately 800 feet from where the Chief Mate's fix put it. Their testimony, which was also based on their "seaman's eye" estimations, was that the vessel was two to three "100-foot tug lengths" off the wharf. There was significant

[3] The Coast Guard called Petty Officer McSweeney, who testified that the buoys were "on station" marking the edge of the channel.

disagreement among them as to the grounding location. The location to which they testified placed the vessel significantly outside of the GPS fix's 100-meter accuracy range. D&O 48, and evidence cited therein.

FINDINGS OF FACT

The M/V CHESAPEAKE TRADER, a 658-foot long, 106-foot-wide loaded tanker, grounded in the environmentally sensitive San Francisco Bay outside the dredged U.S. Army Corps of Engineers-maintained ship channel. There was no damage to the vessel's hull, rudder, or propeller and no oil was spilled. The grounding was imperceptible to those on board, except for the fact that during the turning maneuver the tanker unexpectedly stopped moving in response to her engine and the engines of the attending tugs, one of which was moored on the starboard bow and the other on the starboard quarter. At the time of the grounding, Appellant was serving as a "federal" pilot under the authority of the above-captioned license, and was giving helm and engine orders to execute a 180° turn in order to moor the vessel port side to the Avon wharf.

When those on the bridge of the CHESAPEAKE TRADER noted that the vessel ceased moving in response to engine and helm orders, they correctly concluded that the vessel had grounded. The vessel's Chief Mate immediately saved its position in the on-board Global Positioning System (GPS) and took a visual fix using two points on the shore. When plotted on the chart, the Lines of Position (LOPs) of the bearings to two points on shore crossed at 90°, thus creating as accurate a fix as possible without using a third line of position as a "check". Noting that these two independent fixes of the vessel's position were only 50 yards apart, he was satisfied that they accurately showed where the vessel grounded.[4] The Chief Mate reported that the vessel had grounded outside the channel in the Corps' dredge disposal area. Respondent replied that he didn't see how they could be in the disposal area. He did not ask the Chief Mate to re-check the vessel's position or take his own fix. Instead, Respondent undertook to free the vessel. This was accomplished approximately 15 minutes later.

At the time of the grounding, Respondent did not request that the Chief Mate re-fix the vessel's position after being told that his fixes put the vessel in the disposal area.

Additionally, Respondent did not arrange for soundings to be taken at the place where he believed the vessel had grounded after the event. Nor did the pilot's association, of which Respondent was an influential member, request the Corps of Engineers to take soundings of that area immediately after the grounding. Had they been taken, those soundings would have verified the existence (or non-existence) of shoaling in that area.

The NOAA Chart 18657 for the Avon Wharf area was available to the Respondent while piloting the CHESAPEAKE TRADER. Due to a flood tide, the water in the vicinity of the Avon wharf was approximately 3.2 feet greater than the charted depth at the time of the grounding. At the time of the grounding, the CHESAPEAKE TRADER would touch bottom approximately at soundings of less than 8.9 meters on the NOAA chart (soundings of 29.2 feet on the U.S. Army Corps of Engineers April 10-14, 1997 chart, hereafter "April 1997 chart").

Both parties stipulated that Suisun Bay, a part of San Francisco Bay, is subject to shoaling (sand waves) due to winter snow melt and spring rain water run-off depositing silt into the bay. Respondent contended that the CHESAPEAKE TRADER grounded on an unknown shoal area away from the Disposal Area and closer to the Avon wharf. Thus, it was necessary to determine whether it was more probable than not that shoaling in or near the marked channel created an unknown mud lump or shoal on which Respondent contended the vessel grounded.[5] The ALJ found as a fact that:

> …sand waves in 40 feet of water are no greater than 2 feet high and their height decreases as the water depth decreases. The greatest sand wave seen is 2.75 meters (9 feet) at a depth of 40 meters (over 130 feet) in Suisun Bay. Most sand waves are in the 0.5 to 1 meter (1.6 to 3.2 feet) range and occur in water depth of 12 to 20 meters (39 – 65 feet). The area in question [where Respondent contended the vessel grounded] in this case has a water depth of 40 feet or less (based on Respondent's position of the grounding on RE A). Neither the April 1997 nor the November/December 1997 USACOE soundings show a shoal on which the CHESAPEAKE TRADER could ground south of the shallow water at the Disposal Area. Between the April 1997 and June 28, 1997, the water inflow into Suisun

[4] This location was stipulated by the parties to be a place where the vessel did not have a right to be.
[5] Respondent bore the burden of proof (going forward with the evidence) to establish the existence of this mud lump. See, e.g., Appeal Decision 2284 (BRAHN); The Evelyn v. Gregory, 170 F.2d 899, 901 (4th Cir. 1948); The Anaconda, 164 F.2d 224, 228 (4th Cir. 1947).

