UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA **UNITED STATES COAST GUARD,** **Complainant,** **vs.** **Merchant Mariner's Document** ***[REDACTED]*** **Issued to:** **JOHN P. LOVE, JR.,** **Respondent**	**Docket Number: 99-0187** **Case Number: PA99001173**

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

I. PRELIMINARY

The procedural facts involved in this matter are well known and most of them have been documented in the record through various motions and orders and will not be repeated herein. In addition, it is important to note that the parties have maintained a non-adversarial position and have stipulated to award attorneys' fees and expenses to the Respondent under the Equal Access to Justice Act (EAJA).

On December 27, 1999, the Respondent filed a motion for attorneys' fees and expenses entitled, Respondent's Verified Application for Award of Attorneys' Fees and Other Expenses (Application). The Respondent's Motion was submitted with a Stipulated Agreement (Agreement) between the Coast Guard and the Respondent and

provided for the award of $10,000 (ten thousand dollars) pursuant to the Equal Access to Justice Act. See 49 C.F.R. Part 6 (1999).

The Application and Agreement stipulated to the award of attorneys' fees and expenses but lacked the required information under the EAJA. The Agreement between the Coast Guard and the Respondent contained a provision to "waive[ ] any requirement for the submission of additional documentation in support of the application and stipulates that the amount is proper and in accordance with the requirements of the law." Clearly, the parties could not legally waive the legal documentation required under the EAJA statute and the undersigned issued an Order to the Respondent to provide the required documentation. See Order to Provide Documentation for Respondent's Motion Pursuant to the Equal Access to Justice Act, (February 7, 2000); see also 49 C.F.R. § 6.21 (1999) (stating the "application shall be accompanied by full documentation of the fees and expenses . . . ."). On February 23, 2000, the Respondent submitted "a detailed accounting of Respondent's legal fees and costs incurred in this matter."

Following the submission of the Respondent's detailed accounting certain threshold issues remained. At this point, it should be noted that the Coast Guard had only stipulated to the amount of the award and it did not provide any documentation on whether it was agreeing that the agency's position was not substantially justified. This is important to note because the EAJA law does not allow an award of attorneys' fees where the agency is substantially justified in bringing an action and because the facts in the written record, where the Respondent tested positive for drugs, suggest that the Coast

Guard was in fact, substantially justified when it filed its Complaint against the Respondent.[1] This threshold issue remained unanswered in the Application and Agreement and on April 28, 2000, the undersigned ordered the Respondent to show cause why his claim should not be denied. The Show Cause Order was used because it was more desirable and was less burdensome than scheduling hearings on the EAJA claim. A telephone conference was held on May 9, 2000, to discuss the Show Cause Order and the underlying "substantial justification" issue. On May 19, 2000, the Respondent filed its "Respondent's Memorandum in Response to the Show Cause Order Regarding Stipulated Application for Fees & Expenses Pursuant to the 49 C.F.R. Part 6 (Respondent's Reply). On that same day, the Coast Guard filed a reply entitled, Government Reply to Order to Show Cause Why Application for EAJA Fees Should Not be Denied (Agency Reply).

The undersigned has considered the entire record in this case and it is clear that the parties desire to settle this matter. After reading their responses to the Order to Show Cause, the precise terms of their agreement are manifest. In his response, the Respondent states:

> Precisely because of the burden, expense, and uncertainty associated with litigation, the parties herein have reached a settlement in good faith on the issue of attorneys' fees and expenses. Both parties have carefully weighed the burdens and risks associated with litigation and concluded the settlement regarding an award of attorneys' fees and expenses is in their interests.

Respondent's Reply at 8.

[1] Coast Guard policy concerning a positive drug test result for the use of a dangerous drug is clear. Most recently it was set forth in G-MOA Policy ltr. 3-99, dated August 4, 1999. It states in pertinent part, "where evidence indicates that a mariner has used a dangerous drug, i.e. positive drug test or other evidence of use, IOs shall pursue revocation of the merchant mariner's credentials (MMC) under 46 USC 7704(c)."

