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 LICENSE	:	NO. 2658
Issued to: JAMES MICHAEL ELSIK	:	

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

By two separate Orders, both dated April 6, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, dismissed all allegations of the Coast Guard's Amended Complaint—one allegation of *negligence* and two allegations of misconduct—against James Michael Elsik (hereinafter "Respondent") with prejudice. The ALJ's first Order of April 6, 2004, entitled an "Order Ruling on Respondent's Motion to Dismiss" dismissed both misconduct allegations, with prejudice, and found, as a matter of law, that the Coast Guard could not maintain allegations of misconduct based on violations of statutes for which criminal penalties could be imposed. The ALJ's second Order of that date, entitled an "Order Ruling on Respondent's Motion for Sanctions," dismissed the remaining allegation of negligence, also with prejudice, as a remedy to Respondent for the Coast Guard's failure to respond to Interrogatories ordered by the ALJ.

PROCEDURAL HISTORY

Although the ALJ dismissed the Coast Guard's Complaint, with prejudice, before the hearing convened and, thus, before any evidence as to the relevant allegations was entered into the record, the dismissal occurred after numerous filings were made by both Respondent and the Government and after the ALJ issued numerous Orders in response to those filings. Given the case's disposition, a thorough review of the procedural history is necessary and is set out below.

On September 20, 2004, Coast Guard Marine Safety Office Morgan City, Louisiana, filed a Complaint alleging misconduct against Respondent. The Complaint, seeking a six-month suspension of Respondent's Merchant Mariner License, was supported by two factual allegations: 1) that Respondent, while serving as the Master of the UTV JOHN G. MORGAN on May 10, 2004, was involved in an allision with Army Corps of Engineers Barge CE 869 and failed to notify either his employer or the Coast Guard of the allision; and, 2) that during the subsequent Coast Guard Marine Casualty Investigation of the incident, Respondent stated that he had no knowledge of the allision. The alleged events occurred on May 10, 2004. [Coast Guard Complaint at 2]

On October 29, 2004, Respondent's Counsel filed both a "Notice of Appearance" in the matter and an "Unopposed Motion and Order for Extension of Time to File Responsive Pleadings" with the Coast Guard ALJ Docketing Center. On November 2, 2004, the Chief ALJ, United States Coast Guard, issued an "Order Granting Motion for Extension of Time" and, in so doing, required that Respondent's Answer be filed on or before November 24, 2004. Respondent filed his Answer to the Coast Guard's Complaint on November 20, 2004. In addition to addressing the allegations contained

within the Coast Guard's Complaint and asserting numerous affirmative defenses, Respondent's Answer requested a change of venue from Morgan City, Louisiana, to New Orleans, Louisiana.

On November 23, 2004, the case was assigned to Coast Guard ALJ Jeffie Massey. Thereafter, on December 20, 2004, the ALJ held a Pre-Hearing Teleconference with the parties. ["Order Ruling on Motion for Interrogatories & Motion for Continuance and Establishing Deadlines," dated January 6, 2004 at 2] At the Pre-Hearing Conference, Respondent agreed to withdraw his request for a change of venue in consideration of the fact that the Hearing would be held in Houma, Louisiana, rather than in Morgan City, Louisiana, as had been proposed in the Coast Guard's Complaint. [Id.] As a result of discussion held during the Pre-Hearing Conference, on December 30, 2004, the Coast Guard filed an Amended Complaint. [Id.]

The Coast Guard's Amended Complaint contained two allegations of misconduct and one allegation of negligence. [Amended Complaint at 2] The first misconduct allegation was based on Respondent's failure to provide necessary information after the occurrence of a marine casualty in violation of 46 U.S.C. § 2303(a); the second misconduct allegation was based on false statements Respondent allegedly made to the Investigating Officer (hereinafter "I.O.") in violation of 18 U.S.C. § 1001. [Amended Complaint at 1-2] The negligence allegation was based on the occurrence of the allision described in the Coast Guard's initial Complaint. [Id.]