> Bay was sufficient to deposit no more than one meter (3.3 feet) of sediment in the vicinity of the Avon Wharf.

D & O 41-44.

In part because of these findings, the ALJ found that the vessel did not ground on an unknown shoal area in or adjacent to and near the marked channel. Rather, he found that the vessel grounded in or just outside the disposal area where it did not have a right to be. D&O 63. The ALJ also found that the fact that the vessel did not have any hull or rudder damage from the grounding or the subsequent efforts to free the vessel was not inconsistent with the finding that it grounded in a place where it had no business being. He found that the bottom, where the vessel grounded, is "soft sand" and "soft clay" with a consistency of either "soft" to "very soft" to a depth of 10 feet below the bottom. D&O 63 and citations to the record evidence therein. Thus, the swinging movement of the vessel that occurred while it was being freed from the strand would not have damaged the vessel.

In assessing the appropriate sanction, the ALJ found as aggravating factors the following: San Francisco Bay and its tributaries are designated environmentally sensitive for purposes of oil spill prevention and response; the CHESAPEAKE TRADER was laden with approximately 100,000 barrels of oil. Therefore, Respondent had a higher duty of care than he otherwise would, which he breached. The ALJ also apparently considered that there was a risk of hull penetration due to the grounding in this case, thus resulting in an unreasonable risk of an oil spill into this designated environmentally sensitive area. D&O 72, and the discussion there regarding "[l]arge oil tankers not being designed to be dragged over the seabed", and the ALJ's discussion of the pilot's inability to see the bottom and therefore, "he can not know for sure whether there are rocks under the vessel's bottom." The ALJ also found as an aggravating fact that the Respondent committed both what the ALJ termed a "skill-based" error, as well as "rule-based" errors, that led to the grounding. The "skill-based" error was allowing the vessel to get out of line with the buoys, resulting in the grounding. The "rule-based" error the Respondent allegedly committed was not taking repeated bearings to fix his position as he proceeded

up the channel.[6] The ALJ found Respondent "intentionally engaged in conduct (made affirmative decisions not to use other navigational aids, such as the taking of bearings) which resulted in a grounding." According to the ALJ, "Respondent knew what the rules and procedures were and he consciously decided not to employ them." D&O 73. Finally, the ALJ found as an aggravating factor that Respondent "was in total denial of his responsibility for the grounding; his demeanor, while testifying in the Sanctions portions of the hearing, was arrogant," and he "could not accept that the Coast Guard has jurisdiction over the way he performs his job." The ALJ cited the following portion of Respondent's testimony in support of this finding:

> Your Honor, the term "negligence" associated with my name, with my reputation, positively sickens me. The same word that LT Benson uses so freely today and with such venom sticks in my mouth. I'm not perfect. I don't contend I ever have been perfect. I'm capable of error. But at no time was I negligent to the Chesapeake Trader, to the environment of San Francisco Bay or to any of my duties.

D&O 74.

The ALJ found the following mitigating factors: Respondent had a clean prior record; there was no damage or oil spill as a result of the grounding and removing of the vessel from the strand was accomplished under the vessel's own power within 15-20 minutes with only the already attached tugs assisting. Additionally, the ALJ noted Respondent's excellent reputation in the Bar Pilot community. The Respondent's counsel suggested that an ADMONITION was adequate sanction, while the Coast Guard suggested six months suspension.

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[6] The record contained no citation to a written rule requiring the pilot to take bearings to fix the ship's position. There was no evidence that a "rule" existed requiring anyone on the CHESAPEAKE TRADER to take bearings to fix the ship's position at any particular interval. On the contrary, the applicable regulation, 33 CFR 164.11, requires the ship's officer(s) (not the pilot) to fix the vessel's position, plot that position on the chart at each fix and inform the person directing the movement of the vessel of that position. Significantly, during the rulemaking process, the rule as proposed was changed when it was finalized to remove a requirement that the vessel's position be fixed at any stated interval, such as every 15 minutes or when the course changed in recognition of existing manning requirements. 42 FR 5957 (Jan. 31, 1977). This is not to say that the pilot does not have a responsibility to know the vessel's position at all

BASES OF APPEAL

Respondent filed a 97-page Brief in which he alleged the following errors by the ALJ:

1. Errors in Interpreting the Evidence Presented at Trial:
    a. Location of the Vessel: The ALJ failed to recognize the overwhelming and clear evidence that the vessel physically could not have been in the location suggested by the Coast Guard;
    b. GPS Margin of Error: The ALJ misinterpreted the evidence pertaining to the accuracy of the vessel's non-differential GPS and relied on that fallacy in reaching his decision;
    c. Testimony of Sladen: The ALJ stated that he found Captain Sladen, the vessel's Master, to be credible, but then ignored the portion of Sladen's testimony that Respondent alleges refuted the Coast Guard's argument as to the location of the grounding; and
    d. Use of "Facts" From Outside of the Proceedings: The ALJ improperly relied on a statement from outside of these proceedings (i.e. facts which are not in the transcript of the proceedings), which statements he misconstrued.
2. Errors of Law:
    a. Considering Only the Coast Guard's Evidence to Determine Whether the Basic Fact Giving Rise to the Presumption of Negligence Had Been Proven: The ALJ did not consider the Respondent's evidence in determining whether the Basic Fact underlying the presumption of negligence had been proven, a legal theory that finds no support from any legal authority.
    b. Continuing the Operation of the Presumption of Negligence Despite Overwhelming Evidence Against It: The ALJ continued the presumption in the face of overwhelming evidence refuting the

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times, merely to correct the ALJ's erroneous finding that a written rule *applicable to the pilot* required him to take bearings to fix the vessel's position *at a given interval.*

Presumed Fact. Respondent contends the proper rule of law is that once Vilas met his burden of producing evidence to refute the "Presumed Fact", the presumption was no longer in force as a matter of law. The Coast Guard remained obliged to meet its burden of proof on the basis of the preponderance of all of the evidence, both that of the Coast Guard and Captain Vilas.

3. Procedural Errors:

   a. The Court Erred in Refusing to Strike Captain Sladen's and the Chief Mate Meier's Testimony and Refusing to Dismiss the Case: The ALJ imposed a sequestration order on these proceedings. Thereafter, in reliance on that order, Captain Vilas called the Coast Guard investigating officer as a witness. While still under the sequestration order, the Coast Guard investigating officer discussed with upcoming witnesses Sladen and Meier, both verbally and in writing, the issues that would be brought up in their testimony. Respondent contends this was "coaching" of witnesses by a witness while under the sequestration order and as such was a direct violation of the order. When Vilas protested this violation, the ALJ "solved the violation by lifting the sequestration order as to the Coast Guard investigating officer solely on an 'ex post facto' basis."

   b. The Court Erred in Denying Respondent the Right to Call its Chosen Witnesses. The ALJ allegedly erred in refusing to allow the Respondent to call as a witness Captain Patrick Moloney, who prepared the report of the State Board of Pilot Commissioners into this incident. The ALJ also allegedly erred in preventing Respondent from concluding its examination of the Investigating Officer, Lt. Benson, when it became apparent that the cross examination was proving that the Coast Guard had not conducted a proper investigation. The ALJ also prevented Respondent from examining the Coast Guard's Senior Investigating Officer.

c. The Court Erred in Allowing the Coast Guard to see the Respondent's Case Before Presenting its Own Case. As discussed above in connection with the violations of the sequestration rule, the Respondent began his case prior to the Coast Guard having to put on their case, after which the Court reversed the sequestration ruling on which that order of witnesses had been based. Thereafter, the court allowed the Coast Guard to put on most of its case as "rebuttal", again after hearing the testimony of the Respondent's witnesses.

d. The Court Did Not Maintain an Accurate Record of the Proceedings: The ALJ intentionally turned off the official court record by voice and hand commands to the court reporter. Vilas' counsel protested this action, but the ALJ failed to record the protests on the record. Vilas counts 93 times that the official court record was turned off during the proceedings. This constant off-the-record conduct of the ALJ has prejudiced Vilas by preventing a full record to use on appeal. This action by the ALJ directly violates applicable regulations and due process protections. The ALJ has prevented Vilas from presenting his full testimony on the record for use on appeal. During the first day of hearings, the ALJ turned off the Court record while Captain Vilas was testifying. That testimony of approximately one-half hour in length on the crucial issues of the vessel's course and heading has been forever lost from the record on appeal.

e. Failure to allow Vilas to Submit a Closing Brief in his Defense: After completion of evidence, the ALJ issued his order that there would be a two-step briefing process. He first asked for briefs on the law of the presumption of negligence. He advised at the same time that he would ask for briefs on the merits only if he found that the presumption of negligence had been proven by the Coast Guard. After briefing the issue of presumption of negligence, the Court issued its decision. It never allowed Vilas to submit a brief on the merits.

f. A Mariner in the San Francisco Bay Area Cannot Get a Fair Hearing from this ALJ. According to the results of Respondent's Freedom of Information Act request, in the last five years not a single mariner who has come before this ALJ has had the charges against him found not proven.