The Coast Guard's response states:

> The Agency's position to stipulate to the award of attorneys' fees and expenses in this matter was done in the public interest and exclusively for the purpose of settling the captioned matter without further litigation and attendant costs.

Agency's Reply at paragraph 6.

Given the above, it is evident that the parties agreed to settle the claim for an EAJA award on the basis of the consideration of trial hazards and costs. These are certainly acceptable and appropriate reasons to settle disputed issues involving EAJA claims. Had the parties limited their submissions to the statements quoted above, a brief, concise order would have been issued approving the EAJA Application and Settlement in which further comment would not have been necessary. However, in his response, the Respondent raises other issues that cannot be left unanswered. To do so, would invite the adoption of improper and illegal precedents.

In order to fully understand the arguments made in the Respondent's reply to the Order to Show Cause, it is necessary to review certain salient law and facts. The underlying case was initiated on September 9, 1999, where the Investigating Officer (IO) served a Complaint on the Respondent for the use of or addiction to the use of a dangerous drug pursuant to 46 U.S.C. § 7704 (c) (West Supp. 1999). On October 27, 1999, the ALJ assigned to this case dismissed the matter without conducting a hearing.[2] The ALJ based his decision on the pleadings and did not make any formal findings of fact. Thus, the prior record is devoid of facts that may have been important in

[2] The Administrative Law Judge retired in December 1999. The EAJA application was assigned to the undersigned thereafter.

considering the EAJA claim. In any event, for whatever reason the Coast Guard did not appeal the ALJ's decision and on December 23, 1999, the Respondent filed a timely motion for the award of attorneys' fees and other expenses under the EAJA.

It is well settled that the EAJA's primary purpose is to award attorneys' fees and other expenses in order to "deter the government from bringing unfounded suits or engaging in unreasonable administrative behavior." Panloa Land Buying Ass'n v. Farmer's Home Admin., 844 F.2d 1506, 1509 (11th Cir. 1988). The legal standard and pertinent regulations provide in part that:

> An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant, . . . unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust.

49 C.F.R. § 6.9 (1999).

While the EAJA is relatively new, a reading of the statutory law and regulations as well as the relevant case law does provide guidance in its application. The regulation provides that "[n]o presumption arises that the Department's (Coast Guard's) position was not substantially justified simply because the Department did not prevail." 49 C.F.R. § 6.9 (parenthesis supplied). Further, the same view is expressed in the House of Representative Committee report and in the case law. They provide that the reasonableness standard:

> [S]hould 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 probability of prevailing.

Keasler v. United States, 766 F.2d 1227, 1231 (8th Cir. 1985) (quoting H.R. Rep. No. 1418, 96th Cong., 2nd Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4990).

II. DISCUSSION

In considering any settlement submitted by the parties to a proceeding, the undersigned would generally approve the agreement unless it was illegal or against public policy. To that end, in this particular matter in examining the Application and Agreement it became clear that the parties failed to address the legal standard set forth in the EAJA law, which again states succinctly that:

> An eligible applicant may receive an award . . . *unless the position of the Department over which the applicant prevailed was substantially justified or special circumstances make the award sought unjust.*

49 C.F.R. § 6.9 (emphasis supplied).

In addition to the language in the law, the record in this case supports the conclusion that not only was the IO substantially justified in filing the Complaint where the Respondent had tested positive for drugs, but that, had he not done so, he would have been in violation of Coast Guard policy.[3] So here, it becomes important to know if the Coast Guard in its Stipulated Agreement was agreeing with the assertion made in the Respondent's Application, that:

> As set forth in the Respondent's papers, Respondent alleges that the position of the agency in filing its complaint in this matter was not substantially justified.

Application at 2, paragraph 2.

[3] See supra note 1.

