

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

UNITED STATES OF AMERICA	:	DECISION OF THE
	:	
UNITED STATES COAST GUARD	:	VICE COMMANDANT
	:	
vs.	:	ON APPEAL
	:	
MERCHANT MARINER DOCUMENT	:	NO. 2655
	:	
	:	
<u>JOHN FREDERIK KILGROE</u>	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated October 4, 2004, an Administrative Law Judge (hereinafter “ALJ”) of the United States Coast Guard revoked the wiper endorsement for John F. Kilgroe’s (hereinafter “Respondent’s”) merchant mariner document upon finding proved a charge of *professional incompetence*. The specification found proved alleged that from January 10, 2003, to March 10, 2003, Respondent, while serving as a wiper aboard the USNS SEAY was unable to safely perform his required duties.

PROCEDURAL HISTORY

The hearing in this matter commenced in El Segundo, California, on March 20, 2004. Respondent appeared personally and elected to represent himself. At the hearing, Respondent admitted all jurisdictional allegations, but denied the incompetence allegations. The Coast Guard Investigating Officers introduced into evidence the testimony of two (2) witnesses and fifteen

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(15) exhibits. Respondent introduced six (6) exhibits into evidence, testified on his own behalf and actively cross-examined the Government's witnesses. The Administrative Law Judge admitted one exhibit into the record *sua sponte*.

The ALJ issued the D&O on October 4, 2004. Respondent filed his notice of appeal on October 18, 2004. The Marine Safety Office also filed a notice of appeal on October 25, 2004. Respondent perfected his appeal by filing his brief on November 8, 2004 (an amended brief was filed on November 13, 2004). The Marine Safety Office perfected its Appeal by filing a brief dated December 2, 2004. Therefore, both appeals are properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by LT Marcella Granquist, USCG, and Petty Officer Collin Croft, USCG, of Marine Safety Office Los Angeles/Long Beach, California.

#### FACTS

At all times relevant herein, Respondent served under the authority of his merchant mariner document. [D&O at 11]

Respondent joined the crew of the USNS SEAY on January 10, 2003, when he signed the Ship's Articles in Newport News, Virginia. [Respondent's Exhibit B] The SEAY was operated by American Ship Management/Patriot Contract Services (hereinafter "ASM") for the U.S. Navy Military Sealift Command. Respondent was dispatched to the ship to fill a position as a wiper by the Marine Fireman's Union (hereinafter "MFU"). Respondent is a member of Seaman's Union of the Pacific, not MFU, but no MFU members were available to fill the wiper position on the SEAY.

Respondent sailed aboard the SEAY until he was discharged on March 11, 2003, in Beaumont, Texas. [Investigating Officer (hereinafter "I.O.") Exhibit 3]. Although there was

some dispute as to how long Respondent had been hired to serve aboard the SEAY — Respondent claimed that he had been hired for one voyage while ASM and the union maintained that it was for at least 120 days — there is no dispute that Respondent desired to continue working aboard the SEAY and the senior leadership of the engineering department no longer desired his services aboard the SEAY. Respondent voluntarily departed the SEAY, but agreed that he had been told by the First Engineer to depart the ship in Beaumont, Texas, or he would be fired. [Transcript (hereinafter “Tr.”) at 10-11, 33-36]

During his sixty-one days aboard the SEAY, Respondent was never disciplined. [Tr. at 60]. While Respondent received the highest possible marks (“Excellent”) in the “Relationships with People” and “Attitude” categories of his Performance Report, he received the lowest possible marks (“Needs improvement”) in all other rated categories—“Skill,” “Knowledge,” “Work Habits,” “Ability as a Supervisor” and “Administrative Ability.” [I.O. Exhibit 4] A wiper is an entry level position that does basic cleaning and janitorial work similar to an ordinary seaman in the deck department. A wiper should also be able to perform basic mechanical work and provide assistance to other members of the engine department. [I.O. Exhibits 7 and 9] While Respondent worked aboard the SEAY, he required constant supervision from a Qualified Member of the Engineering Department (QMED) at all times and had difficulty following and remembering instructions. [I.O. Exhibit 4] He was unable to identify and use basic hand tools, such as a crescent wrench, screwdriver, or drill. [I.O. Exhibit 8] In addition, Respondent could not clean, sweep, or mop effectively. [I.O. Exhibit 4] Specifically, Respondent was known to sweep dirt into piles and then fail to pick up the piles and he did not change the water in his pail when he was mopping so that the last portion of the deck that he mopped would often be dirtier than when he began. [I.O. Exhibit 8] In addition, when Respondent was told to clean an area by