4. Violations of Ethics by the Coast Guard Investigating Officer, which went unpunished by the Court. The Investigating Officer engaged in misconduct, performed his investigation in a haphazard manner, and then did not complete his investigation until after charges were filed against the Respondent.
5. Improper Sanctions:
    a. Sanction is Extreme: The sanction imposed by the Coast Guard is entirely inconsistent with the nature of the case and the factors presented to the ALJ; and
    b. Sanction Based on Misconception of a Pilot's Duties: The sanction is based at least in part on the ALJ's misconception that the Respondent should have ignored his navigational duties at the time of the grounding in favor of creating evidence for use in a later license hearing.

OPINION

I. Alleged Errors of Law

I will deal first with the alleged errors of law (paragraphs 2 a. and b. above). I note at the outset of discussion on this issue, that whereas Respondent argues that the ALJ "intentionally did not consider the Respondent's evidence in determining whether the basic fact underlying the presumption of negligence had been proven", he failed to cite any instance in the record where that occurred (other than the ALJ's refusal to allow Pilot Patrick Moloney to testify, with which I will deal separately in this opinion). On the contrary, the record reveals that the ALJ carefully considered *all* the evidence, both the Coast Guard's and Respondent's, in reaching his decisions. Respondent admits that the

ALJ accepted evidence from Respondent on the critical issue of where the vessel grounded. See Respondent Appeal Brief at 59, wherein he states, "But Judge McKenna accepted evidence day after day from the Respondent on the Basic Fact of whether the vessel could have been at the location suggested by the visual fix."

Turning now to a discussion of Respondent's issue 2 a. and b, when the Coast Guard concluded its case in chief, Respondent moved to dismiss on the grounds that the Coast Guard had not made out a *prima facie* case. It was agreed by the parties that if the Coast Guard had proven that the vessel grounded in a place where it was not supposed to be, the presumption of negligence would be properly invoked. In considering the motion to dismiss, the ALJ, perforce, relied on the evidence which had been admitted up to that point in the proceeding (primarily that produced by the Coast Guard). The procedure followed by the ALJ in that regard is the same as that followed by all ALJs (and most courts). Appeal Decision 2416 (MOORE); *Woods v. United States Dep't of Transp.*, 681 F.2d 988, 1982 U.S. App. LEXIS 16846, 1985 A.M.C. 2112 (5th Cir. 1982). To the extent that Respondent contends that it was error for the ALJ to invoke the presumption in deciding that the case would not be dismissed at that stage, Respondent's contention is rejected. Appeal Decision 2321 (HARRIS). My review of the record confirms that once the Coast Guard had proven that the CHESAPEAKE TRADER grounded in or near the disposal area (primarily through the testimony of Chief Mate Meier), the ALJ was justified in invoking the presumption. Numerous Commandant's Decisions on Appeal have ruled precisely that. Appeal Decision 2404 (McALLISTER), a decision cited by Respondent. In fact, it strains credulity to argue otherwise.

But that does not dispose of the alleged error claimed here. In addition to arguing that it was error for the ALJ to invoke the presumption in ruling on his motion to dismiss, Respondent also argues it was error to continue it in force in the face of Respondent's evidence because that evidence was sufficient to overcome the presumption. The ALJ ruled that the Coast Guard had made out a *prima facie* case, including using the presumption. Although Respondent does not agree with the ALJ's finding in this regard, it is not a legal error for the ALJ to also rule that the Respondent had not introduced *credible* evidence to rebut the basic fact (that the vessel grounded in a place where it had

no business being) on which the presumption was based. Indeed, the ALJ was called on to make a finding as to the credibility and weight of Respondent's evidence in this regard. And, as stated earlier (and as noted by Respondent in his brief on appeal), after the Coast Guard concluded its case in chief, the ALJ listened to a number of days of evidence from Respondent on precisely that point.

Respondent correctly notes that if the evidence, taken as a whole, showed that he grounded the CHESAPEAKE TRADER in a place where it had a right to be, i.e., not in or adjacent to the disposal area, but rather just outside the marked channel where vessels docking at Avon wharf routinely turn, then that evidence would have rebutted the basic fact on which the presumption was based (vessel grounded in or immediately adjacent to the disposal area), and the case should have been dismissed. *Wardell v. Department of Transportation*, 884 F2d 510 (9th Cir. 1989); *Commandant v. Jahn*, NTSB No. EM 88; *Commandant v. Murphy*, NTSB No. 139. Respondent is also correct that, if the presumption is rebutted by credible evidence, he need not also disprove fault in order to prevail. This is because the burden of proof (persuasion) is and remains on the Coast Guard. *See* 46 C.F.R. § 5.539. Where the presumption has been rebutted, the Coast Guard must put forth evidence to prove negligence independent of the presumption, in order to sustain that burden. *Murphy*, NTSB No. EM 139, *supra*.