On January 3, 2005, in addition to filing an Answer to the Coast Guard's Amended Complaint, Respondent filed a "Motion to Dismiss," a "Motion to Continue," and a "Motion for Interrogatories" with the ALJ. Thereafter, on January 5, 2005,

Respondent filed a "Motion for Issuance of Subpoenas" with the ALJ. Respondent's "Motion to Dismiss" argued that the ALJ did not have jurisdiction to hear the allegations of misconduct—based on violations of 46 U.S.C. § 2303(a) and 18 U.S.C. § 1001—because both statutes allegedly violated by Respondent allow for the imposition of criminal penalties. [Respondent's "Motion to Dismiss" at 1-2] To that end, Respondent concluded that an administrative action for suspension and revocation of a merchant mariner license for misconduct could not be based on violations of statutes for which criminal penalties may be imposed.[1]

On January 6, 2005, the ALJ issued an "Order Ruling on Motion for Interrogatories & Motion for Continuance and Establishing Deadlines." Via that Order, the ALJ granted Respondent's "Motion for Interrogatories" and his "Motion to Continue" the matter. In addition, the ALJ established a briefing schedule for arguments regarding Respondent's "Motion to Dismiss." ["Order Ruling on Motion for Interrogatories & Motion for Continuance and Establishing Deadlines" at 4] Specifically, the ALJ required that Respondent's brief in support of his motion be filed by February 1, 2005, and the Coast Guard's response, thereto, be filed by February 15, 2005 [Id.] The ALJ issued her January 6, 2005, Order before the Coast Guard's time to respond to Respondent's motions expired.[2] In so doing, the ALJ prevented the Coast Guard from responding to the bulk of Respondent's Motions, except his Motion to Dismiss the matter.

On January 14, 2005, the ALJ issued an "Order Establishing Procedural Schedule." In addition to establishing a discovery schedule for the proceeding, the Order

[1] The two counts for misconduct would later be dismissed based on this argument.

[2] Pursuant to 33 C.F.R. § 20.309(d), "a party shall file any response to a written motion 10 days or less after service of the motion."

set the hearing date for May 2, 2005. Thereafter, on January 24, 2005, the Coast Guard filed a pleading titled "Deadline for Interrogatory Objections." In this pleading, the Coast Guard noted that although the ALJ's "Order Ruling on Motion for Interrogatories & Motion for Continuance and Establishing Deadlines" specifically required that objections to interrogatories be filed within 15 days of issuance of the Order, the Coast Guard would file objections to the interrogatories "within 30 days as required by regulations."[3] ["Deadline for Interrogatory Objections" at 1] In accordance with the ALJ's procedural schedule, on January 31, 2005, Respondent filed his "Memorandum in Support of Motion to Dismiss."

On February 1, 2005, the Coast Guard filed its response and objection to Respondent's Interrogatories. The Coast Guard's response and objection to the interrogatories was filed after the 15 days mandated by Order of the ALJ, but within the 30 days that the Coast Guard argued it was entitled pursuant to 33 C.F.R. § 20.603(e). On the same date, Respondent filed a "Motion to Compel Answers to Interrogatories and a Motion for Sanctions." In that Motion, Respondent claimed that the Coast Guard's failure to respond to the Interrogatories required by Order of the ALJ and its subsequent objections to those Interrogatories were frivolous and meant to impede the discovery process. [Respondent's "Motion to Compel Answers to Interrogatories and Motion for Sanctions" at 1-4] Respondent further asserted that the Coast Guard "gamesmanship designed to impede proper discovery and to flout the authority and power of the ALJ" should result in the Coast Guard being sanctioned and ordered to pay Respondent's

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[3] The Coast Guard cited 33 C.F.R. § 20.603(e) which states with regard to interrogatories: "Responses or objections must be filed within 30 days after the service of the interrogatories."

attorney's fees and costs with respect to the Motion. [Respondent's "Motion to Compel Answers to Interrogatories and Motion for Sanctions" at 5]

On February 14, 2005, the ALJ issued two Orders, an "Order Denying Motion of the USCG to 'Appeal' January 6, 2005 Order" and an "Order On Objections to Interrogatories." The former Order denied the Coast Guard's "Appeal" of the ALJ's January 6, 2005, Order, while the latter denied the Coast Guard's objections to Respondent's interrogatories and required that the Coast Guard answer those interrogatories, in full, as ordered. In addition, the Order further required that Respondent file a report with the ALJ by March 10, 2005, if the Coast Guard failed to answer the interrogatories, in full. In addition, on the final page of the "Order On Objections to Interrogatories," the ALJ issued the following warning to the Coast Guard:

> I am willing to allow the USCG one opportunity to amend their conduct with respect to discovery in this proceeding. Should they choose to not take advantage of this opportunity, I shall, after due consideration, employ the use of sanctions that are available to me.

