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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER DOCUMENT	:	
	:	NO. 2670
	:	
Issued to: MARK GLEN WAIN	:	

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 May 4, 2004, Judge Joseph N. Ingolia, the Chief Administrative Law Judge (hereinafter "Chief ALJ") of the United States Coast Guard, at Baltimore, Maryland, revoked the merchant mariner credentials (merchant mariner document and STCW Certificate) of Mr. Mark Glen Wain (hereinafter "Respondent") upon finding proved two charges of misconduct. The first specification found proved alleged that on September 25, 2002, Respondent, while serving in a deck maintenance crew position aboard the M/V SEA LAND EXPLORER, disobeyed the master's order to report aboard the vessel for its scheduled departure in Okinawa, Japan. The second specification found proved alleged that on July 9, 2003, Respondent, while applying for duplicate merchant mariner credentials, submitted a fraudulent application that failed to fully disclose Respondent's conviction history.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent's Coast Guard issued merchant mariner credentials on October 14, 2003. Respondent filed his Answer to the Complaint on October 31, 2003. In his Answer, although Respondent admitted all jurisdictional allegations, he denied both that he had disobeyed the order of the ship's master and that he had wrongfully submitted a fraudulent renewal application to the Coast Guard. The case was assigned to the Chief ALJ on November 4, 2003. Thereafter, via a Scheduling Order dated November 18, 2003, the Chief ALJ scheduled the hearing in the matter to convene on January 27, 2004. On December 24, 2003, Respondent submitted several filings to the Coast Guard ALJ Docketing Center, including a set of interrogatories, a motion requesting the production of documents, and a motion requesting admissions. In response to these filings, the Chief ALJ ordered the Coast Guard to respond to both Respondent's First Set of Interrogatories and his Request for Production of Documents by January 19, 2004. In addition, the Chief ALJ made clear that any issues arising from the Coast Guard's Answers to Respondent's Interrogatories would be resolved during the hearing scheduled for January 27, 2004.

The Coast Guard filed its Response to Respondent's Interrogatories and Requests for Document Production on January 15, 2004. The Coast Guard only responded in part, refusing to answer some of the interrogatories and to produce some of the documents requested based on a belief that some of the requested materials were irrelevant to the proceedings. [United States Coast Guard Response of Interrogatories and Requests for Production of Documents dated January 15, 2004] Via a "Motion to Compel Responses to Discovery Requests" dated January 20, 2004, Respondent requested that the Chief ALJ

order the Coast Guard to produce all of the documents requested and, simultaneously, asked for a continuance until such compliance was achieved. Via an "Order Denying Respondent's Motion to Compel Responses to Discovery and Motion for Continuance" issued on the same date as Respondent's request, the Chief ALJ denied Respondent's request for both further discovery and a continuance and instructed the parties to be prepared to litigate any remaining discovery issues at the hearing.

After a delay due to a period of unusually severe winter weather, the hearing was convened in Baltimore, Maryland, on February 19, 2004. During the hearing, the Coast Guard introduced the testimony of three witnesses and introduced sixteen exhibits into evidence. [D&O at 3] Respondent appeared with counsel, testified on his own behalf and introduced one exhibit into evidence. [*Id.*] Following the conclusion of the hearing, both parties submitted post-hearing briefs for consideration by the Chief ALJ. [*Id.*]

The Chief ALJ issued the D&O in the matter on May 4, 2004. Thereafter, on May 28, 2004, Respondent filed his Notice of Appeal with the ALJ Docketing Center. After obtaining one 60-day continuance and having had his request for an indefinite continuance denied, Respondent filed his Appellate Brief "under protest" on September 27, 2004.[1] The Coast Guard did not file a reply brief. Accordingly, this appeal is properly before me.

APPEARANCES: Respondent was represented (*pro bono*) by Mr. Nicholas A. Sloan, Esq., 2708 Summerview Way, Suite 204, Annapolis, Maryland. The Coast Guard

[1] Respondent requested an indefinite continuance until such time as he received, and had at least 30 days to review, materials provided in response to two requests he had made under the Freedom of Information Act (FOIA). *See* Respondent's Appellate Brief at 1-2 and Respondent's "Motion for Indefinite Continuance" dated Aug. 25, 2004.

was represented by LT Scott Baranowski, U.S. Coast Guard Activities Baltimore, Baltimore, Maryland.