Respondent's difficulty is that the foregoing rule is not applicable on the facts as found in this case. The ALJ ruled that Respondent's evidence was not sufficiently credible to rebut the basic fact that the vessel had grounded in a place where it had no right to be. The very fact on which the Coast Guard's *prima facie* case depended, that Respondent was responsible for grounding the CHESAPEAKE TRADER in a place where it should not have been, was not overcome even after Respondent's evidence was considered. Properly understood, Respondent's argument on appeal becomes whether the ALJ erred in so finding (after listening to all the evidence).

Respondent's principal arguments as to why the ALJ erred in so finding are that (1) Respondent and the two tug captains all placed the location of the grounding of CHESAPEAKE TRADER well away from the disposal area, and much closer to (if not in) the marked channel; (2) the margin of error for the Chief Mate's GPS fix is 100

meters, vice 80-90 feet, which made that GPS "fix" useless to confirm the Chief Mate's two-LOP fix based on the visual bearings; (3) the vessel could not have grounded in the disposal area where the Chief Mate's visual fix placed it because it would have been physically impossible for the vessel, which needed 29.2 feet of water to float, to have gotten to that location because the water was too shallow (24-26 feet).

The standard of review for the ALJ's findings of fact, particularly his determinations which of two or more conflicting witnesses' accounts to accept or reject, is whether or not his decision was clearly erroneous. If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's are arbitrary and capricious. Appeal Decision 2465 (O'CONNELL); Appeal Decision 2424 (CAVANAUGH).

After reviewing the record in this case, I am convinced that the ALJ's finding that the vessel grounded in a place where it had no right to be was supported by reliable evidence. Respondent's evidence, that the vessel grounded in or nearly adjacent to the marked channel, was either inherently contradictory, and therefore unreliable as found by the ALJ (as in the case of the tug captains "seaman's eye" estimates of where the vessel grounded) or based on mere speculation (the existence of a sand or mud lump 10-feet above the bottom of the dredged channel on June 27, when no signs of such a mud lump were visible in either the April or December Corps sounding charts). Respondent's arguments to the contrary amount to nothing more than reiterations of his disagreement with the findings of the ALJ and the evidence on which they were based. The ALJ's findings in this regard are not clearly erroneous.

II. The Asserted Procedural Errors

I now consider the asserted procedural errors. The first is whether the ALJ erred by not striking the Master's and Chief Mate's testimony and dismissing the case. I

conclude that the ALJ did not err in refusing to strike those witnesses' testimony or dismiss the case.

Respondent's argument in this regard is, indeed, novel. He contends that striking these witnesses' testimony and dismissing the case is the only appropriate remedy because the fact witnesses were ordered sequestered at the outset of the hearing, and LT Benson, who testified at the outset of the hearing at the request of Respondent, allegedly corrupted the other fact witnesses' testimony by discussing the subjects on which he had been examined with them. The facts surrounding this alleged procedural error are as follows:

LT Benson, one of the Investigating Officers, was permitted to be called as a witness by Respondent out of turn. LT Benson (who was also assertedly subject to the sequestration order) subsequently talked to the Master and Chief Mate Meier about the same subjects (how Chief Mate Meier's visual fix was taken, the accuracy of the GPS, and the vessel's gyro compass) on which he (Benson) was examined. According to Respondent, the Master and Chief Mate thereby learned the subjects of Respondent's questions. According to Respondent, and solely by virtue of those discussions, the Master's and Chief Mate's testimony was rendered so corrupted as to be untruthful; it should be stricken, and the case dismissed. Respondent cites as his authority for this novel contention the cases of *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994); *United States v. Rugiero*, 20 F.3d 1387, 1394 (6th Cir. 1994), and *United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir. 1983). The courts in those cases noted that sequestering witnesses is designed to ensure that a witness will not shape his testimony based on the testimony of others and that the witness' testimony will be based on his recollection, and that barring a witness who violates a sequestration order may be an appropriate remedy, provided there is a showing of actual taint, or a realistic probability that the witness' testimony was tainted by the violation of the sequestration order. Assuming, without deciding, that LT Benson was covered by the sequestration order after he testified about his investigation, and also assuming that he should not have mentioned the subjects of the questions asked by Respondent during the first hearing session, it does not follow that the Master's and Chief Mate's testimony in this case actually was or reasonably could be said

to be thereby so corrupted that it should have been stricken as untruthful. Neither the cases cited by Respondent nor any other authority found requires that result in the absence of such a finding. Based on my review of the record, I conclude that no such showing has been made. Nor is it reasonably likely under the circumstances. Therefore, I conclude this assignment of error is without merit. Before leaving this issue, however, I should note the following for the benefit of future cases where Respondent seeks to call the investigating officer as a fact witness.