On February 23, 2005, the Coast Guard filed a "Witness and Exhibit List" in the proceeding. The "Witness and Exhibit List" summarized the expected testimony of witnesses the Coast Guard intended to call at the hearing. A review of the record shows, however, that the Coast Guard did not, at any time, respond to the interrogatories ordered by the ALJ.

On February 28, 2005, prior to the deadline set by the ALJ, Respondent filed a "Report On the Coast Guard's Failure to Answer Respondent's Interrogatories and Motion for Sanctions" with the ALJ. Therein, Respondent argued that the Coast Guard's "Witness and Exhibit List" failed to provide specific answers to the ordered interrogatories and proposed that the proper sanction for the Coast Guard's failure to

comply with the required discovery was dismissal of the Coast Guard's Complaint, with prejudice. On March 2, 2005, the Coast Guard filed a "Motion Opposing Respondent's Motion for Sanctions." In addition to renewing its previous arguments as to the discovery process ordered by the ALJ, the Coast Guard noted that, as of the filing date, it had received no discovery from Respondent and sought that the ALJ "reconsider her prior Orders and set…[the]…matter for hearing as soon as possible." ["Motion Opposing Respondent's Motion for Sanctions," at 8] Presumably in Response to the Coast Guard's March 2, 2005, Motion, on March 3, 2005, Respondent filed a "Memorandum in Opposition to the Coast Guard's Motion Opposing Respondent's Motion for Sanctions." On the same date, via an "Order Scheduling In Person Conference," the ALJ scheduled a pre-hearing conference in the case on March 22, 2005.

On March 22, 2005, the in-person conference was held with the ALJ, Respondent and the Coast Guard in attendance. During the conference, discussions were held regarding various procedural and legal issues involved in this case. At the conference, the ALJ ordered the parties to prepare memoranda on a number of issues raised during the conference. Subsequent to the proceeding, both parties filed memoranda on the issues the ALJ requested.

On April 6, 2005, the ALJ issued an "Order Ruling on Respondent's Motion to Dismiss" and an "Order Ruling on Respondent's Motion for Sanctions." The net effect of these orders was to dismiss, with prejudice, the Coast Guard's Complaint against Respondent. The "Order Ruling on Respondent's Motion to Dismiss" found, as a matter of law, that the Coast Guard could not maintain allegations of misconduct based on violations of statutes for which criminal penalties could be imposed. The "Order Ruling

on Respondent's Motion for Sanctions" dismissed the remaining allegation of negligence, also with prejudice, as a remedy to Respondent for the Coast Guard's failure to respond to Interrogatories ordered by the ALJ.

On April 7, 2005, the Coast Guard filed a "Notice of Appeal" of the ALJ's Orders dismissing the case. On June 3, 2005, the Coast Guard perfected its appeal by filing its Appellate Brief in the matter. Accordingly, this appeal is properly before me.

APPEARANCE: J. Mac Morgan, Esq., Post Office Box 24501, 879 Robert E. Lee Boulevard, New Orleans, Louisiana, 70124, for Respondent. The Coast Guard was represented by ENS Matthew Spolarich and ENS Timothy Tilghman, USCG, Marine Safety Office Morgan City, Louisiana, and LCDR Christopher Keane, USCG, Eighth District Legal (at the pre-hearing conference, only).

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued merchant mariner credential issued to him by the United States Coast Guard.

On May 10, 2004, an alleged allision occurred between the UTV JOHN G. MORGAN and Army Corps of Engineers Barge CE 869. At the time of the alleged allision, Respondent served as Master of the UTV JOHN G. MORGAN and was acting under the authority of his Coast Guard issued mariner credential.

BASES OF APPEAL

The Coast Guard appeals the decisions of the ALJ, dismissing, with prejudice, the Coast Guard's Complaint against Respondent. The Coast Guard raises the bases of appeal summarized below:

I. *The ALJ erred in dismissing the misconduct allegations and to do so was contrary to applicable law, precedent, and public policy;*

II. *Dismissal of the negligence allegation for failure to comply with discovery was improper;*

III. *The ALJ was biased against the Coast Guard; and,*

IV. *The ALJ acted arbitrarily and capriciously when she failed to follow the regulatory process for motions and discovery.*

OPINION

I.

The ALJ erred in dismissing the misconduct allegations and to do so was contrary to applicable law, precedent, and public policy.