FACTS

At all relevant times herein, Respondent was the holder of, and acted under the authority of, Coast Guard issued merchant mariner credentials. [D&O 2, 4] Respondent has served in various capacities as a credentialed merchant mariner since 1978. [D&O at 3]

On September 25, 2002, Respondent was employed aboard the M/V SEA LAND EXPLORER. [D&O 4, 9] After leaving the vessel while it was in port in Naha, Okinawa, Japan, on the morning of September 25, 2002, Respondent failed to be onboard for the vessel's scheduled departure time of 2100 hours. [*Id.*] He arrived at an empty dock at 2145. [*Id.*] Admitting that it was his fault, Respondent returned to California at his own expense. [*Id.*]

In October of 2002, Respondent's car was stolen. [Investigating Officer (hereinafter "IO") exhibit 1] Although the police recovered Respondent's car, various important documents were lost during the incident, including Respondent's passport, professional credentials, and union book. [D&O at 12; IO exhibit 1 at 5] Thereafter, respondent first filed an application for duplicate mariner credentials with the REC in Baltimore, Maryland[2]. [D&O at 4] At that time, Respondent was told that his application could not be accepted because of an ongoing investigation in Long Beach,

[2] The date of Respondent's initial application for duplicate credentials in Baltimore, Maryland, is not developed in the record.

California, concerning his failure to report to the SEA LAND EXPLORER in Okinawa, Japan. [Id.]

On July 9, 2003, Respondent filed another application for duplicate mariner credentials with the REC in Toledo, Ohio. [D&O at 4; Tr. at 13-15; IO Exhibit 1] Respondent thought that he could "expedite matters" by filing his application with a "smaller Coast Guard station" that he believed would be less busy than the one in Baltimore, Maryland, and would, as a result, be more likely to quickly re-issue his mariner credentials as soon as the on-going investigation into his actions while employed aboard the SEA LAND EXPLORER was completed. [Tr. at 89-91]

When Respondent filed his application with the REC in Toledo, Ohio, he answered "yes" to three questions: 1) whether he had ever been convicted of any offense other than a minor traffic violation, 2) whether he had ever been convicted of operating a motor vehicle while under the influence and, 3) whether he ever had his driver's license suspended or revoked. [D&O at 5] In explaining his "yes" answers, Respondent attached a brief written statement which indicated that he previously disclosed all information relating to his convictions, to the best of his ability, to the Coast Guard in Long Beach, California. [D&O at 5; IO Exhibits 1 at 4] Irrespective of that fact, the record contains evidence of eight convictions not mentioned in any of Respondent's prior mariner credential applications. [D&O at 7-8] The content of Respondent's credential applications and his actions while employed aboard the M/V SEA LAND EXPLORER formed the basis of the Coast Guard's initiation of suspension and revocation action against Respondent's mariner credentials.

BASES OF APPEAL

This appeal is taken from the Chief ALJ's D&O, finding proved two charges of misconduct and ordering the revocation of Respondent's merchant mariner credentials. On appeal, Respondent raises the following assignments of error:

I. The Coast Guard should not have brought this action against Respondent because it falls outside the guidelines contained in 46 C.F.R. § 5.61;

II. The Chief ALJ erred by concluding that Respondent's statements on his renewal application were fraudulent;

III. The Chief ALJ erred in relying on the testimony of an "expert" witness as to the appropriate length of the period of license revocation as 5 years;

IV. The Chief ALJ erred in refusing to compel the Coast Guard to provide Respondent with relevant materials he had requested; and

V. The Chief ALJ erred by imposing a sanction – revocation – that was excessively severe under the special circumstances of this case.

OPINION

I.

The Coast Guard should not have brought this action against Respondent because it falls outside the guidelines contained in 46 C.F.R. § 5.61

Respondent first argues, citing 46 C.F.R. § 5.61, that any "misconduct" in which he might have been involved is not the kind requiring the revocation of his mariner's documents. [Appellate Brief at 2] To that end, Respondent contends that the Coast Guard has conducted a "malicious prosecution" that "border[s] on [the] vigilante." [*Id.*] Respondent cites 46 C.F.R. § 5.61 to support his assertion that there is a clearly-defined limit to the types of "acts or offenses for which revocation of licenses [and other marine documents] may be sought." Respondent concludes that because he committed none of the offenses stated in 46 C.F.R. § 5.61, the Coast Guard was precluded from initiating

suspension and revocation action against his mariner credentials. [Appellate Brief at 3] For the reasons set forth below, I disagree.