Although the Coast Guard stipulated at the time that they had no objection to LT Benson testifying, the subjects about which he was called and examined by Respondent (LT Benson's experience or lack thereof in piloting ships, LT Benson's knowledge of or investigation into the accuracy of the ship's GPS, his knowledge of the accuracy of the Chief Mate's visual fix, and whether he conducted any investigation of the ship's gyro compass and synchronization between it and the ship's starboard wing gyro repeater[7]) were not relevant to the issues in this proceeding. The true fact witnesses, Captain Sladen, Chief Mate Meier, the tug captains and Respondent, all testified as to their observations of the location of the grounding and the methods used to fix the position of the grounding, as well as the accuracy of those methods and procedures. It was not relevant whether and to what extent LT Benson examined the accuracy of the ship's GPS, the gyrocompass, or its synchronization to the starboard bridge repeater.[8]

Respondent also complains that he was not allowed to call witnesses in his defense. Specifically, he refers to the ALJ's refusal to allow him to call Pilot Patrick Moloney as a witness to the events surrounding the grounding as pilot Moloney learned them as a result of the State Pilot Commission's Investigation (in which pilot Moloney participated). Respondent wanted pilot Moloney to testify concerning the findings of the

[7] I interpret these as attacks on the quality of the Coast Guard's investigation into the grounding, and attempts to cast doubt on the validity of the Coast Guard's case by attacking the investigation efforts and experience of the Investigating Officer. The validity of the case against Respondent is based on the totality of the evidence, and not on the experience or lack thereof of the investigating officer in piloting ships the size of the CHESAPEAKE TRADER.

[8] Respondent also complains that he was precluded from calling LT Benson's immediate superior, the Senior Investigating Officer, LCDR Sharpe, to testify about the Coast Guard investigation. The subject of testimony to be elicited from LCDR Sharpe was similar to that elicited from LT Benson. I conclude that this testimony was as irrelevant as LT Benson's testimony for the same reasons.

State Board of Pilots as a result of their investigation, and to explain why that Board found as it did in respect of where the vessel grounded. In refusing to allow Respondent to call pilot Moloney as a witness, the ALJ ruled that the report of the Pilot Commission's investigation, its findings as to the location of the grounding and their reasons for so finding were not relevant to this proceeding, since the witnesses who testified in that proceeding were available to testify in this proceeding. I agree with the ALJ's ruling in this respect, particularly since Respondent had his chosen expert, Pilot Waugh, testify as to where he believed the vessel grounded, why in Pilot Waugh's expert opinion it could not have grounded where the Chief Mate's visual fix placed it, and why the Coast Guard, again in Pilot Waugh's opinion, had not proven its case. These were substantially the same opinions as Pilot Moloney found to be the "facts" as to where the vessel grounded, and why Respondent's conduct in navigating the vessel was an "error" but did not constitute "negligence". In addition to the report of the Pilot Commission's not being relevant, I find that Pilot Moloney's testimony, to the extent it constituted expert testimony as Respondent contends in his brief on appeal, would have been cumulative to Pilot Waugh's testimony. The ALJ has discretion to prohibit testimony that is merely cumulative of other evidence in the record. *Woodward v. Director OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

Respondent also complains that the ALJ provided the Coast Guard with a preview of Respondent's case before having to put on its own, in violation of the regulations (46 C.F.R. § 5.539 and § 5.501).

I note that Respondent specifically requested the right to proceed out of turn by calling LT Benson. While I have already decided that LT Benson's testimony as to the conduct of the investigation by him was irrelevant to this proceeding, it seems to me that one of the inevitable risks Respondent chose to take by requesting to proceed out of turn before the Coast Guard concluded its case, was to "preview his case" to the extent Respondent chose to question LT Benson[9] when and as he did. Therefore, by voluntarily

[9] I expressly reject any suggestion that Respondent impermissibly attempted to introduce error into the proceeding or to confuse it by calling LT Benson out of turn. On the contrary, I view Respondent's attorney's allegation of error as zealous advocacy on behalf of his client. Nevertheless, I conclude that he waived the right to claim this as error by requesting that LT Benson be called out of turn.

assuming this "litigation risk", Respondent waived whatever error might otherwise have attended Respondent's witness testifying before the Coast Guard finished its case.