the First Assistant Engineer, he threw a bucket with expensive tools over the side of the boat, even though the bucket could not have been confused with junk. [I.O. Exhibit 13 at 68, 70, 75, 86, 88]

The most important concern for the senior members of the SEAY's engineering department and for his marine employer was that Respondent presented a danger to himself and to other members of the crew. The SEAY had a large engine plant including four 14,000 horsepower diesel engines, generators, and other rotating machinery, superheated surfaces, electrical equipment, and high-pressure fuel and hydraulic pipelines. [I.O. Exhibit 6] The engine department had only 12 personnel, including the Chief Engineer. [I.O. Exhibit 13 at 66] In prior testimony, the Chief Engineer observed that on several occasions, Respondent, while in the engine room, did not appear to be "aware of his surroundings and was in an apparent daze." [I.O. Exhibit 8] When asked what he was supposed to be doing, Respondent stated that the First Assistant Engineer had given him a job, but that he could not recall what the job was. [*Id.*] The First Assistant Engineer stated that Respondent appeared to be a fish out of water in the engine room and was unaware of his surroundings. [I.O. Exhibit 13 at 68, 85] In addition, Respondent agreed that he twice reported to the wrong boat during abandon ship drills, although at least one incident could be attributed to the fact that he and the other wiper had to switch positions because Respondent could not fit into a damage control suit. [Tr. at 74] ASM informed the MFU that if Respondent was dispatched to another vessel operated by ASM, it would exercise its rights under the collective bargaining agreement and reject him. [Tr. at 56-57]

Later, Respondent filed a grievance against ASM and MFU alleging that they violated his rights under a collective labor agreement with respect to granting him membership in MFU. The

arbitrator found that Respondent failed to perform at a satisfactory level while on board the SEAY and denied the grievance. [I.O. Exhibit 5]

Respondent also requested that the National Labor Relations Board issue a complaint against ASM for refusing to re-employ him and against MFU for rejecting his membership application. The NLRB refused to issue a complaint against either ASM or MFU. [I.O. Exhibits 10 and 11]

### BASES OF APPEAL

This case is unique in that both Respondent and the Coast Guard have appealed the ALJ's Order. Since the appeals arise from the same facts and circumstances, both will be addressed within this opinion.

Respondent's Appeal Brief and Amended Appellate Brief set forth numerous bases of appeal. For ease of analysis, this decision combines several of Respondent's bases of appeal as follows:

- I. The Complaint's first factual allegation— that Respondent was dispatched to serve as a Wiper onboard the USNS SEAY for a period of 4 to 6 months — does not constitute incompetence and is not supported by substantial evidence.*
- II. The Complaint's second factual allegation — that the Respondent was unable to safely perform his required duties as a wiper while onboard the USNS SEAY — does not constitute incompetence and is not supported by substantial evidence.*
- III. The ALJ abused his discretion in denying a delay in the hearing in order for the Investigating Officer to respond to Respondent's discovery request.*
- IV. The failure to allege any wrongful conduct violated substantive and procedural due process.*
- V. The ALJ erred by admitting certain exhibits.*
- VI. The ALJ should have disqualified himself due to an ex parte communication with the Investigating Officer.*

The Coast Guard's appeal focuses on the ALJ's determination that the Coast Guard lacked jurisdiction over Respondent's Ordinary Seamen and Stewards Department endorsements and asserts, in effect, that the ALJ erred in failing to order the revocation of Respondent's merchant mariner document in toto, vice ordering only the revocation of Respondent's Wiper endorsement.