First, the controlling statutory authority, 46 U.S.C. § 7701(b), makes clear that "Licenses, certificates of registry, and merchant mariners' documents may be suspended or revoked for acts described in section 7703 of this title." 46 U.S.C. § 7703 provides that the Coast Guard may suspend or revoke a mariner's credentials if the mariner is found to have "violated or fails to comply with . . . any other law or regulation intended to promote marine safety . . . or . . . has committed an act of misconduct or negligence." 46 U.S.C. § 7703(1)(A), (B).

Moreover, while the Coast Guard has, as Respondent argues, listed several "Acts or offenses for which revocation of licenses, certificates, or documents is sought" in 46 C.F.R. § 5.61, Respondent fails to note that the regulation, itself, affords investigating officers the discretion to seek revocation in other cases not specifically addressed therein. Indeed, 46 C.F.R. § 5.61(b) makes clear that:

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

In this case, Respondent was charged with two specific acts of misconduct. The first misconduct charge alleged that Respondent missed the sailing of the M/V SEA LAND EXPLORDER, the vessel to which he was assigned, after a port call in Japan. [D&O at 2] With respect of the allegation, the Chief ALJ found as follows:

> On September 25, 2002, the SEA LAND's scheduled departure time was 2100 hours. The official logbook shows that Respondent arrived to an empty dock at 2145. The Captain of the vessel testified that Respondent was late for the vessel's departure. Respondent, serving as a member of

> the ride-along-gang, also admits that he failed to be onboard for the vessel's departure in Naha Okinawa, Japan.

[D&O at 11, citations to transcript omitted] In addition, citing Appeal Decision 399 (TATE), the Chief ALJ determined that "a failure to join a vessel constitutes Misconduct" and noted that "the logbook entry, Respondent's admission [during the hearing], and the testimony of the Captain of the vessel that Respondent was late for the vessel's departure on September 25, 2002…[was]…sufficient to establish misconduct." [*Id.*] As the Chief ALJ correctly noted in his D&O, prior Commandant Decisions on Appeal hold that doing so is, in fact, misconduct. *See* Appeal Decisions 2068 (REED) and 399 (TATE).

If the only act of *misconduct* committed by Respondent was his failure to timely join the vessel, I have little doubt the Coast Guard and Respondent could have negotiated a mutually satisfactory settlement agreement, easily disposing of this matter. However, Respondent faced a second, far more serious charge of misconduct which, if found proved, necessitates a far more serious sanction.

Fraud committed in the procurement of a mariner's license constitutes both a violation of a law designed to promote maritime safety and a serious act of misconduct. Appeal Decision 2613 (SLACK). Indeed, Appeal Decision 2569 (TAYLOR) made clear that "fraud in the procurement of any license, certificate, or document is a clear threat to the safety of life or property." That is because the truth of the information provided to the REC in order for the Coast Guard to make a determination as to whether to issue a credential is critical. *See* Appeal Decision 2569 (BURKE). As such, on the basis of the second misconduct charge, it was perfectly appropriate for the Coast Guard to seek revocation of Respondent's mariner credentials under 46 C.F.R. § 5.61. As a result, the Coast Guard did not err in initiating suspension and revocation action against

Respondent's mariner credentials in this case and, as such, Respondent's first assignment of error is without merit.

II.

The Chief ALJ erred by concluding that Respondent's statements on his renewal application were fraudulent.

Respondent next argues that the ALJ misconstrued the facts of this case in concluding that he committed fraud. To that end, Respondent asserts that he, "in good faith relied on the documents that were on file in Long Beach" and "reasonably assumed that Long Beach was basing the investigation on all public records…[and, therefore, assumed that]…when he disclosed the existence of the documents (in his attachment to the Toledo Application) he reasonably assumed the [California] convictions were included." [Respondent's Appeal Brief at 3] Respondent then concludes that "when he disclosed the existence of the documents…he reasonably assumed that the CA convictions were included" and adds that "this whole matter is predicated on Respondent's alleged failure to disclose documents which the Coast Guard had in their possession" and, as such, Respondent should not be viewed to have committed any wrongs in failing to, himself, disclose such information. [Respondent's Appellate Brief at 3-4] For the reasons discussed below, I do not find Respondent's assertions, in this regard, persuasive.