The remaining procedural errors alleged by Respondent - that an accurate record of the proceedings was not maintained; a mariner cannot receive a fair hearing before this ALJ; he was denied the right to file a closing brief on the issues; and there were violations of ethics and poor investigation by the Investigating Officer - are unsupported in the record. Respondent filed numerous and voluminous briefs throughout the course of proceedings on all the issues. The ALJ's Decision and Order comprehensively dealt with most, if not all, of those issues. The Respondent's Brief comprehensively dealt with the issues; and my own review of the record, including the trial transcript, reveals that the ALJ fully understood all the issues and arguments presented by Respondent. Based on that record review, I conclude that all the arguments made by Respondent here were raised below in one way or another, save one – that Respondent could not get a fair trial before ALJ McKenna. Respondent's failure to raise this issue below in the form of a motion to disqualify the ALJ on the grounds that he was biased is fatal to his raising it for the first time on appeal, particularly when the sole support for the alleged error is that Judge McKenna may not have ever found a charge against a mariner "not proved". Such fact is not a legally recognized basis for disqualification. It could just as well be a testament to the Coast Guard's care when deciding which cases to bring before Judge McKenna and presenting cases in which the charges should be found proved. In either event, I conclude this assignment of error is without merit. Respondent also complains that there were violations of ethics and that the investigation was not thorough. Respondent gives no specifics in respect of the allegation of misconduct by the Investigating Officer, other than the alleged violation by LT Benson of the sequestration order, with which I have already dealt. Respondent has cited no legal authority for the proposition that the allegedly inadequate investigation provides a defense to Respondent against the charge of negligence. In fact, what I said above concerning the alleged inadequacies of the investigation being irrelevant to whether Respondent was negligent in grounding the vessel where he did, applies equally here.

I specifically find that the record on appeal is complete. Those portions of the transcript which contain off-the-record discussions all involved insubstantial matters not necessary to reviewing the adequacy and sufficiency of this case. Significantly, Respondent has not provided any evidence, by affidavit or otherwise, that material pieces of evidence were omitted by the ALJ. This allegation of error is without merit. I turn now to the appropriateness of the sanction.

III. Appropriate Sanction

Respondent challenges the appropriateness of the sanction on the grounds that it is clearly excessive. In support, Respondent argues it exceeded that which was recommended by the Investigating Officer; it exceeded the suggested range of appropriate orders in the table at 46 C.F.R. § 5.569; and it exceeded the sanction given in similar cases. Respondent cites Appeal Decision 2515 (Cousins)[10]; and Appeal Decision 2455 (Wardell)[11], as similar cases in which mariners were awarded far less sanction than Respondent.

The Table of Recommended Awards in 46 C.F.R. § 5.569 sets forth a range of sanction, expressed in months of suspension outright, for negligently performing duties relating to vessel navigation: 2-6 months. The expressed purpose of the table in the Code of Federal Regulations is for guidance of the ALJ and to promote uniformity in orders rendered. Where the individual case shows aggravating factors, the suggested range may be exceeded. Conversely, where there are mitigating factors, the regulation contemplates that the sanction should be less severe than that suggested in the table. The table contemplates that appropriate aggravating and mitigating factors be applied to those sanctions set forth in the table to arrive at the appropriate order in a given case.

The sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ. He is not bound by the scale of average orders. Nor is he

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[10] Nine months suspension outright for 3rd Mate who negligently grounded *Exxon Valdez* on a charted rock in Prince William Sound resulting in largest oil spill in U.S. waters in history.

[11] Three months suspension outright for pilot who allided with berth causing damage to both wharf and vessel after negligently mishandling turn of vessel as it approached its berth.

bound to follow the recommendation of the Investigating Officer. Appeal Decision 2362 (ARNOLD); Appeal Decision 2173 (PIERCE). In order to overturn the sanction on appeal, it must be shown to be obviously excessive or involve an abuse of discretion. Appeal Decision 2423 (WESSELS); Appeal Decision 2366 (MONAGHAN). In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review. Appeal Decision 1937 (BISHOP). It is against this backdrop that I decide whether the sanction in this case is obviously excessive or a gross departure from the listed sanctions, and therefore must be remitted.

In Appeal Decision 2455 (WARDELL), aff'd sub. nom. *Commandant v. Wardell,* NTSB Order EM-149 (1988), I approved a suspension of a pilot's license for 3 months outright for an allision with a berth he negligently caused when he misjudged the turning radius of his ship. I noted that damage resulting from negligence could be considered as one aggravating factor. On appeal, the NTSB observed, in dicta, that damage ought not to be considered as an aggravating factor, but it did not disturb the sanction on appeal, concluding that it was, nevertheless, appropriate. In Appeal Decision 2515 (COUSINS), I again considered damage resulting from the negligence as an aggravating factor. I affirmed a sanction of 9 months suspension (3 months more than the maximum in the table of appropriate sanctions) for the 1989 grounding of the *Exxon Valdez* in Prince William Sound, which resulted in the largest single oil spill in U.S. waters in history. Significantly, in COUSINS, I noted that just as the damage (consequence) is one of the appropriate factors in aggravation, so the absence of damage or consequence from the negligence can be a mitigating factor.

