

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD

Complainant

v.

AARON LOUIS CHRISTIAN

Respondent

Docket Number CG S&R 09-171

CG Case No. 3468937

ORDER DENYING RESPONDENT'S MOTION FOR COSTS AND FEES UNDER EAJA

Date Issued: July 21, 2011

**Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge**

Appearances:

For Complainant:

**Bruce L. Davies, Esq.
MSTC Chrisina L. Jeanes, IO
USCG Marine Safety Unit Port Arthur**

For Respondent:

**Craig J. Schexnaider, Esq.
Conley & Schexnaider**

RESPONDENT'S MOTION

On May 8, 2011 Respondent Aaron Louis Christian (Respondent), through counsel, timely filed a Motion under the Equal Access to Justice Act, 5 USC §504(a)(2), (EAJA) for an award of fees and costs against the United States Coast Guard.

BACKGROUND

The Coast Guard filed an adverse administrative action against Respondent on May 6, 2009, alleging two theories: That Respondent had engaged in either “Misconduct” and/or “Violation of Law or Regulation” by failing his employer’s (Higman Marine) random alcohol testing. The original Complaint also sought suspension of Respondent’s Coast Guard-issued Merchant Mariner’s License and Document.

On August 18, 2009, the Coast Guard filed an Amended Complaint. The gravity of that amendment was of significance in both the underlying Suspension and Revocation action and the instant EAJA petition. The Amended Complaint specifically alleged that the Respondent committed only “Misconduct” as that term is defined in 46 CFR §5.27. The Coast Guard deleted the allegation of “Violation of Law or Regulation” contained in the original Complaint.

On September 22, 2009, the Coast Guard presented its case-in-chief to this court in the Federal Courthouse in Beaumont, TX. Amidst the presentation of the Coast Guard’s case-in-chief, Respondent Moved to dismiss the action because an alcohol test at issue was not, in fact, a random test as required by the Respondent’s employer’s policy—the violation of which constituted “Misconduct” per the Amended Complaint.

On October 27, 2009, this court dismissed the Coast Guard’s case with prejudice because the test selection required by the employer’s policy method was not, in fact, “random.” The Coast Guard then appealed that decision to the Coast Guard Vice Commandant, who, on February 28, 2011, reversed this court and remanded for further proceedings.

Despite its success on appeal, on April 4, 2011, the Coast Guard moved to withdraw the charges against Respondent—which this court granted, with prejudice, four days later.

Respondent’s EAJA Motion followed this court’s April 8, 2011 grant of the Coast Guard’s Motion for Withdrawal.

By his Motion, Respondent seeks an award of \$38,150.00 in attorney fees (218 hours x \$175.00 per hour)¹ and no apparent itemization of costs. 5 USC §504(a)(2),(b)(1)(A).

EQUAL ACCESS to JUSTICE ACT (EAJA)

The EAJA is found twice in the United States Code: at 5 USC §504 and 28 USC §2412. The provisions of either “Act” are essentially identical, except the former applies to adverse administrative proceedings and the latter applies to civil actions in federal district courts. For the purpose of the instant Motion, 5 USC §504 controls – but appellate precedent construing either statute is authoritative.

The administrative version of the Act mandates the payment of costs and fees to a respondent when an agency fails to prevail in an adversary adjudication, unless the Administrative Law Judge determines that special circumstances render an award unjust, or the position of the agency “as a party to the proceeding was substantially justified.” Appeal Decision 2312 (HITT) (1983).

Title 49 CFR §6.5 implements the Act in “Coast Guard suspension or revocation of licenses, certificates or documents under 46 USC §7701 et seq.”² Section 6.7 provides, in

¹ Title 49 CFR 6.11(b) specifically provides: “No award for the fee of an attorney or agent under these rules may exceed \$125.00 per hour. This amount shall include all other expenses incurred by the attorney or agent in connection with the case.” Thus, Respondent’s counsel’s claim of \$175.00 per hour for attorney’s fees is inappropriate. Further computation of a correct sum is moot, however, given the decision herein.

