

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

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Complainant

vs.

MURRAY R. ROGERS

Respondent.

Docket Number: CG S&R 04-0537

CG Case No. 2126028

**Order Confirming Ruling Made on Record
And Addressing filed Sworn Testimony of Respondent**

Issued: January 19, 2005

Issued by: Jeffie J. Massey, Administrative Law Judge

BACKGROUND

This administrative proceeding was initiated on October 7, 2004, when the United States Coast Guard (“USCG” herein) filed a Complaint seeking the suspension of certain documents issued to Respondent Murray R. Rogers, based on alleged acts which occurred on or about June 20, 2004 and June 22, 2004, while Respondent was serving as Master of the BAILEY ANN. Respondent filed an Answer to said Complaint on October 28, 2004. Although he admitted the jurisdictional allegations, he denied the factual allegations, and noted the existence of “extenuating circumstances” as an affirmative defense. On December 7, 2004, I issued an Order

confirming the fact that counsel had entered a formal appearance on behalf of the Respondent. On January 5, 2005, at the time and place duly noticed, the undersigned called this proceeding for hearing.

RULINGS & DISCUSSION ON THE RECORD

Before any evidentiary materials or testimony were received, counsel for Respondent made an oral motion that LCDR Ronnie Patrick be recused as lead investigator for the USCG in this proceeding, in light of the fact that Mr. Patrick had been placed on Respondent's witness list, and Respondent's counsel indicated an intent to, in fact, call Mr. Patrick as a witness during the hearing.

A lengthy discussion ensued on this subject, during which time the USCG called for Respondent's Counsel to make an offer of proof regarding the testimony it expected to elicit from Mr. Patrick. Said offer of proof was made, and the undersigned indicated that, based on the offer of proof, it appeared that Mr. Patrick could and would offer testimony that was relevant to one or more issues in this proceeding. After much discussion, the undersigned indicated that she was granting the Respondent's request for recusal in part. Specifically, Mr. Patrick was to consider himself a witness in the proceeding and as such, was not to discuss other witnesses' testimony with said witnesses or allow their testimony to be discussed in his presence. It was left up to the second chair in this proceeding, Mr. Timothy Tilghman, to take Mr. Patrick's place as lead investigator.

During the discussion, all of which took place on the record, Mr. Patrick continually objected, repeatedly saying that the undersigned lacked the "precedent" to make such a ruling.

Even after a recess, which was taken at the suggestion of the undersigned so that the USCG could discuss whether or not to take advantage of the opportunity for a continuance offered by the undersigned (so that Mr. Tilghman could prepare to be lead investigator in the hearing room), Mr. Patrick continued to object to the ruling that he could be called as a witness, and, as such, could not continue to be lead investigator in the proceeding. Continuing to press the issue, Mr. Patrick asked for an opportunity to file a brief with the undersigned, purportedly to further challenge the undersigned's authority to enter such a ruling.

Without reversing any part of the rulings made on the record, the undersigned established close of business on February 1, 2005, as the deadline for the USCG to file a brief on whatever issue it believed was still open to discussion. The Respondent was given until close of business on February 3, 2005, to file a responsive brief, if deemed necessary by Respondent.

It was suggested, during the course of discussion on the record, that the real issue in this proceeding was the sanction to be imposed. The undersigned encouraged the parties to attempt to stipulate to the underlying facts of this case, if possible, thereby leaving only the issue of sanction to be determined by the undersigned.

After further discussion and another recess, February 11, 2005 was set as the hearing date in this matter. Accordingly, the hearing in this proceeding shall commence on said date at 10:00 a.m., at the U.S. Courthouse in Houma, Louisiana.

WRITTEN SWORN TESTIMONY OF RESPONDENT

When the undersigned returned to her office in New Orleans, she found that she had received, from Respondent's Counsel, written sworn testimony sent to her on behalf of the

Respondent, with a request that said testimony be delivered to the undersigned. Obviously, this testimony was not received before the time set for the hearing in Houma. (The testimony had been sent to the undersigned's office by facsimile transmission on the afternoon of January 5, 2005.) While on the record in this proceeding on January 5, 2005, counsel for Respondent inquired as to whether or not it was permissible to file written sworn testimony of a Respondent, pursuant to 33 CFR §20.808. The undersigned indicated that the section did not appear to prohibit such a practice, so long as the Respondent was available for cross-examination.

It should be noted that, at the present time, the undersigned offers no opinion on the admissibility of the written sworn testimony of the Respondent that has been tendered by Respondent's counsel. It has not been offered as "evidence" in this matter. When and if it is offered as "evidence" in lieu of direct testimony of the Respondent, the undersigned will determine its admissibility.

ORDER

IT IS HEREBY ORDERED that the hearing in this proceeding will be held, as previously scheduled, on February 11, 2005, beginning at 10:00 a.m., at the United States Courthouse in Houma, Louisiana. Mr. Tilghman shall appear as lead investigator for the USCG at that time. Mr. Patrick shall make himself available to be called as a witness.

Done and dated January 19, 2005
New Orleans, Louisiana

**JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**