For the reasons set forth below, neither party's appeal is persuasive. Therefore, both appeals are denied.

OPINION  
RESPONDENT'S APPEAL  
I.

*The Complaint's first factual allegation— that Respondent was dispatched to serve as a Wiper onboard the USNS SEAY for a period of 4 to 6 months — does not constitute incompetence and is not supported by substantial evidence.*

Respondent contends that the first factual allegation raised in the Coast Guard's Complaint—that Respondent was dispatched to serve as a Wiper onboard the USNS SEAY for a period of 4 to 6 months—was incorrect and, as such, does not support a conclusion that Respondent is incompetent. At the hearing, Respondent strenuously argued that he was dispatched to serve aboard the vessel for a single voyage, not for a period of 4 to 6 months. [Tr. at 8-12, 18, 60-64] Respondent raised this argument because he believed that the fact that he completed a voyage without being disciplined or fired proved that he was not incompetent.

The ALJ addressed Respondent's assertion, in this regard, in "Finding of Fact" Number 7. The ALJ's Factual Finding states as follows:

Respondent was a wiper on board the USNS SEAY from January 10, 2003 to March 11, 2003 – approximately 61 days. The Respondent was told to either resign or be fired for cause. The fact that Respondent sailed for 61 days without disciplinary action does not prove that he was professionally competent from a

safety standpoint given the overwhelming evidence of record to the contrary.  
[Citations omitted]

[D&O at 6]

I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), aff'd NTSB Order No. EM- 182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). The findings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2614 (WALLENSTEIN), 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSEN), 2506 (SYVERSTEN), 2424 (CAVANAUGH), and 2282 (LITTLEFIELD). The standard of proof for suspension and revocation proceedings is that the ALJ's findings must be supported by reliable, probative, and substantial evidence. Appeal Decisions 2603 (HACKSTAFF), 2592 (MASON), 2584 (SHAKESPEARE) and 2575 (WILLIAMS).

The ALJ's finding, in this regard, shows that he did not believe that the duration of time for which Respondent was dispatched to the vessel had any bearing on the penultimate issue presented in Respondent's case—whether Respondent was incompetent to fulfill the duties for which his merchant mariner document was required. As is evidenced in Finding of Fact Number 7, the ALJ properly focused his attention on the quality of Respondent's performance while aboard the SEAY and not the circumstances of his departure from the vessel. The ALJ's finding did not depend on the fact that Respondent left the ship after sixty-one days rather than one hundred twenty days. Nevertheless, the testimony of Respondent's dispatcher, Mr. Callahan, and the Memorandum of Agreement between ASM and the Seafarer's International Union provides

substantial evidence that Respondent was, contrary to his assertion, dispatched for a minimum of 120 days. [Tr. at 29; I.O. Exhibit 15] Accordingly, I am not persuaded by Respondent's first basis of appeal.

## II.

*The Complaint's second factual allegation — that the Respondent was unable to safely perform his required duties as a wiper while onboard the USNS SEAY — does not constitute incompetence and is not supported by substantial evidence.*

Expanding on his first basis of appeal, Respondent next contends that the allegation that he was unable to safely perform his required duties as a wiper, if proved, would not constitute incompetence. Specifically, Respondent argues that because the Coast Guard issues merchant mariner documents to wipers without professional examinations “there is no such thing as a professionally incompetent wiper.” Consequently, Respondent argues, the Coast Guard can only prove that a wiper is incompetent through medical evidence that the wiper is mentally or physically incapable of performing his required duties. Respondent concludes that because no such evidence was produced, the Coast Guard failed to prove the allegation and the ALJ abused his discretion by revoking Respondent's wiper endorsement.

Respondent's argument fails because it is founded on an incorrect premise. While wiper is an entry level position and the Coast Guard issues merchant mariner documents to wipers without professional examinations, this does not mean that there can be no such thing as a professionally incompetent wiper. All merchant mariners take an oath to faithfully perform their duties and carry out the lawful orders of their superior officers. 46 U.S.C. § 7305. A merchant mariner document may be revoked for incompetence which is defined, in part, as the inability to perform required duties due to professional deficiencies. 46 U.S.C. § 7703(1)(B); 46 CFR 5.31. The purpose of the suspension and revocation procedures is to promote the safety of life at sea.