²Title 49 of the Code of Federal Regulations governs activities by the Department of Transportation. Sec. 103(c) of the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2144, 6 USC §113(c) transferred the Coast Guard from the Department of Transportation to the Department of Homeland Security. The Act’s Savings Provisions at §1512, 116 Stat. 2135, 2310, 6 USC §552, provide that completed administrative actions of an agency [e.g., regulations] shall not be affected by the enactment of this Act or the transfer of such agency to the Department but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or

pertinent part, that the applicant must be a party to an adversary adjudication for which it seeks an award and that the applicant meets all conditions of eligibility set out in the regulations.

Subpart B of Title 49 CFR Part 6 lists the requirements for filing an application: a showing that the applicant has prevailed and identifying the position of an agency that the applicant alleges was not substantially justified; a statement of the applicant's net worth; an affidavit supporting the amount of fees and expenses for which the award is sought; and a written verification under oath that the information provided is true and correct. Here, Respondent generally complied with the requirements for a proper filing under EAJA. However, it is questionable whether the required affidavit described in §6.21 was in the form contemplated by the regulation.

Finally, 49 CFR §6.33 provides that the Administrative Law Judge shall issue an initial decision containing findings, if at issue, on whether the Department's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. Either party may seek review of the decision or the Department may decide to review the decision on its own initiative. Otherwise, the initial decision becomes final 30 days after it is issued.

For Respondent to prevail under both the Act and the implementing regulation, he must establish that he was the prevailing party and that Coast Guard's position was not substantially justified. Also, there must be no special circumstances that make an award unjust.³ Conversely,

revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

³It has been held that "[t]he 'special circumstances' language in the EAJA [is] interpreted to direct courts 'to apply traditional equitable principles' in determining whether a prevailing party should receive a fee award under EAJA. Application of such principles has historically involved a determination of whether the equitable doctrine of 'unclean hands' [by a petitioner] would render an award of fees unjust." Ass'n of Am. Physicians v. United States FDA, 391 F. Supp. 2d 171, 176 (D.D.C. 2005).

for an agency to prevail, it must prove that fees and costs awards should not be made under EAJA by showing its position was substantially justified. Charger Management, Inc. v. N.L.R.B., 768 F.2d 1299, 1301 (11th Cir. 1985).

In the instant case, the court finds that Respondent was the prevailing party. However, the court also finds that the Coast Guard was substantially justified in its position. Thus, Respondent's Motion must be **DENIED**.

PREVAILING PARTY

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001), is frequently cited to determine “who” is a prevailing party under any federal statute which awards costs and fees at the conclusion of litigation. The Buckhannon test seeks a “material alteration” of the parties’ legal relationship at litigation’s end as a prerequisite to an award of costs and fees. Id at 604. See also Texas Teachers Assn. v. Garland School Dist., 489 US 782 (1989) at 792-793. Thus, the inquiry here is whether the parties’ legal relationship had been materially altered by the Coast Guard’s Motion for Withdrawal and this court’s subsequent grant of dismissal with prejudice, so as to determine which was the “prevailing party.”

A reading of Buckhannon, alone, is not dispositive. That case is too factually and procedurally dissimilar from the case at bar. For instance, Buckhannon dealt with an award of fees under the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990 – but not the EAJA. Hence, there is some risk in reading Buckhannon too broadly, here. Resort must be had to subsequent, more definitive appellate decisions.

A number of federal cases which followed Buckhannon have held that if a voluntary dismissal was granted with prejudice, it effectively satisfies the “change in legal relationship” test and thus creates a prevailing party. In Highway v. FECO, Ltd., 469 F.3d 1027 (Fed. Cir. 2006), the court said that a dismissal with prejudice bore the necessary “judicial imprimatur” to

constitute a judicially sanctioned change in the legal relationship of the parties. The court noted that its holding is consistent with other circuits which have held that a voluntary dismissal with prejudice meets the Buckhannon test, because such a disposition causes a material alteration of the legal relationship of the parties—specifically noting that a voluntary dismissal with prejudice terminates any claims a plaintiff may have had against a defendant. Id. at 1035-1036. See also Power Mosfet Techs., L.L.C. v. Siemens AG, 378 F.3d 1396 (Fed. Cir. 2004)(A dismissal of a claim with prejudice is a judgment on the merits.)