A finding of fact by the ALJ may only be disturbed on appeal if it is not based on substantial evidence. 46 C.F.R. § 5.701(a); 33 C.F.R. § 20.1001(a). The term "substantial evidence" is synonymous with preponderance of the evidence as defined by the Supreme Court. *See* Appeal Decision 2477 (TOMBARI); Steadman vs. Securities and Exchange Commission, 450 U.S. 91, 101 S. Ct. 999 (1981). In order to satisfy the

preponderance of the evidence standard, the ALJ needs to be convinced that the existence of a fact is more probable than its nonexistence. Appeal Decision 2477 (TOMBARDI); *See also* Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring).

In its Complaint, the Coast Guard alleged that Respondent submitted a fraudulent License Application Form (CG-719B) for a duplicate merchant mariner document and STCW Certificate on July 9, 2003, by failing to fully disclose his history of criminal convictions. Respondent contends, as is noted above, that no fraud was intended or committed. [D&O at 2] The ALJ concluded, however, that based on the entire record, Respondent committed fraud. [D&O at 16]

The applicable regulations permit a seafarer who loses his mariner's credentials to apply for reissue upon submission of an application form, and payment of the appropriate fee, to any REC. 46 C.F.R. § 12.02-23(c). In doing so, the mariner must provide "written disclosure of all prior convictions . . . at the time of application." 46 C.F.R. § 12.02-4(c). In this case, Respondent submitted an application to the REC in Toledo, Ohio, on July 9, 2003, for a duplicate merchant mariner document and STCW Certificate. [D&O at 12] The Toledo application was submitted after the Coast Guard had rejected an earlier application that Respondent submitted to the REC in Baltimore, Maryland. [*Id.*]

On the application that Respondent submitted in Toledo, Respondent marked the "Yes" block on three questions in "Section III – Narcotics, DWI/DUI, and Conviction Record." [IO Exhibit 1 at 2] Each question asked whether Respondent had ever been

convicted of, or lost his driving privileges for, any offense other than a minor traffic violation. [*Id.*] Following each question, the form states in bold letters: **"If yes, attach statement."** [*Id.*]

Respondent then typed, signed, and attached the following statement to his application:

> All information disclosed has been provided to the best of my ability. It is not my intent to deceive or misslead [sic] by any absence of information. Any conviction, traffic violation or driver's license suspension is currently on record at U.S.C.G. (Long Beach, CA).

[IO Exhibit 1 at 4] Contrary to Respondent's assertion, however, documents on file at the REC in Long Beach indicate that Respondent failed to mention—in earlier mariner credential applications that occurred prior to his service aboard the SEA LAND EXPLORER—several convictions of which he should have been aware. [D&O at 13-14; IO Exhibits 6, 7] First, in response to similar questions on previous applications filed at the REC in Long Beach, California, (dated February 16, 1999, December 13, 1999, March 13, 2000, and May 23, 2000) Respondent answered "No" to all but one of the questions in Section III. [D&O at 13-16] The sole exception concerned any convictions he had based on driving under the influence of alcohol. [*See* IO Exhibits 6, 7, 8, and 9] In attached statements, he made reference to only one previous conviction, a DUI in Lafayette, Louisiana, in 1997. [*Id.*] However, the Coast Guard presented evidence to show that Respondent had several other prior convictions, including criminal mischief, misdemeanor battery, resisting arrest, resisting arrest with violence, and making harassing phone calls, stemming from incidents that occurred in May and November 1992. [I.O. Exhibits 12, 13, 14, 15, and 16] Neither in his applications to the Coast Guard office in

Long Beach in 1999 and 2000, nor in his application to the Toledo REC in March 2003, did Respondent ever disclose any of those earlier convictions. [D&O at 13-16]

Moreover, Respondent failed to reveal four criminal convictions that he received after filing applications in Long Beach in 1999 and 2000. [D&O at 14] The record includes court documents establishing that Respondent was convicted, in 2001 and 2002, of crimes stemming from several incidents of misdemeanor assault, misdemeanor battery, public intoxication, and possession of an alcoholic beverage where prohibited. [IO Exhibits 2, 3, 4, and 5] Respondent failed to include any mention of these incidents in the application package he submitted in July 2003, at REC Toledo, Ohio.