I have long held that I will only reverse the opinion of the ALJ if her findings are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2647 (BROWN), 2645 (MIRGEAUX), 2642 (RIZZO), 2641 (JONES), 2640 (PASSARO), 2584 (SHAKESPEARE), 2570 (HARRIS), aff' NTSB Order No. EM-182 (1996). On appeal, the Coast Guard argues that the ALJ erred, as a matter of law, when she held that the Coast Guard may not base an administrative suspension of a mariner credential for misconduct on claims that the Respondent violated statutes for which criminal penalties may be imposed. I agree. There can be no question but that the Coast Guard may initiate suspension and revocation proceedings for actions that violate statutes which provide for criminal penalties. Any decision to the contrary is not only inconsistent with the laws governing these proceedings but is also contrary to the very intent of these proceedings—to promote safety at sea. 46 U.S.C. § 7701(a).

In this case, the Coast Guard sought to suspend Respondent's mariner license pursuant to 46 U.S.C. § 7703(1)(B). Under this statute, a mariner's license may be suspended or revoked when the mariner "has committed an act of incompetence,

misconduct, or negligence." 46 U.S.C. § 7703(1)(B). In its Complaint, the Coast Guard alleged two counts of misconduct pursuant to this statutory authority. In the first count, the Coast Guard alleged that the Respondent committed misconduct by failing to render necessary assistance or provide identifying information to the barge involved in the allision, as required by 46 U.S.C. § 2303(a).[4] The second count alleges that the Respondent made false statements to the Coast Guard in violation of 18 U.S.C. § 1001.

46 U.S.C. § 7703 states, in relevant part, that "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder" commits an act of misconduct. Pursuant to 46 C.F.R. § 5.27, "misconduct" is defined as:

> [B]ehavior 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 failure to do that which is required.

A plain-language reading of the definition of "misconduct" shows that it includes behaviors that violate statutes. In its Complaint, the Coast Guard expressly alleged that Respondent violated two statutes, 46 U.S.C. § 2303(a) and 18 U.S.C. § 1001. The

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[4] 46 U.S.C. § 2303 states, in relevant part, as follows:

> (a) The master or individual in charge of a vessel shall—
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> (1) render necessary assistance to each individual affected to save the effected individual from danger caused by the marine casualty, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or the individuals on board; and
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> (2) give the master's or individual's name and address and identification of the vessel to the master or individual in charge of any other vessel involved in the casualty, to any individual injured, and to the owner of any property damaged.
>
> (b) An individual violating this section or a regulation prescribed under this section shall be fined not more than $1,000 or imprisoned for not more than 2 years. The vessel also is liable *in rem* to the United States Government for the fine.

alleged violation of those statutes, whether they allow for the imposition of criminal penalties, or not, is—by regulatory definition—misconduct that may properly result in the initiation of suspension and/or revocation proceedings. There are numerous Commandant Decisions on Appeal that support this conclusion. *See, e.g.*, Appeal Decisions 2570 (HARRIS) (upheld ALJ's decision to revoke mariner license for misconduct based on a violation of 18 U.S.C. § 1001), 2430 (BARNHART) (upheld ALJ's decision to revoke a mariner's document for violation of a criminal statute, possession of marijuana), 2346 (WILLIAMS) (upheld ALJ's decision to revoke a mariner's license for misconduct that resulted from a violation of 18 U.S.C. § 2197), and 1873 (TORRENGO) (upheld ALJ's decision to revoke a mariner's document for misconduct that also could have resulted in criminal charges, stating that "[i]t does not matter that the act might also be criminal in nature…it does not even matter if there has been an acquittal in a criminal proceeding involving the same act. The standards of proof [for administrative and criminal actions] are entirely different."). Accordingly, I find that the ALJ erred, as a matter of law, when she dismissed the Coast Guard's misconduct allegations in this case. The fact that criminal violations were available for the charged offenses does not preclude the Coast Guard from initiating suspension and revocation action for those offenses.

II.

Dismissal of the negligence allegation for failure to comply with discovery was improper.

Via her "Order Ruling on Respondent's Motion for Sanctions," the ALJ dismissed the Coast Guard's allegation of negligence, with prejudice, as a remedy to Respondent

for the Coast Guard's failure to respond to ordered Interrogatories. The ALJ erred in so doing.