In United States v. Marion L. Kincaid Trust, 463 F. Supp. 2d 680 (2006), the court applied the Buckhannon test to a case voluntarily dismissed with prejudice, much like the case at bar:

The Supreme Court has held that the ‘touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.’ . . . To be considered as ‘prevailing,’ a party must be able to point to a resolution of the dispute which changes the legal relationship between itself and [the opposing party]’ . . . A majority of courts also hold that a defendant is entitled to the full legal relief of a judgment on the merits where a plaintiff voluntarily dismisses a complaint. . . . Moreover, the plaintiff’s voluntary dismissal of a cause of action ‘is a complete adjudication of the issues presented by the pleadings and is a bar to further action between the parties’ under the doctrine of res judicata. This Court holds that the voluntary dismissal of a complaint with prejudice renders a defendant a “prevailing party” for the purpose of 28 U.S.C § 2412(a) and (d).

Id. at 690 - 691(citations omitted)(emphasis added).

The weight of authority thus suggests that a voluntary dismissal with prejudice works a material alteration of the legal relationship between parties such that the Buckhannon test is satisfied and a prevailing party is created.⁴

⁴ See, “The Buckhannon Stops Here: Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources Should Not Apply to the New York Equal Access to Justice Act” Vol. 72, Issue 4, Fordam Law Rev. January 2004.

For the purposes of his Motion, the court finds that the Respondent was the prevailing party because he was the beneficiary of a voluntary dismissal with prejudice. Such a dismissal did materially alter the legal relationship between the parties to the original Suspension and Revocation action, because the dismissal with prejudice resulted in the termination of the Coast Guard's claim against Respondent. Hence, the inquiry whether Respondent was the prevailing party is resolved in his favor.

SUBSTANTIAL JUSTIFICATION

Congress has characterized the “substantially justified” standard as one of reasonableness: “The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.”⁵

⁵ S. Rep. No. 96-253, 96th Cong. 1st Sess. (1979) to accompany S.265, at 6; [H. R. REP. No. 96-1418](#), 96th Cong. 2d Sess. at 10, reprinted in (1980) [U.S. Code Cong. and Ad. News](#) 4953, 4971. Appeal Decision 2312 (HITT), [supra](#). Both the House and Senate Committees emphasize that:

The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial possibility of prevailing.

S. Rep. No. 96-253, [supra](#), at 7; [H. R. Rep. No. 96-1418](#), [supra](#), at 11.

According to the legislative history of the Act, the language “substantially justified” was adopted from the standard in [F. R. Civ. P. 37](#). S. Rep. No. 96-253, [supra](#), at 21; H. R. Rep. [supra](#), at 18. The Senate Report expressly refers to the notes of the Advisory Committee on Civil Rules concerning the 1970 amendments to F. R. Civ. P. 37(a)(4). [F. R. Civ. P. 37](#) provides that reasonable expenses, including attorney's fees, shall be awarded to the prevailing party on a motion for an order compelling discovery unless the court finds that the position of the losing party was “substantially justified.”

A brief survey of recent cases arising under [F.R. Civ. P. 37\(a\)\(4\)](#) reinforces the notion that fees are not awarded absent “captious or frivolous conduct.” [Baxter Travenol Laboratories Inc. v. Lemay](#), 89 F. R. D. 410 (S. D. Ohio 1981); an “indefensible” position (where the losing party had conceded the relevance of the documents withheld and that no privilege existed, and had failed to show that the requests were overly burdensome), [Persson v. Faestel Investments, Inc.](#), 88 F. R. D. 668 (N. D. Ill. 1980); or failure to answer, object to or request additional time in response to a discovery request, [Shenker v. Sportelli](#), 83 F. R. D. 365 (E. D. Pa. 1979); [Addington v. Mid-American Lines](#), 77 F. R. D. 750 (W. D. Mo. 1978). The standards applied to [Rule 37\(a\)\(4\)](#), (F. R. Civ. P) have been “reasonableness,” [SCM Societa Commercial S.P.A. v. Industrial and Commercial Research Corp.](#), 72 F. R. D. 110 (D. Tex. 1976) or “good faith,” [Technical, Inc. v. Digital Equipment Corp.](#), 62 F. R. D. 91 (N. D. Ill. 1973).