Respondent contends that the Coast Guard should be responsible to search public records to ascertain an applicant's criminal history. He argues that, as a high school graduate and simple seafarer, he has neither the resources nor the competence to attempt a comprehensive records search, while the Coast Guard has both. [Appellate Brief at 9] However, the Coast Guard reasonably requires that applicants will do their best to provide this crucial information accurately and completely, and has required that each applicant must provide written disclosure of all prior convictions. 46 C.F.R. 12.02-4(c). On this point, Appeal Decision 2569 (BURKE) states:

> [I]nformation concerning the criminal background of an applicant is a crucial factor for the Coast Guard in deciding whether to issue seaman's papers because an applicant's character relates to the risk he may pose to the seafaring world. Consequently, the truth of information provided by applicants for licenses and documents is essential to the Coast Guard's ability to discharge its mission of protecting life and property at sea.

The onus is properly on the applicant to report his personal history of criminal convictions completely and in good faith. [*Id.*]

Respondent also contends that he should not be held responsible for fraudulent representations contained in his application because he never actually signed or dated the block indicating that he certified they were true. [Appellate Brief at 8] Indeed, a review of the record shows that the portion of the application where Respondent would have acknowledged "that a false statement is grounds for denial of the application as well as criminal prosecution and financial penalty" is unsigned and undated. [I.O. Exhibit 1 at 2] However, in Section VI of that same application, Respondent signed and dated a "Certification and Oath" in which he acknowledged that any willfully false writing, document, or statement submitted in conjunction with any part of the application "violates the U.S. Criminal Code" and "subjects the violator to Federal prosecution." [I.O. Exhibit 1, at 3] Moreover, the record shows that Respondent signed a mandatory statement indicating "that the information on this application is true and correct." [*Id.*] Respondent also signed the amplifying statement that was directly related to his "yes" answer in Section III of the form. [I.O. Exhibit 1 at 4] In view of all of the representations, including Respondent's signature on the attachment sheet, I agree with the Chief ALJ that the fact that Respondent did not sign or date the block in question was "not relevant to the issues" presented in the case. [D&O at 15]

On considering the evidence presented, the Chief ALJ determined that "[t]he Coast Guard proved by a preponderance of reliable, probative, and substantial evidence that…Respondent committed misconduct by failing to fully disclose his conviction history and submitted a fraudulent application to the Coast Guard, Regional Exam Center, Toledo, Ohio." [D&O at 9] A careful review of the record reveals that the Chief ALJ's factual findings are substantially supported by compelling documentary evidence,

testimony of the witnesses, and reasonable inferences to be drawn from such evidence. 46 C.F.R. § 5.701(a); 33 C.F.R. § 20.1001(a). As such, Respondent's second basis of appeal is not persuasive.

III.

Respondent contends that the Chief ALJ erred in relying on the testimony of an "expert" witness as to the appropriate length of the period of license revocation of 5 years.

In his third basis of appeal, Respondent argues that the Chief ALJ erred by relying on the testimony of Mr. John Cassady, the Chief of the REC in Baltimore, Maryland, who Respondent claims was never established as an expert witness, to determine that the appropriate period of license "revocation" in Respondent's case should be 5 years. [Appellate Brief at 10]

First, Respondent misconstrues the import of Mr. Cassady's testimony. The witness was not testifying as to his understanding of the appropriate period of license revocation. Rather, his testimony concerned the "maximum assessment period" for an applicant who had been recently convicted of misdemeanor assault, battery, and public intoxication. [Tr. at 19-20] Under 46 C.F.R. § 12.02-04(c)(2), the Coast Guard uses the "assessment periods" listed in Table 12.02-4(c) as "guidelines to evaluate applicants for merchant mariner's documents who have criminal convictions." In essence, an applicant must "keep his nose clean" following a criminal conviction for a certain period of time before the Coast Guard will consider issuing him merchant mariner credentials. Contrary to Respondent's assertion, therefore, Mr. Cassady's testimony had nothing to do with the period of revocation of a license as a sanction.