46 U.S.C. § 7701. The ability to perform duties without endangering yourself or others is certainly the most minimal requirement of professional competence. Given this statutory and regulatory background, there can be no doubt that an allegation that an individual is unable to safely perform his required duties states a cause for revoking a merchant mariner document.

A review of the record shows that there is substantial evidence to support the ALJ's conclusion that Respondent was unable to safely perform his duties as a Wiper while he was aboard the USNS SEAY. Indeed, the record shows that the ALJ made the following Findings of Fact in that regard:

- **Finding of Fact No. 11:** The ALJ quoted extensive portions of the performance evaluation completed by First Engineer Bob Vint for Respondent's time aboard the SEAY. Specifically, the ALJ noted that Mr. Vint stated as follows:

John is a willing and pleasant worker with a great attitude. However he does not possess even the rudimentary skills necessary to be effective as a wiper. He cannot remember instructions from one minute to the next although his memory of events long past appears to be excellent. He has no understanding of tools and does not possess the motor skills necessary to use them properly. He cannot clean, sweep, mop or sugee effectively...If we had a position available for an entertainer, John would be our choice but he is absolutely no use in a mechanical environment. Since he seems to have no awareness of the dangers of working around moving machinery, I am concerned for his safety and that of his fellow crewmembers.
- **Finding of Fact No. 12:** The ALJ noted that "Mr. Vint rated the Respondent in the lowest category in skill, knowledge, work habits, ability as a supervisor, and administrative ability."
- **Finding of Fact No. 16:** The ALJ found that due to the "potentially dangerous environment" of the SEAY's engine room space "anyone working in the engine room must be constantly aware of what is going on around them, and they must be concerned

with safety at all times.” The ALJ further found, citing I.O. Exhibit 6, that “[s]omeone who is not sufficiently safety-conscious or aware of his surroundings poses a danger to not just himself, but also to the other members of the engine crew and to the vessel itself.” [D&O at 8-9]

- **Finding of Fact No. 18:** The ALJ noted that Mr. Robert Barret Wood, Jr., the Chief Engineer of the SEAY stated that it quickly became apparent after Respondent joined the vessel that Respondent “was incapable of performing these tasks [unsupervised tasks] on his own, and I elected to have supervision provided.” As a result, Mr. Wood “was concerned that he [Respondent] might injure himself or one of his shipmates.” [*Id.*]
- **Finding of Fact No. 19:** The ALJ quoted Mr. Wood as stating that he “became concerned for Mr. Kilgroe’s safety after observing him upon several occasion[s] out in the engine room in an apparent stupor and seemingly oblivious to his surroundings.”
- **Finding of Fact No. 29:** The ALJ concluded that:

Respondent’s supervisors believed he did not have a mechanical aptitude to perform the duties of a wiper. In this regard, testimony was given that when Respondent first came on board he was unable to identify a crescent wrench. Additionally, Respondent had to be given instructions several times.

[D&O at 7-10] Based upon these factual findings, the ALJ concluded that “[t]he Coast Guard proved by a preponderance of the evidence that Respondent, while acting under the authority of his Merchant Mariner’s Document, was ‘professionally incompetent’ to hold a ‘wiper’ endorsement; as it relates to his safety and to the safety of the crew and vessel.” [D&O at 11]

As I have already stated, I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2614 (WALLENSTEIN), 2607 (ARIES), 2581 (DRIGGERS), 2570 (HARRIS), aff ‘d

NTSB Order No. EM- 182 (1966), 2474 (CARMENKE), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA). Based on the evidence contained in the record, I find that the ALJ properly concluded that Mr. Kilgroe's presence in the engine room created a safety threat to himself, his shipmates and the vessel such that he was unable to safely perform his duties as a wiper. A wiper who cannot safely perform his duties fails to meet the most minimal test of professional competence. Accordingly, the ALJ properly revoked Respondent's wiper endorsement for professional incompetence.