By expressly adopting the F. R. Civ. P. [37\(a\)\(4\)](#) standard in the Act, Congress evinced its intent that fees should not be awarded against the government unless the government's position is found to be unreasonable or the government has sued or defended in a situation where no genuine dispute exists. Support for this position emerges as well from

Pierce v. Underwood, 487 U.S. 552 (1988), set the standard for determining whether a government agency was substantially justified in prosecuting its case under the AJA statutes, supra. Because Pierce is universally cited as the seminal decision in the area,⁶ Justice Scalia’s majority rationale deserves reading:

The Court of Appeals, following Ninth Circuit precedent, held that the Government’s position was substantially justified if it had a reasonable basis both in law and in fact. The source of that formulation is a Committee Report prepared at the time of the original enactment of the EAJA, which commented that the test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact. . . We are of the view, therefore, that as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main” – that is, justified to a degree that could satisfy a reasonable person. . .

Id. at 563–565 (citations omitted) (emphasis added).

Simply put, Justice Scalia instructs that an agency’s position is substantially justified if it could “satisfy a reasonable person” (i.e., that it has a reasonable basis in fact and law) and if supported by enough “relevant evidence that would satisfy a reasonable person.” Id.

While “winning” or “losing” may be informative to this inquiry; neither are necessarily determinative. In Scarborough v. Principi, 541 U.S. 401 (2004), the Court noted: “Congress did not . . . want the “substantially justified” standard to be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. . . Congress

reported cases dealing with EAJA awards. The reasonableness test was specifically adopted in [Alsapach v. District Director of Internal Revenue](#), 527 F. Supp. 225, 229 (D. Md. 1981).

⁶ Numerous cases apply the Pierce analysis: Bergen v. Comm’r of Soc. Sec., 454 F.3d 1273 (11th Cir. 2006); E. W. Grobbel Sons, Inc. v. NLRB, 176 F.3d 875 (6th Cir. 1999); United States v. Jones, 125 F.3d 1418 (11th Cir. 1997); United States v. Douglas, 55 F.3d 584 (11th Cir. 1995); Bice v. United States, 84 Fed. Cl. 173, 181 (Fed. Cl. 2008); Prowest Diversified v. United States, 40 Fed. Cl. 879 (Fed. Cl. 1998); D’Alessandro v. Mukasey, 2010 U.S. Dist. LEXIS 31229 (W.D.N.Y. Mar. 31, 2010); Orantes-Hernandez v. Holder, 713 F. Supp. 2d 929 (C.D. Cal. 2010); Simms v. Astrue, 2009 U.S. Dist. LEXIS 50185 (N.D. Ind. 2009); Habitat Educ. Ctr., Inc. v. Bosworth, 2006 U.S. Dist. LEXIS 21922 (E.D. Wis. Mar. 28, 2006); Californians for Alternatives to Toxics v. Dombeck, 2004 U.S. Dist. LEXIS 29938 (E.D. Cal. Jan. 30, 2004); Oberdorfer v. Glickman, 2001 U.S. Dist. LEXIS 14677 (D. Or. Sept. 14, 2001).

apparently sought to dispel any assumption that the Government must pay fees each time it loses.” *Id.* at 415 (citations omitted). See SEC v. Huff, 2011 U.S. Dist. LEXIS 29981 (S.D. Fla. Mar. 23, 2011).

Thus the Coast Guard’s voluntary withdrawal of the Amended Complaint, after having been successful on appeal to the Vice Commandant, does not vitiate the original factual or legal justification for instituting charges.