The authority of an ALJ to order sanctions is provided by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., (hereinafter "APA") and via agency regulations implementing that Act. I have searched in vain for express authorization in the APA for an ALJ to order dismissal of a charge with prejudice as a sanction for failure to comply with a discovery order. There is no such express provision of authority. In addition, while 33 C.F.R. § 20.607 states that "the ALJ may take such action as is just," if a party fails to permit discovery, the list of available sanctions provided by the regulation focuses on ALJ action with respect to the admissibility of the evidence that would have been obtained through discovery,[5] not dismissal of the action. In addition, while Coast Guard regulations state that "dismissal resides within the discretion of the ALJ" and allow the parties to an action to move for dismissal for failure to comply with an order of the ALJ, the regulations do not specify whether the resulting dismissal would be with or without prejudice. See 33 C.F.R. § 20.311(d) and 33 C.F.R. § 20.311(e).

Because Coast Guard regulations do not specify whether dismissal with prejudice is an authorized sanction for a failure to comply with a discovery order, the APA, as interpreted by the courts and other government agencies, must be looked to for guidance. The only provision in the APA that mentions "sanctions" is 5 U.S.C. § 558. That section does not expressly authorize dismissal with prejudice as a sanction for failure to comply

[5] Specifically, 33 C.F.R. 20.607 states that the "just" action of the ALJ may include: (a) infer that the testimony, document, or other evidence would have been adverse to the party; (b) order that, for the purposes of the proceeding, designated facts are established; (c) order that the party not introduce into evidence the evidence that was withheld; (d) order that the party not introduce into evidence information obtained in discovery; and, (e) allow the use of secondary evidence to show what the evidence withheld would have shown.

with a discovery order. Rather, 5 U.S.C. § 558(b) provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." As noted in the Attorney General's Manual on the APA[6], the original draft of this section limited the available sanctions to only those authorized by statute. However, when enacted, the clause, "as authorized by law" was substituted. Thus, the change from "statute" to "law" was intentional; it refers to law as reflected in treaties, statutes, regulations or judicial decisions. It also was intended to refer to the powers and authorities agencies possessed under existing law, whether expressed or implied. 5 U.S.C. § 556(d) provides that the agency may, consistent with the law, authorize an adverse decision against a party which violates the provisions of the APA with respect to *ex parte* communications with the ALJ. These two sections are the only places in the APA that "sanctions" are mentioned.

The policies behind 46 U.S.C. Chapter 77 are also relevant in determining whether an ALJ is empowered to dismiss a complaint with prejudice for failure of a party to comply with a discovery order. An important policy behind Chapter 77 is to further marine safety. It does not further marine safety to dismiss a proceeding with prejudice for failure to comply with a discovery order because such a dismissal prematurely terminates the government's ability to proceed against a mariner's credential without a full hearing at which the government puts forth the evidence on which the charges and specifications were founded. In this regard, I find that the sanctions provided in 33

[6] Attorney General's Manual on the Administrative Procedure Act, p. 88 (U.S. Department of Justice 1947).

C.F.R. § 20.607[7] are adequate for failure to comply with a discovery order, notwithstanding the ALJ's finding to the contrary. Accordingly, I find that the ALJ abused her discretion and committed an error of law by dismissing the Coast Guard's negligence charge, with prejudice, as a sanction for the Coast Guard's failure to comply with the ALJ's discovery order.

III.

The ALJ was biased against the Coast Guard.

On appeal, citing many of the ALJ's oral and written statements—including the fact that all of the adverse rulings in this case were to the Coast Guard's detriment, often addressing the Coast Guard in a derogatory manner—the Coast Guard contends that the ALJ was biased. While acknowledging both that "[b]ias requires more than mere allegations" and that "allegations of adverse rulings are not bias when both parties receive adverse rulings," the Coast Guard contends that "taken as a whole…the actions of the ALJ clearly were biased in this proceeding." [Coast Guard Appellate Brief at 34, 38] I disagree.

Parties to suspension and revocation proceedings may request that an ALJ withdraw from the proceedings on the grounds of personal bias or other disqualification.

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[7] 33 C.F.R. § 20.607 states as follows with respect to the sanctions available to an ALJ if a party fails to comply with the applicable discovery provisions:

> If a party fails to provide or permit discovery, the ALJ make take such action as is just. This may include the following:
> (a) Infer the testimony, document or other evidence would have been adverse to the party.
> (b) Order that, for the purposes of the proceeding, designated facts are established.
> (c) Order that the party not introduce into evidence—or otherwise rely upon, in support of any claim or defense—the evidence that was withheld.
> (d) Order that the party not introduce into evidence, or otherwise use in the hearing, information obtained in discovery.