### III.

*The ALJ abused his discretion in denying a delay in the hearing in order for the Investigating Officer to respond to Respondent's discovery request.*

Respondent next contends that the ALJ abused his discretion by denying Respondent a delay in the hearing until the Coast Guard answered his discovery request. This argument fails principally because the Respondent never asked the ALJ to delay the hearing although the ALJ did discuss Respondent's discovery request with him twice. [Tr. at 5-6, 82-83] In fact, it was only after the hearing that Respondent tried to admit his discovery request as an exhibit and to re-open the hearing after he had received the discovery. There having been no request to delay the hearing, there was also no denial and, therefore, no abuse of discretion.

The only complaint Respondent raised at the hearing with regard to discovery was that he asked the Investigating Officer to "state the factual basis for the acts of incompetence which I am charged with" or at the end of the hearing, to "give me the factual basis for the acts that I'm accused of." [Tr. at 5-6, 83] There is no evidence that the Respondent served his motion for discovery on the Coast Guard or filed it with the ALJ prior to the hearing. By the date of the hearing, Respondent had received all of the evidence that the Coast Guard offered in the case.

When the ALJ pointed this out to Respondent, he simply repeated that he wanted the allegations to “be made more specific so I would know what the heck they’re coming up with” or, in other words, to “state in the pleadings what Respondent was charged with.” [Tr. at 83; Respondent’s Amended Appellate Brief at 9] Essentially, Respondent’s argument is not really that he was denied discovery, but that he was denied substantive and procedural due process as is discussed in Respondent’s Fourth basis of appeal, below.

#### IV.

*The failure to allege any wrongful conduct violated substantive and procedural due process.*

Respondent next argues that in order to find the charge proved, the Coast Guard was required to plead and prove that he violated a specific law. As support for this notion, Respondent cites *Klatt v. United States*, 965 F.2d 743 (9<sup>th</sup> Cir. 1992). In *Klatt*, the Ninth Circuit held that when the Coast Guard seeks to suspend or revoke a mariner’s license because he violated a law under 46 U.S.C. § 7703(1)(A), the Coast Guard must prove that the mariner actually violated the law, not merely that the vessel on which he was serving as master violated the law. *Klatt*, however, does not apply to this case because the Coast Guard sought to revoke Respondent’s merchant mariner document and endorsements due to professional incompetence under § 7703(1)(B). Since the Coast Guard was not alleging that Respondent violated the law, there was no requirement to plead and prove that he violated a law.

In reading Respondent’s pleadings in total, however, he arguably means that the Coast Guard violated his substantive and procedural due process rights because it did not plead specific instances of professional incompetence. That argument also fails because, after the Coast Guard amended its complaint, Respondent was on notice as to both the legal and factual basis under which the Coast Guard was proceeding.

## V.

*The ALJ erred by admitting certain exhibits.*

Respondent contends that the ALJ erred by admitting Exhibits 2, 6, 7, 9, 10, and 11—all of which are associated with the NLRB investigation—because they were not relevant. Relevant evidence is evidence that tends to make the existence of any material fact more or less probable. 33 C.F.R. § 20.802(a). Although the NLRB investigation was a separate proceeding, the evidence gathered during that investigation tended to prove that Respondent's performance as a wiper aboard the SEAY was unsatisfactory and unsafe. This was material to the ultimate issue of whether Respondent's performance as a wiper aboard the SEAY was professionally incompetent.

Respondent contends that the ALJ erred by admitting his performance evaluation, Exhibit 4, on grounds that it was hearsay, was not relevant, was a conclusion and an opinion, and that the relevant manual was not followed in producing it. First, hearsay evidence is admissible at an S&R proceeding. 33 C.F.R. § 20.803. Second, because Respondent's performance was the key issue in this case, the evaluation based on his performance was certainly relevant. Third, the evaluation was completed by the First Assistant Engineer and approved by the Chief Engineer. These two mariners have extensive experience serving as licensed and unlicensed engineers aboard merchant vessels and personally observed Respondent's performance. Both, therefore, were qualified to express an opinion as to his performance aboard the SEAY. Although the First Assistant Engineer was not available for cross-examination, Respondent could have called witnesses or produced evidence on his behalf to support his contention that he could safely and competently perform his duties as a wiper. He attempted to do this, in part, by cross-examining

witnesses to show that he had never been disciplined aboard the SEAY or fired. Finally, no evidence was introduced to show that the evaluation was not completed in accordance with proper procedures. In sum, the ALJ did not abuse his discretion by admitting Exhibit 4.