Perhaps more importantly, Mr. Cassady, who testified that he made determinations such as this one "every day," was indeed an "expert" on matters such as

the one on which he testified before this S&R hearing. [Tr. at 22] While there was no real effort to qualify him as an expert and the Chief ALJ did not specifically rule that he was one, Respondent did not question his competence on the record, and the Chief ALJ properly determined that he was qualified to answer the questions presented. There are no rigid requirements for qualifying an expert witness in suspension and revocation proceedings. *See* 33 C.F.R. § 20.601(a)(1) and § 20.706. However, Mr. Cassidy's qualification testimony clearly established him as having extensive experience at the REC. [Tr. At 111-12] Indeed, in objecting to a question, Respondent's counsel stated that he was willing to "stipulate" as to part of Mr. Cassady's testimony, apparently with respect to the assessment periods in Table 12.02-4(c). [Tr. at 20-21]

Therefore, based on Mr. Cassady's "specialized knowledge" and "experience," it was appropriate for him to offer his "opinion" as to the likely assessment period that would have been applied in Respondent's case. *See* Fed. R. Evid. 702.[3] Indeed, the record shows that Mr. Cassady provided helpful insight into how long the Toledo REC, or any Coast Guard REC, likely would have required Respondent to wait to get his replacement mariner credentials had he truthfully advised the Coast Guard of his recent criminal history. The Chief ALJ did not abuse his discretion by allowing the witness to testify and using his testimony, along with the rest of the evidence in the record, to arrive at a decision. 46 C.F.R. § 5.701(c); 33 C.F.R. § 20.1001(c).

[3]Although the Federal Rules of Evidence do not apply to administrative agencies, such as S&R hearings, "the spirit of" the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which sets forth the rules for qualifying an expert witness in Federal trials under F.R.E. 702, "does apply to administrative proceedings." Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004).

IV.

The Chief ALJ erred in refusing to compel the Coast Guard to provide Respondent with the relevant materials he had requested.

Although Respondent did not specifically list this argument as a basis of appeal, he expressed great concern in his appellate brief, and had contended in earlier motions, that the Chief ALJ should have done more to compel the Coast Guard to provide him with the materials that he had requested, both in discovery prior to the hearing, and in a FOIA request he submitted in preparation for his appeal. [Appellate Brief at 13] He contends that he had to proceed to the hearing, and had to file his appeal, without information essential to a fair presentation of his defense. [*Id.*]

A. Respondent's Discovery Requests Prior to the Hearing

Title 33, C.F.R. part 20, subpart F, provides for the discovery process during S&R hearings and other formal administrative proceedings of the Coast Guard. Each party to an investigation has an obligation to make available to the ALJ and to the other party copies of exhibits, the names of experts and other witnesses, and brief narrative summaries of their expected testimony. 33 C.F.R. § 20.601(a). Any party requesting to submit interrogatories must make a motion to the ALJ, including the purpose and language of the proposed interrogatories. 33 C.F.R. § 20.603. Only after reviewing the proposed interrogatories does the ALJ enter an order either approving or denying the motion. [*Id.*]

About five weeks after filing his Answer to the Complaint, Respondent's attorney submitted to the I.O. and the ALJ Docketing Center in Baltimore what he styled as "Respondent's First Set of Interrogatories, Requests for Production of Documents, and Request for Admissions." Two weeks later, on January 8, 2004, the Chief ALJ ordered

that the Coast Guard respond to the interrogatories and produce the requested documents by January 19, 2004. He specifically denied Respondent's request for admissions, stating that the applicable discovery regulations do not provide for admissions. In the final paragraph of his order, the Chief ALJ ordered "that any issues regarding interrogatories that arise after Coast Guard's response is filed, will be considered and resolved when the case is called for hearing." [Order Deferring Action on Respondent's Motion for Further Discovery at 4]

On January 9, 2004, the I.O. submitted to the Docketing Center, with a copy to Respondent's attorney, a list of four witnesses and 17 exhibits, including all of Respondent's applications and all records of Respondent's criminal convictions that the Coast Guard had been able to locate. On January 15, 2004, the Coast Guard provided its "Response of Interrogatories and Requests for Production of Documents." Although it responded to about half of Respondent's requests, it objected to having to answer several of the interrogatories and having to provide some of the documents on the basis that they were not relevant to the matter at hand. [United States Coast Guard Response of Interrogatories and Requests for Production of Documents dated January 15, 2004]

In a subsequent filing on January 20, 2004, Respondent's counsel made a motion to order the Coast Guard to answer fully the interrogatories and provide the documents the Coast Guard had failed to provide earlier, and requested a continuance until such time as the Coast Guard complied. On the same date as an order postponing the hearing until a later date due to inclement weather, the Chief ALJ issued an order denying Respondent's motion to compel further responses to his discovery requests and motion for a continuance. [Order Rescheduling Hearing as a Result of Inclement Weather dated

January 30, 2004] For his part, Respondent's counsel provided his list of witnesses and exhibits on February 4, 2004. When the hearing was actually held on February 19, 2004, there was no mention whatsoever of any unresolved discovery issues.