Further, in Bruch v. United States Coast Guard, 749 F. Supp. 688 (E.D. Pa. 1990), an EAJA application for costs and fees was denied even though the respondents in the underlying action successfully defended allegations of misconduct that they docked boats without requisite licenses. On appeal, the critical question was whether the Coast Guard’s position -- the stance it took in the administrative hearing, its basic rationale for the issuance of the citations -- was “substantially justified.” *Id.* at 693. The district court, citing Pierce, *supra*, held that the test is not whether the Coast Guard’s position was ultimately correct but only whether a reasonable person could countenance the Coast Guard’s position in the particular context of the dispute. *Id.*

In the instant case, the Coast Guard satisfied Justice Scalia’s concerns that it proceeded with both a reasonable basis in fact and in law:

Basis in Fact

Testimony and evidence adduced at the underlying hearing revealed that before November 14, 2008 (the day he was selected and tested), Respondent had signed a Higman drug and alcohol policy and a testing consent form. (CG Ex 1)(Tr. at 51 - 53).

Respondent’s employer testified that on November 14, 2008, the Respondent was randomly selected for alcohol and drug testing. (Frey Tr. at 9).⁷ The Amended Complaint alleged that on November 14, 2008, Respondent was administered two breath alcohol tests which

⁷ Contrary to Respondent’s assertions, the court is satisfied Respondent was a Higman crewmember for the purposes of random drug testing. (Tr. at 29-31).

resulted in findings that Respondent had a blood alcohol content of .103 and .097 -- both of which were in excess of the employer's definition of a positive drug test in the employment policy manual.⁸ Those positive results lead to the charges of Misconduct levied by the Coast Guard.

If the Coast Guard's underlying legal analysis is correct—that an employer's drug and alcohol policy can form the basis of a charge of Misconduct under 46 CFR §5.27, see infra, -- then I find that the Coast Guard had a reasonable factual basis to initiate the underlying proceedings.

Basis in Law

The underlying case was a Suspension and Revocation action brought by the Coast Guard pursuant to 46 U.S.C. §§7703 and 46 CFR §5.27.

The Coast Guard's Amended Complaint alleged that Respondent committed Misconduct in violation of 46 CFR §5.27. That regulation defines "Misconduct" as:

[H]uman 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.

The Coast Guard alleged that Respondent's violation of the Higman policy constituted "Misconduct" and offered into evidence, over Respondent's objection, the policy manual which proscribed an employee from having certain levels of alcohol in his blood, supra. (Tr. at 34).

Drug and alcohol testing of marine employees is clearly justified based upon the federal government's compelling interest in protecting public safety and ensuring safety in an often-hazardous maritime work environment. This is the philosophical bedrock upon which all

⁸ The Higman policy only referenced 49 CFR Part 40 to define the company's alcohol standards...but it is important to remember that the Respondent was not charged with violating a regulation; only his employer's policy. The Higman policy was admitted as CG Ex 1 (Tr. at 34- 35).

maritime drug and alcohol testing is based. See generally, 33 CFR Part 95; 46 CFR Part 16, subpart B.

In the instant case, the Coast Guard contended that its Exhibit 1 was the “policy” referenced in the Amended Complaint and which was grafted into the definition of a “duly established rule” per 46 CFR §5.27.

At trial, the Coast Guard argued that: “The evidence will show that Higman Marine Services has a random alcohol and drug testing policy. The Respondent knew of that policy, and it was available to him. The Respondent signed an alcohol and drug consent screen form. On November 14th, Higman Marine Services conducted random drug and alcohol tests on oncoming crew members conducting crew change at their Orange, Texas office in accordance with its policy. Since the Respondent was an oncoming crew member, he was subject to random test.” (Tr. at 16). Throughout the trial, the Coast Guard consistently referred to the November 14, 2008 selection and testing as a “random alcohol and drug” test consistent with the Higman policy. (See, e.g., Tr. at 170 – 172). Even though the Coast Guard pled and repeatedly argued that the Higman test was random, the Vice Commandant subsequently vitiated the “randomness” requirement.⁹

As indicated above, the facts adduced at trial revealed that the Respondent was selected for alcohol testing on November 14, 2008 and he failed those tests, supra. (Tr. at 168).