Respondent next contends that because the ALJ excluded Exhibits 5 and 13, those exhibits cannot be used to prove the Coast Guard's case. *See* Tr. at 17. In so stating, Respondent misreads the transcript. The discussion on page 17 of the transcript concerns an issue from the arbitration proceeding, specifically whether Respondent needed to have ten days or one hundred-twenty days of satisfactory service before he qualified for union membership. Because the ALJ rightly considered that issue to be irrelevant to the suspension and revocation case, he stated that such evidence would be excluded unless it was relevant to the incompetence charge. Minutes later, all Coast Guard exhibits—including Exhibits 5 and 13—were admitted by the ALJ. [Tr. at 22].

Finally, Respondent objects to the admission of I.O. Exhibit 8. Respondent contends that the ALJ erred in admitting the exhibit because it was an unsworn statement that was not subject to cross-examination. Respondent's assertion in this regard is without merit. This is because the ALJ has broad authority to admit any evidence that he deems relevant or which makes the existence of a material fact more or less probable in Coast Guard suspension and revocation proceedings. *See* 33 CFR 20.802; Gallagher v. National Transp. Safety Bd., 953 F.2d 1214, 1218 (10th Cir. 1992). Therefore, since Exhibit 8 is a statement describing Respondent's performance aboard the SEAY—a key issue at the hearing—I do not believe that the ALJ erred in determining that Exhibit 8 was relevant and, thereafter, admitting the exhibit into evidence. Irrespective of my determination in this regard, the record shows that the ALJ expressly stated

that he did “not rely on this evidence [I.O. Exhibit 8] in...[his]...decision.” [D&O at 25]

Accordingly, Respondent’s objection is moot.

## VI.

*The ALJ should have disqualified himself due to an ex parte communication with the Investigating Officer.*

Respondent filed at least six motions or supplements to his motion to disqualify the ALJ because of an *ex parte* communication with the Investigating Officer. Originally, Respondent argued that since the Investigating Officer’s original Complaint lacked specificity, if the ALJ found the incompetence charge proved, the ALJ would be taking on the Investigating Officer’s role and should therefore be disqualified. This argument that the Coast Guard is required to make more specific pleadings has already been dealt with in Issue IV above.

In his later motions, the Respondent alleged that the ALJ was disqualified because he had an *ex parte* communication with the Investigating Officer. In his October 3, 2004, Order, the ALJ explained that, on March 10, 2004, he contacted the Respondent, who was proceeding *pro se*, to inform him that he should be represented by counsel at his March 30<sup>th</sup> hearing, that not having counsel could harm his case, and that the ALJ would be happy to answer any procedural questions that he might have. Respondent complained that the charge against him was vague in that it did not specify whether his alleged incompetence was physical, mental, professional or some combination thereof. The ALJ agreed and informed him that he would call the Coast Guard and direct them to amend the charge to reflect what they intended to prove. On March 11, 2004, the ALJ spoke with the Assistant Senior Investigating Officer to insure that the complaint was amended. Although Respondent argues that he did not authorize the ALJ to make that call,

the ALJ's account is consistent with the Respondent's repeated requests for greater specificity regarding the charge throughout the case and I find it to be credible. Furthermore, even if the ALJ did not have Respondent's consent to communicate with the Investigating Officer, there is no question that the Respondent, in fact, wanted the charge to be more specific. Thus, the Respondent was not harmed in any way by this communication. To the extent that he was unsatisfied with the outcome, he had an opportunity to seek greater specificity at the hearing. [Tr. at 5-6]