The ALJ in this case noted that grounding CHESAPEAKE TRADER, a loaded tanker, in an environmentally sensitive area in San Francisco Bay was an aggravating factor because Respondent could not know for sure what the bottom condition was. The ALJ also found that Respondent's subsequent action of dragging the vessel over the ground to free it increased the risk of rupturing the hull; the resulting increased risk of a catastrophic oil spill was an additional aggravating factor. While these factors may be proper aggravating factors in the abstract, their application depends on the facts of the particular case. Put another way, they may not apply in a given case. I find, based on my

review of the record, they were at most theoretical possibilities here unsupported by the record. In short, they do not apply to this case.

The evidence here supports the finding that the grounding and subsequent actions to free the CHESAPEAKE TRADER from the strand occurred in or near the ACOE disposal area, an area in which the evidence also showed the bottom was known to be "soft". The evidence also supports the finding that the vessel was freed by the actions of its own engines and assisting tugs in 15-20 minutes. In short, it appears that there was no cognizable risk of rupturing the hull and a resulting oil spill. In fact, there was no hull damage, and no oil spill. Under these circumstances, this case is one in which the lack of damage is a mitigating factor.

The evidence also failed to support the finding, in aggravation, that Respondent committed a "rule-based" error.[12]

Finally, the ALJ concluded that Respondent's continued denial that he had been negligent and his "arrogance" during the sanctions portion of the hearing showed a lack of remorse and apparent refusal to accept Coast Guard jurisdiction over his actions during the sanctions portion of the hearing, which was a matter in aggravation.[13] Whether "arrogance" or lack of remorse is an appropriate aggravating factor has not been decided in the context of suspension and revocation proceedings. However, even assuming, without deciding, that a refusal to admit negligence after the charge was found proved can constitute "arrogance" or lack of remorse, and that they are appropriate aggravating factors, my review of the quoted portion of Respondent's testimony, as well as the balance of the record, compels me to conclude that, while Respondent never did agree with the Coast Guard's action in charging him with negligence, he did not challenge the Coast Guard's jurisdiction over his license, pursuant to 46 U.S.C. §7701, *et seq*.[14] Rather, Respondent's testimony revealed he was an expert San Francisco Bay bar pilot, justifiably proud of his long-standing record of piloting ships successfully. He was distressed by the grounding and resulting blemish on his otherwise clean record, whether that blemish was characterized as resulting from his "error in judgment" or negligence.

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[12] See fn. 6, *supra*.
[13] See p. 7, *supra*.

The quoted portion of Respondent's testimony demonstrated a profound confidence in his own piloting ability. Accepting the ALJ's characterization of that testimony as arrogant, these do not constitute such aggravating circumstances, considering the record as a whole, as to justify an award that is nearly twice the recommended maximum in the regulations.[15] Finally, I note that while not contesting the charge at the pleading stage of the proceeding may be a matter in mitigation, it does not follow that the converse (denying the charge, putting the Coast Guard to its proof at a hearing, and preserving issues for appeal) is a matter of aggravation.

A search of past Decisions on Appeal reveals that in no prior case was a sixteen month suspension upheld, and in no case of negligence was such a severe sanction awarded, much less allowed to survive on appeal.

For the foregoing reasons, I conclude that the sanction imposed in this case – 16 months suspension, 10 months outright and an additional six months on 18 months probation - was obviously excessive and a gross departure from the Table of Recommended Awards in 46 CFR § 5.569, not supported by the record. The total sanction is seven months higher than the sanction imposed in the most egregious (in terms of results) grounding (EXXON VALDEZ), in recent history. The suspension outright portion of it is seven months higher than that approved by the NTSB in WARDELL and in Appeal Decision 2174 (TINGLEY), aff'd sub nom. *Commandant v. Tingley*, NTSB Order EM-86 (1981), aff'd mem. sub nom. *Tingley v. United States*, 688 F.2d 848 (9th Cir. 1982). Based on the entirety of the record, I conclude that the sanction recommended by the Coast Guard at the hearing of six (6) months suspension outright is appropriate, and will reassess the sanction in this case in accordance with that conclusion.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The Administrative Law Judge's finding of proved for the charge of negligence, failing to adequately control the tank vessel CHESAPEAKE TRADER,

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[14] In fact, Respondent never objected to the Coast Guard's jurisdiction over his license.
[15] See 46 C.F.R. §5.569

contributing to the grounding of that vessel outside the channel, is AFFIRMED. However, the sanction awarded is obviously excessive and will be reassessed.

ORDER

The Administrative Law Judge's Final Order dated November 22, 1999, is DISAPPROVED, and the sanction is reassessed. As reassessed, only so much of the original Order as awarded six (6) months suspension outright is AFFIRMED.

T. H. COLLINS
VICE COMMANDANT

Signed at Washington, D.C. this 2 of May, 2002.