The Stipulated Agreement contained nothing specific regarding the legal requirement. However, it did state that the agency ”waives any requirement for the submission of additional documentation in support of the application” and it “stipulates that [the] application is proper and in accordance with the law.” Agreement at 2. Neither the waiver or the assertion that the Application was in accordance with the law clarified the “substantial justification” issue and it was not until the replies to the Order to Show Cause were filed that the positions of both parties became clear. In his Reply, the Respondent not only still asserts that the Coast Guard was not substantially justified in filing the Complaint, but further, that by entering into the agreement consenting to the award, “the Agency had *de facto* agreed that its position in the underlying action was ‘not substantially justified.’” He then, even at this late date, mistakenly asserts that “counsel for the Agency agreed to provide such a statement to the CALJ pursuant to the Show Cause Order.” Apparently, counsel for the Agency has not agreed to provide such a statement because in its reply, the Coast Guard states:

> Nothing herein should be construed as an admission of fault or liability on the part of the Agency or that the Agency was not substantially justified in filing a Complaint, initiating subject case.

Agency Reply at paragraph 6.

So here, contrary to the Respondent’s assertions and beliefs, the Coast Guard is agreeing to the settlement of the EAJA claim, not because it is agreeing its actions were not substantially justified, but as has been noted, because of trial hazards and costs. Indeed, if it had indicated agreement with the Respondent’s position, the undersigned would not have approved the Settlement Agreement, but rather would have held further hearings to clarify the matter.

Given all of the above, the Respondent, in essence, in support of the premise that "the settlement is in accordance with the law," argues that (1) Department of Transportation regulations specifically provide for the settlement of EAJA claims, (2) the regulations provide authority to settle an EAJA claim without a trial on the merits, (3) the Show Cause Order misapprehends the regulatory framework for an award of attorneys' fees because it "impermissibly shifts to Respondent the burden of proof to justify award," and that (4) since the Agency was willing to state on the record "that the Agency's position was 'not substantially justified' . . . the Show Cause Order is clearly inconsistent with both DOT regulations and the statute." Respondent's Reply at 6.

As to Respondent's analysis of DOT regulations concerning settlement, he is correct. They not only provide for settlement, but as is true in most agencies, they favor settlement. As to settlement without the necessity of trial on the merits, the Order to Show Cause in no way was a trial on the merits or even a further hearing. It was intended and, indeed resulted in, the parties clarifying the specific terms of their agreement to make certain that it was in accordance with the pertinent law and regulations. As to the assertion that the Show Cause Order shifts the burden of proof to the Respondent, it is incorrect. First of all, there is no question involving burden of proof. In this case, there was no adversarial proceeding involving that legal concept, but rather an agreement that had to be clarified and approved. Finally, as to the allegation that the agency is willing to state on the record that its position was not substantially justified, as has been noted - - it is simply wrong. Further, Respondent argues that because the agency is willing to state on the record that its position was not substantially justified, it leads the Respondent to

conclude that "the Show Cause Order is clearly inconsistent with both DOT regulations and the statute." Id. In so arguing, the Respondent apparently recognizes the fact that the law does not allow claims if the agency's position was substantially justified. This is the precise point that required clarification of the Stipulated Agreement in the first instance and caused the issuance of the Show Cause Order.

In his response the Respondent asserts that, "The Settlement Is Consistent With Agency Policy." Under that heading he makes a series of basic assertions regarding agency settlement policy, most of which are not in issue. He then proceeds to argue that the Show Cause Order was improper because it somehow violates DOT regulations. Those arguments are invalid. They lead to broad, imprecise, unsupportable statements that are both, illogical and argumentative. To allege that, "[s]urely, if the DOT had intended for counsel for the Agency to concede affirmatively that the position of the Agency was not 'substantially justified' before allowing the ALJ to approve a stipulated award, the DOT regulations would provide [for] that," is incomprehensible. Respondent's Reply at 9. Settlements are crafted on an ad hoc basis and any regulation that would require in all settlement cases the restrictive provision the Respondent suggests, would be unwise and patently unworkable. Indeed, such a provision would prevent the approval of the settlement involved here. As has been noted, the agency's agreement to the monetary award is based on trial hazard and costs that are related to *proving if there was or was not substantial justification*, and not on any required *admission or agreement* by the Coast Guard that its action was not substantially justified.