33 C.F.R. § 20.204(b). After making such a request, the party seeking disqualification carries the burden of proof. Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665 (1982). The courts have long stated that there is a rebuttable presumption that the officers presiding over hearings are unbiased and that bias is required to be of a personal nature before it can be held to taint proceedings. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). Prejudgment also serves as a basis for disqualification. As a result, a proceeding is subject to challenge if it appears that the action has been prejudged. Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). In order to establish a disqualifying prejudgment, a party must demonstrate that the mind of the ALJ is "irrevocably closed" on the particular issue being decided. FTC v. Cement Institute, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Accordingly, an ALJ should be disqualified only when there has been a clear and convincing showing that he or she has an unalterably closed mind on matters critical to the disposition of the proceeding. Association of National Advertisers v. FTC, 617 F.2d. 1151 (D.C. Cir. 1979).

A review of the record supports the Coast Guard's assertion that the ALJ consistently ruled against the Coast Guard, often in a derogatory manner and for Respondent. However, a careful review of the ALJ's orders does not show that she had a personal interest in the case or that she had an unalterably closed mind about the facts and issues to be argued. What it does show, as is discussed throughout this decision, is that the ALJ misunderstood the applicable law and misapplied the Coast Guard's procedural rules. While regrettable, such misunderstandings and misapplications do not make a clear and convincing showing of bias.

(e) Allow the use of secondary evidence to show what the evidence withheld would have shown.

IV.

The ALJ acted arbitrarily and capriciously when she failed to follow the regulatory process for motions and discovery.

On appeal, the Coast Guard contends that the ALJ erred in failing to follow the Coast Guard's discovery regulations when she, among many other things, granted Respondent's request for further discovery—specifically his request for Interrogatories—before "initial" discovery concluded. Contrary to the ALJ's several Orders on the issue, I find that the Coast Guard was correct to conclude that the applicable regulations, at 33 C.F.R. Subpart F, require that discovery beyond that set out in 33 C.F.R. § 20.601(a) and (b),[8] so called "further discovery," only occur upon order of the ALJ after specific and detailed findings are made. *See* 33 C.F.R. § 20.601(d). In this case, that did not occur. Rather, the ALJ permitted the use of "further discovery"—interrogatories—before initial discovery concluded. There can be no question that the ALJ's action, in that regard, unnecessarily complicated these proceedings.

Coast Guard suspension and revocation actions are administrative proceedings that are remedial, not penal in nature and are "intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. While the Coast Guard has enacted regulations to protect the due process rights of individuals during the administration of their cases, those regulations are to "be construed so as to obtain a just, speedy, and economical determination of the issues presented." 46 C.F.R. § 5.51.

A review of the Interim Rule through which 33 C.F.R. § 20.601 was promulgated shows that the regulation was not intended to impose "criminal-style" procedural hurdles

[8] Generally, the "swapping" of Witness and Exhibit lists.

on either Respondents or the Government; instead, the regulation was promulgated to afford ALJs a tool to ensure that Coast Guard S&R hearings did not become "trials by ambush." *See* Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard, 64 Fed. Reg. 28,054-01 (May 24, 1999). The Coast Guard's interpretation of the applicable rules, adopted by myself, above, is consistent with this intent. Accordingly, I find the Coast Guard's fourth basis of appeal to be persuasive.

CONCLUSION

The ALJ committed an error of law when she dismissed the Coast Guard's misconduct allegations for lack of jurisdiction. The fact that criminal violations were available for the charged offenses does not preclude the Coast Guard from initiating suspension and revocation action for the offenses. In addition, the ALJ abused her discretion and committed an error of law by dismissing the Coast Guard's negligence allegation, with prejudice, as a sanction for the Coast Guard's failure to respond to interrogatories ordered by the ALJ. Because the ALJ's Orders terminated the case without hearing, the case must be remanded for further proceedings. In addition, the ALJ acted arbitrarily and capriciously by failing to follow the applicable discovery rules when she ordered "further discovery" before "initial discovery" concluded. The record does not contain sufficient evidence to support a conclusion that the ALJ evidenced a bias against the Coast Guard in this case.

ORDER

The ALJ's "Order Ruling on Respondent's Motion to Dismiss" and her "Order Ruling on Respondent's Motion for Sanctions" are VACATED and REMANDED for further proceedings consistent with this decision.

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

Signed at Washington, D.C., this 17th day of May, 2006.