In this EAJA matter, the legal issue is whether the Coast Guard had a reasonable basis in law to file and prosecute charges of Misconduct. Thus, the question obtains, whether the Coast

⁹ At trial, this court found that the testing was not, in fact, random as that term was used in the employer’s policy and thereafter dismissed the Amended Complaint. However, that ruling was reversed by the Vice Commandant of the Coast Guard in Appeal Decision 2692 (CHRISTIAN) (2011). By doing so, the Vice Commandant essentially re-wrote the employer’s policy; saying that because there are “no regulations that govern the maritime industry’s selection of mariners for random alcohol testing” the Higman policy requiring that the alcohol testing be, in fact, “random” was in error. Id. (Query then, the future reliability of employment manuals as the basis for a charge of Misconduct under 46 CFR §5.27?)

Guard could rely upon the provisions of the Higman policy manual as the basis for a charge of Misconduct under 46 CFR §5.27. Although Respondent's counsel timely objected to the Coast Guard's position on Constitutional grounds, the court lacked the authority (as it does now) to rule on Constitutional questions. (Tr. at 34).¹⁰

However, the court must still contend with the question of law: Whether violation of a corporate policy or employment manual can be fairly grafted into the definition of "Misconduct" under 46 CFR §5.27 -- even though the regulation plainly does not list or identify corporate policies or manuals as sources for allegations of "Misconduct."

Otherwise stated, the salient question is whether the Higman drug and alcohol policy constituted a "formal, duly established rule . . . [which] may be found in a variety of sources including among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." 46 CFR §5.27. (Query: What process results in a "formal, duly established rule" vis-a-vis a private employers' policy manual?)

Reading 46 CFR §5.27 carefully, one notices that the Higman corporate manual or policy is not a statute or regulation, and it is not the common law or general maritime law. Further, employment policies and writings described in cases like Commandant's Decision on Appeal

¹⁰ The Commandant's Decisions on Appeal (CDOAs) that touch upon Constitutional concerns provide conflicting guidance. In Appeal Decisions 2613 (SLACK) (1999) and 1862 (GOLDEN) (1971), the Commandant bluntly said of Constitutional questions: "[i]f appellant wishes to complain about my [regulatory] definitions and interpretations he is free to do so, but this is not the forum in which he will obtain" his desired remedy. Such logic is perplexing as both SLACK and GOLDEN rely upon appellate authority that says an ALJ cannot hold a statute unconstitutional; however, neither case cites federal appellate authority on the question whether an agency, or an ALJ, can hold a regulation unconstitutional.

Moreover, in Coast Guard cases, Congress has not explicitly authorized the Commandant to "hear and determine appeals raising substantial questions of law or fact." According to 46 USC §7701, the provision governing "Suspension and Revocation" of mariner's licenses and credentials, "the Secretary may prescribe regulations to carry out this chapter." Id. at (d). There is no specific authorization given to the Commandant, as an appellate authority with oversight of ALJ decisions, to rule on "substantial questions of law." Hence, absent a specific legislative grant, the Commandant has not been given the express authority to rule on constitutional questions. Accord, Appeal Decisions 2563 (EMERY) (1995); 2546 (SWEENEY) (1992) and 2049 (OWEN) (1976) (refusing the authority to resolve a question of the constitutionality of a statute).

2640 (PASSARO) (2003)¹¹, were of a character likely to be found aboard a vessel; they pertained to the operational command and control of a vessel. Documents such as those described in PASSARO would be properly regarded as part of a ship's regulation or order. Contrast those kinds of materials with a corporate policy or manual which might pertain to general administrative, non-operational matters and apply to non-licensed shore personnel (as well as mariners) employed by the corporation.

An early decision, Commandant's Decision on Appeal 1567 (CASTRO) (1966), construed a forty-four year old predecessor regulation "R.S. 4450," which, ostensibly, defined "Misconduct." Assuming for the purposes of this discussion that the language of "R.S. 4450" and the present 46 CFR §5.27 are similar, CASTRO provides little guidance, here. A pertinent portion of that decision reads:

A private steamship company's policy for maintenance of order and good safety conditions aboard a vessel, governing the conduct of the crew, is precisely the kind of rule that does establish standards for the invocation of the "misconduct" provision of R.S. 4450. A company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct. A company policy with regard to whether a crewmember could act in certain ways or wear certain clothing while ashore, absent some other considerations, could have no connection with safety aboard the ship.