*Ex parte* communications are governed by section 557(d) of the Administrative Procedures Act. 33 C.F.R. § 20.205. Technically, the ALJ's communication to the Investigating Officer is not an *ex parte* communication because such communications must be made with parties outside the agency. 5 U.S.C. § 557(d). In addition, an ALJ cannot consult with a person or party regarding a fact at issue without notice and an opportunity for all parties to participate. 5 U.S.C. § 554(d)(1). In this case, however, the ALJ did not discuss any fact at issue with the Investigating Officer; the ALJ merely conveyed the Respondent's request for greater specificity with regard to the charge. While it might have been a better procedure to have a single teleconference with both parties instead of two phone calls, no reasonable person could interpret this communication as evidence of bias on the part of the ALJ. Accordingly, I am not persuaded by Respondent's final basis of appeal.

#### THE COAST GUARD'S APPEAL

The Coast Guard argues that the ALJ erred by finding that the Respondent's Ordinary Seaman and Steward's Department (F.H.) endorsements were not at issue in this case, and, in the alternative, that the Coast Guard did not prove incompetence with respect to these two

endorsements. Because the complaint only alleged incompetence as a wiper, the ALJ's finding that the other endorsements were not at issue was in accordance with the applicable law. In addition, the ALJ did not abuse his discretion in finding that the Coast Guard failed to show by a preponderance of the evidence that Respondent was professionally incompetent to hold the other endorsement.

The complaint in this case alleges that Respondent was dispatched to "serve as a Wiper onboard the USNS SEAY" and that he "was unable to safely perform his required duties as a Wiper." As such, Respondent was on notice that his ability to safely serve as a wiper was at issue in this case, but he was not on notice as to his ability to safely serve as a food handler or as an ordinary seaman. The Coast Guard argues that the pleadings can be amended to conform to the proof in the case, citing Appeal Decision 1574 (STEPKINS) and other cases. While that may be true, in this case, the ALJ reasonably found that the Coast Guard did not prove that Respondent could not safely perform the required duties of ordinary seaman or food handler.

The majority of the evidence produced showed that the Respondent had no mechanical ability and that he could not be trusted to safely work in the engine room in the vicinity of hot, rotating, dangerous equipment. The only evidence that directly related to his ordinary seaman and food handler duties would be that the Respondent was negligent in the manner in which he mopped and swept the deck. The ALJ could also have considered the Respondent's difficulty following instructions and his failure twice to go to the correct lifeboat as further proof that he was not professionally competent in those categories. Under those circumstances, the ALJ did not abuse his discretion in finding that this evidence did not meet the preponderance of evidence standard.

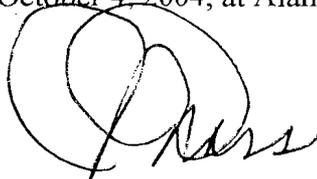
Since the ALJ found that the Coast Guard failed to prove that the Respondent was professionally incompetent to serve as an ordinary seaman and food handler, amending the complaint to conform to the proof in the case would not change the decision.

CONCLUSION

While a mariner is not required to pass an examination to receive a wiper endorsement, a wiper who cannot safely perform his required duties is not professionally competent. Furthermore, the ALJ's finding that the Respondent could not safely perform the required duties of a wiper was supported by substantial evidence. Respondent's bases of appeal are without merit. In addition, the Coast Guard's basis of appeal is similarly without merit.

ORDER

The order of the ALJ, dated October 4, 2004, at Alameda, California, is **AFFIRMED**.



**TERRY M. CROSS**  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C. this 9<sup>th</sup> of January, 2006.

CASES SENT TO ADM-1 ON 2/1/06

AET2 TREMAYNE HICKS  
FN CAMERON J. SCHIRTZINGER  
FS2 ERIC D. HATTEN  
YN3 CRAIG KIBODEAUX  
ET1 MICHAEL BUCKLEY  
OS1 ISABEL CAPORALE  
MST3 JEREMY L. MOON  
SN CHERYLLYNN AFAISEN  
YN1 DEBRA DEWITT  
OS1 MELANIE A. PARKER