At page 10 (ten) of his reply to the Order to Show Cause the Respondent undertakes to answer 5 (five) questions that were set forth in the Show Cause Order. In doing so, the Respondent does not really "answer" the questions. Rather, he embarks on argument based on unfounded and/or argumentative facts. For example:

- In response to first question in the Show Cause Order, the Respondent erroneously states "that the Agency has de facto agreed that its position in the underlying action was not 'substantially justified.'" As previously noted, the Coast Guard had never provided a written statement on the Agency's position until May 18, 2000 where it strongly stated:

  > "Nothing herein should be construed as an admission of fault or liability on the part of the Agency or that the Agency was not substantially justified in filing a Complaint, initiating subject case."

  This fact involves the most important part of the Stipulated Agreement and is the pivotal fact relating to the legality of the agreement pertaining to the Coast Guard's substantial justification or lack thereof. So here, the Respondent is wrong to infer a *de facto* agreement when in actual fact there is none.

- As to the second question, the Respondent's position that the Coast Guard had "substantial evidence" that the positive drug test was faulty before bringing the Complaint is based totally on unfounded testimony and conclusions. It is clear that present Coast Guard policies render the Respondent's defense that his positive urinalysis was due to consumption of hemp seed oil as non-availing. See Attachment 7, Compl't Memorandum to Support Coast Guard's

Reply Motion, (October 15, 1999) (referencing to DOT memorandum that states in part " MRO's must never accept an assertion of consumption of hemp food product as a basis for verifying a marijuana test as negative"). Moreover, the MRO specifically did not find nor was he given, any other valid, legitimate reason why the Respondent's urine specimen contained marijuana metabolites.

- As to whether the Maine State Police ever tested the eyeglass container, the Respondent states that the record in Attachments 6, 7, and 12, contained in its Memorandum in Support of Respondent's Motion to Dismiss, provide consistent evidence that the eyeglass container was tested and found not to contain "any traces of THC." A review of Attachment 6 provides the following statement from the Maine State Police lab:

  > On May 18, 1999 we received one eyeglass case with residue and one pipe with residue. No cannabis was detected in residue from the pipe.

  What the Respondent fails to note is that the report curiously omits any reference to an analysis of the eyeglass container. The Respondent then provides conclusory statements made by the President of the Maine Maritime Academy that has no basis in the written record, to support his statements that the eyeglass container was tested with negative results. As the IO correctly noted, the written record was devoid of any test result of the eyeglass container when the Coast Guard filed its Complaint.

- Respondent's counsel referred to Attachments 8 (eight) and 9 (nine) from its Memorandum in Support of Respondent's Motion to Dismiss, to address the question concerning the second search of the Respondent's room. This question was raised because the record supports the contention that the Respondent's room was searched on that particular occasion due to suspected drug use which gave rise to his testing positive on a later drug test.

  The Attachments provide uncontested evidence that the Respondent's room was searched on that particular occasion for the presence of drugs. The administrative search warrant clearly states a probable cause belief that the Respondent's room contained drugs. This belief was formulated by a previous, contemporaneous search that produced an eyeglass container which contained a small amount of residue that field tested positive for marijuana. The results of both search warrants produced 2 (two) positive field tests on the Respondent's property indicating the presence of marijuana and provide a clear indication that the Respondent might have been reasonably suspected of using drugs and that his subsequent drug test was given with reasonable cause. So here, Attachment 8 and 9 indicate that there were positive field drug tests that justified the reasonable cause drug test that the Respondent tested positive giving rise to the Complaint. The Decision and Order dismissing the Complaint never discussed these facts but they are relevant in considering the EAJA claim because they relate to the question of substantial justification.

- With regard to the drug testing history of the Respondent, the referenced Attachment 1 (one) in The Memorandum in Support of Respondent's Motion to Dismiss is simply a statement that the Respondent has been enrolled in an approved program for 6 (six) months and that he has not failed or refused to take a drug test. It clearly does not state what tests, if any, were given.

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As to the award agreed to by the parties, it should be noted that the Coast Guard stipulated to an award amount of $10,000 (ten thousand dollars). In doing so, the Coast Guard states, the Respondent "incurred greater costs in defending [the case]." While this may or may not be true, the per hour rate pursuant to 49 C.F.R. § 6.11 (b) (1999), limits attorneys' fees to $125.00 (one hundred twenty five dollars) per hour and not the $250.00 (two hundred fifty dollar) per hour rate charged by Respondent's counsel. A generous reading of the Respondent's detailed expenses show that his claimed expenses, as applied under the law, yield a figure much closer, and could even be lower, than the stipulated payment of $10,000 (ten thousand dollars).