Id. (emphasis added).

Like PASSARO, the facts in CASTRO dealt with company policies regarding the maintenance of good order and discipline aboard the vessel itself. CASTRO specifically says

¹¹ In PASSARO, the Commandant said: "pursuant to 46 CFR §5.27, 'misconduct' is 'human behavior which violates some formal, duly established rule.' The regulation makes clear that such 'established rule(s)' may be found in a variety of sources including 'among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources.'" Id. (quoting 46 CFR §5.27). "The Coast Guard's complaint stated that the misconduct charge resulted from the fact that ['e]ach of the two overboard discharges was a direct violation of Liberty Maritime Corporation's company restrictions on pumping bilges as set forth in the Vessel Instruction Manual and the Chief Engineer's Standing Order 11.' Therefore, whether the discharges were 'illegal' is of no relevance to this case. Instead, to effectively prove the misconduct alleged, the Coast Guard must show that Respondent violated Liberty Maritime's Company policy, without justification" Id. (emphasis added).

that a company policy that attempted to govern behavior ashore could have “no connection with safety aboard the ship” and, hence, could not form the basis for a charge of Misconduct. Id. This court is of the opinion that corporate employment manuals/drug policies are not of the character of documents referred to in PASSARO and CASTRO. However, reasonable minds might differ on that point. Hence, for the purposes of the instant EAJA Motion, it is certainly reasonable to conclude that there was a reasonable legal basis for the Coast Guard to proceed under that theory.

Finally, employer policies or manuals are not “shipping articles.” In the United States, shipping articles originated by an Act of Congress of July 20, 1790. Act of July 20, 1790, ch. 29. Shipping articles generally direct that a master of any vessel bound from a port in the United States to any foreign port shall, before commencing such voyage, make an agreement in writing with every seaman or mariner on board such vessel, declaring the voyage, and term of time for which such seaman or mariner shall be shipped. 46 U.S.C.A. §10302; see generally, Isbrandtsen Co. v. Johnson, 343 U.S. 779, 784-85 (1952); Stevens v. Seacoast Co., 414 F.2d 1032, 1034, 1969 A.M.C. 1911 (5th Cir. 1969). Shipping articles include a description of the mariner’s wages, transportation, and subsistence during time of transportation. Id.

Certainly, if the Coast Guard wanted its present Misconduct regulation to include company policies or corporate manuals that include the governance of conduct ashore, then 46 CFR §5.27 could have been so written.¹² However, that is a question left for another day in another venue.

¹² If the Coast Guard simply interlineates “employer policies” or “employment manuals” to the definition of Misconduct in 46 CFR §5.27 by fiat, then it could be argued that the Coast Guard is engaging in rulemaking without having observed procedural requirements of the Administrative Procedures Act, 5 U.S.C. §553, which require notice and comment, etc. Addition of these terms would be material; not simply a mere “interpretation” of the regulation for which court deference might be accorded per Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). However, this is a question for another day.

Absent clear guidance from an appropriate appellate authority, however, this court must presume for the purposes of Respondent's EAJA Motion that the Coast Guard acted reasonably when it relied upon a violation of the Higman manual to define "Misconduct." While legal minds might differ about the status of the law, plainly it can be argued that alcohol use has a potential impact upon the operational command and control of a vessel, and, thus, the Coast Guard had a reasonable legal basis for its action.

Given the totality of the facts and evidence adduced at the hearing, I find that the Coast Guard was reasonably within the bounds of the law (and the facts) by charging and proceeding against Respondent under the aegis of 46 CFR §5.27.

ORDER

Because the Coast Guard was substantially justified in pleading and prosecuting the underlying Suspension and Revocation action against him, Respondent's Motion for EAJA Fees and Costs is hereby **DENIED**.

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001.



Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date:

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS PART 20 RULES OF PRACTICE, PROCEDURE, AND
EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD
SUBPART J - APPEALS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and

- (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
 - (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
 - (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.