On March 1, 2004, the Coast Guard submitted a "Post Hearing Brief," and, on March 8, 2004, Respondent's attorney submitted a "Memorandum Supporting Respondent's Position." Although each of those briefs dealt with several substantive issues involved in the case, there was no mention of any issue concerning discovery. Finally, when the Chief ALJ signed his D&O on May 4, 2004, he made no mention of any unresolved issues stemming from the discovery process. In addition, prior to the hearing, the Chief ALJ expressly notified Respondent that he would have the opportunity to litigate any remaining discovery issues at the hearing. [Order Denying Respondent's Motion to Compel Responses to Discovery Requests and Motion for Continuance dated January 20, 2004; Order Rescheduling Hearing as a Result of Inclement Weather dated January 30, 2004] Irrespective of that fact, the record shows that Respondent abandoned the issue during the hearing and in his initial post-hearing brief. As a consequence, there is simply no basis to give Respondent discovery relief now. 46 C.F.R. § 5.701; 33 C.F.R. § 20.1001.

B. Respondent's FOIA Request Prior to Filing His Appeal

Respondent also complains that he was forced to file his appellate brief "under protest," since he had not been provided with the documents he had requested from the Coast Guard under FOIA. [Appellate Brief at 1] In conjunction with his FOIA requests, Respondent's counsel first requested a 60-day continuance, and, once that had run, requested an "indefinite continuance" until 30 days after the Coast Guard had complied

with his FOIA request. [*Id.*] The materials sought were similar to those the Chief ALJ had refused to force the Coast Guard to provide because he considered them to be "not relevant" to the hearing. Although the ALJ Docketing Center approved the 60-day continuance, it denied Respondent's request for an "indefinite continuance" for three reasons: (1) "FOIA requests are governed by 5 U.S.C. 552 and are separate from this appellate process;" (2) "Pursuant to 33 CFR 20.1002(a) the record on appeal consists of the record in the proceeding below. The record cannot be supplemented on appeal;" and (3) "[I]t is not the policy of the Coast Guard to grant indefinite continuances." [Letter from Mr. George Jordan, Director of Judicial Administration, ALJ Docketing Center, to Mr. Nicholas A. Sloan, Respondent's Counsel (Sep. 15, 2004)] Respondent has not made the case as to how the separate issue of a FOIA request has compromised his substantive rights in this appeal or at the hearing and, as such, his contention in this regard, is without merit.

V.

Respondent maintains that the Chief ALJ erred by imposing a sanction – revocation – that was excessively severe under the special circumstances of this case.

It is well established that "[w]here fraud in the procurement of a license is proved in a suspension and revocation proceeding, revocation is the only appropriate sanction." Appeal Decision 2570 (HARRIS). Appeal Decision 2613 (SLACK), "reiterate[d] the rule that proof in a suspension and revocation proceeding of a single specification and charge of fraud in the procurement of a license is enough to require that [the] license…be revoked." *See also* Appeal Decision 2569 (TAYLOR) (concluding that revocation was the appropriate sanction for fraudulent application submitted for a MMD).

Respondent contends that revocation of his documents has eliminated the only livelihood he has known since the age of 17. He argues that all of his troubles with the civil authorities stem from an addiction he has had to alcohol, one that he has fought hard in recent years to overcome. The arguments Respondent advances are essentially claims for clemency. *See* 46 CFR 5.905. Prior Commandant Decisions on Appeal dictate that it is not appropriate for clemency requests to be acted upon during suspension and revocation appeal proceedings. *See* Appeal Decisions 2428 (NEAT) and 2435 (BABER). Therefore, although Respondent may apply for clemency via the procedures set forth in 46 CFR §§ 5.901-5.905, it is inappropriate for me to consider his assertions, in that regard here and Respondent's final basis of appeal is not persuasive herein.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find that Respondent's bases of appeal to be without merit.

ORDER

The order of the ALJ, dated at Baltimore, Maryland, on May 4, 2004, is **AFFIRMED.**

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 24th of October, 2007