Finally, there are two aspects of the Respondent's Reply to the Order to Show Cause that need to be addressed. The first is exemplified at page 13 (thirteen) of the Respondent's Reply wherein he refers to the 5 (five) questions contained in the Show Cause Order and mistakenly states that they are "irrelevant to an award for attorneys' fees."[4] He then embarks on a convoluted argument that hypothecates that *if* the agency

[4] The gist of the Show Cause Order and this Order is that an EAJA award cannot be made if the agency's position is "substantially justified." Where the Application and Agreement are unclear on this point, the questions are relevant and directly related to the issue. This is especially true of the first question posed.

disputed the Application, the "reasonableness " standard would be the appropriate standard. He asserts that the Coast Guard would be estopped from challenging Judge Gardner's Decision and Order which held that there was an unreasonable search that cannot be used as a basis for a "reasonable cause" drug test. Finally, he then concludes that somehow the position of the agency in the underlying hypothetical adversarial proceeding would not be "substantially justified."

While Respondent's argument gives new meaning to the term "bootstrapping," it does not warrant a response except to say that there is no legal basis, and none is cited, to support invoking the doctrine of estoppel against the Coast Guard on the basis of Judge Gardner's Decision and Order. What does require comment is the Respondent's reference to the prior Decision and Order dismissing the Complaint. As the Show Cause Order noted, the decision on the merits of the case is not dispositive of the EAJA claim. In that case, the Judge made no comment, much less a holding involving any claim for attorneys' fees. Further, the holding that *any evidence* derived from what it termed an "unreasonable search" of the Respondent's dormitory room cannot be used as a basis for a "reasonable cause " test is erroneous. It ought not and cannot affect, on the basis of any argument including collateral estoppel, the determination of the EAJA claim. Indeed, if it had become necessary the undersigned would have held further hearings in the EAJA case to resolve the question. Failing that, the undersigned would have held that, based on the record of the underlying case, there were ample facts to support the "reasonable cause" drug test that was required. The record clearly indicates that at the time that drug

test was given, the Maine Maritime Academy had 2 (two) positive field test results for the presence of drugs on the personal property of the Respondent.

The second aspect of the Respondent's reply to the Order to Show Cause that requires comment is his repeated reference to the actions of the Maine Maritime Academy and its President, in dealing with the Respondent. Those actions, to the extent that they support the Respondent, relate to facts relating to merit issues in the case, and not to the EAJA claim. The statements made are themselves of questionable weight and in some instances are inconsistent with other facts of record. If, in considering the EAJA Application the statements of the President of the Maine Maritime Academy were relevant, they would have been made part of the record under oath, as would the testimony of other witnesses whose testimony on the same facts was also relevant.

III. SUMMARY

This case is an important case and in deciding the EAJA claim the following holdings are made:

1. Where there is an application and stipulated agreement for an EAJA award, the ALJ not only has the authority but the duty to ensure that the application and agreement are in accordance with the law and not against public policy.

2. Where the terms of the application and agreement are ambiguous, the ALJ not only has the authority, but the duty to ensure that any ambiguities are clarified

so that the pertinent documents clearly reflect the intended agreement of the parties.

IV. ORDER

IT IS HEREBY ORDERED that the Respondent's Application for the award of attorney fees and expenses under the EAJA for $10,000 (ten thousand dollars) is **APPROVED**. If neither the applicant nor the agency seek review within 30 (thirty) days after issuance of this Order, this decision will become final. For the purposes of this action, the department of review is the United States Coast Guard. An appeal of this Order may be filed using the process as described in 33 C.F.R. Subpart J. (1999). A copy of Subpart J is attached to this order.

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Hon. Joseph N. Ingolia
Chief Administrative Law Judge

Done and dated on this 16th of June, 2000
Baltimore, Maryland

[REDACTED]