UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

MURRAY R. ROGERS

Respondent.

Docket Number: CG S&R 04-0537

CG Case No. 2126028

Order Ruling on Proposed Sanctions
Based on Non-Compliance with Subpoena

Issued: March 25, 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.

Since this proceeding was assigned to the undersigned, there have been many procedural issues that I have addressed in a series of Orders. Rather than repeating the lengthy procedural

history of this proceeding in this Order, I adopt the "Background" section of each Order I have issued in this proceeding, and incorporate them herein, as though reproduced in their entirety.[1]

I have before me the Respondent's Motion to Dismiss, filed on or about March 1, 2005. This Motion to Dismiss is the direct product of an Order I issued on February 9, 2005, inviting the Respondent to propose sanctions for the USCG's failure to respond to a subpoena I issued to them on January 12, 2005.

Respondent requested that I issue the subpoena after I determined that LCDR Ronnie Patrick, formerly the lead Investigating Officer in this proceeding, could be called as a witness by the Respondent.[2] Once the deadline for compliance with the subpoena had passed without compliance, the Respondent moved for a continuance of the pending hearing date. During a telephonic Pre-Hearing Conference initiated by the undersigned, the USCG indicated it was not going to comply with the subpoena. I gave them an additional day to make a written filing confirming this oral assertion. The next day, a short statement was filed by the USCG, confirming that there would be no compliance with the subpoena.[3] Notably, the USCG never filed a Motion to Quash or Modify the subpoena, as contemplated by 33 CFR §20.609.

I also have before me a response to the Respondent's Motion to Dismiss, filed by the USCG on or about March 8. In that response, the USCG rejects most of the arguments made by the Respondent in his Motion to Dismiss—with one notable exception: The USCG wholly fails

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[1] A lengthy procedural statement will not substantively contribute to the reader's understanding of this Order, as there is only one procedural issue before me at this time.

[2] This ruling was made by me on the record on January 5, 2005. The entire discussion leading up to my ruling is contained in a transcript of proceedings which took place that day.

[3] All of these details are contained in the February 9 Order requesting sanction proposals from the Respondent.

to address Respondent's request that this proceeding be dismissed (as the sanction for refusing to comply with the subpoena). They do, however, attempt to revisit other issues in this proceeding by asking me to "reconsider her prior Orders and set this matter for hearing as soon as possible."[4]

DISCUSSION

The subpoena requested by the Respondent was issued because, on review of the record before me, I determined that the records requested constituted appropriate discovery requests relevant to the issues in this proceeding. The plain language of 33 CFR §20.608(a) provides that any party may request the ALJ to issue a subpoena "for . . . . the production of books, papers, documents or any other relevant evidence *during discovery* or for any hearing [emphasis supplied]." Per the provisions of 33 CFR §20.202, it is within the power of the undersigned to issue subpoenas, order discovery, hold hearings, and regulate the course of hearings, to name just a few of the powers enumerated there. Together with the provisions contained in Subpart F of Part 20, Title 33 of the Code of Federal Regulations, the authority and responsibility of guiding the course of discovery in a Suspension & Revocation ("S&R" herein) proceeding lies exclusively with the presiding ALJ.

I find these regulatory provisions to be a codification of the principals contained in the Administrative Procedure Act ("APA" herein). In fact, the enumerated powers and duties of an ALJ, as codified in 33 CFR Part 20 are virtually a mirror image of those contained in 5 USC §556(c), which lists powers authorized for "employees presiding at [due process] hearings." I insert the words "due process" here because that is what APA judges do—they conduct "due process" hearings. APA judges are easily distinguished from other "administrative judges" or

[4] Closing paragraph, at page 11.

"hearing examiners" particularly because of the responsibilities placed upon us by the APA (and by regulations written to empower APA Judges by specific agencies). As discussed in the Introduction of the Manual for Administrative Law Judges (2001 Interim Internet Edition):

> Historically, . . . the need for administrative hearing officers was recognized well before the APA [footnote omitted]. The large number of cases where an agency was required, statutorily or constitutionally, to afford a hearing impelled federal agency heads to delegate responsibility for conducting those hearings to subordinates [footnote omitted]. However, these subordinates were subject to the direction and control of the agency, and thus perceived as being prone to make findings favorable to the agency. Considerations of fairness led to granting these hearing officers increasing degrees of independence, culminating in the provisions of section 11 of the APA [footnote omitted][5], which accords the Administrative Law Judge (ALJ) [footnote omitted] a unique status[footnote omitted].
>
> Although an employee of the agency, the ALJ is responsible for conducting formal proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency in the course of administrative adjudications [footnote omitted].[6]

In April of 1998, the USCG proposed significant changes in its procedural rules, as applicable to S&R Proceedings. In proposing these changes (which became effective in May 1999), the explanatory comments specifically addressed evidence in S&R Proceedings:

> 3. Changes in the Rules of Evidence.
> This rule proposes to apply the Administrative Procedure Act (APA) rules of evidence as the standard for evidence brought in S&R cases. In current practice some ALJs apply the Federal Rules

[5] The successors to the contents of Section 11 of the APA are now found mainly in 5 USC §§ 3105 (1994), 5372 (1994 and Supp. V 1999), and 7521 (1994).

[6] Mullins, Morell E., Manual for Administrative Law Judges, 2001 Interim Internet Edition.

> of Evidence. This proposed rule seeks to have one consistent standard, the APA standard, used in S&R cases.[7]

The APA contains the following language concerning evidence:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[8]

In the opinion of the undersigned, my role as an APA Judge is to direct discovery and the course of each proceeding in such a way that each party is guaranteed the rights expressed in the APA. By doing so, I am then able to satisfy my obligation in each proceeding before me with respect to compiling a record that contains a full and true disclosure of the facts.

A primary tool by which to obtain this goal is discovery.[9] The plain language of 33 CFR Part 20 gives each ALJ discretion to enter such discovery orders as that ALJ deems appropriate in each proceeding. In this case, based on the record before me as of January 12, 2005, I made the determination that the documents and things identified by the Respondent in his subpoena request constituted a search for evidence which would assist him in presenting his case, defending his position, and ultimately, supporting the full and true disclosure of facts in this proceeding. At the time I issued the subpoena, I was confident that my actions were consistent with the APA, well within the powers granted me by 33 CFR Part 20, and the most efficient means available to keep the proceeding on its procedural track.

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[7] Notice of Proposed Rulemaking, Rules of Practice, Procedure and Evidence for Administrative Proceedings of the Coast Guard, 63 FR 16731, at16733.

[8] 5 USC § 556(d).

[9] Another tool is cross-examination of witnesses at the hearing. In my experience, meaningful cross-examination most often is preceded by meaningful discovery.

Nothing I have read or heard since January 12, 2005, has caused me to waiver the slightest in that belief.

The USCG argues (in its response to the Motion to Dismiss) that there was, somehow, a failure to follow the procedures outlined in Part 20, and so the Respondent's discovery (subpoena) request should have been denied. Nothing is gained by my attempting to detail the USCG's argument in this Order. Suffice it to say I have carefully considered it, noted that it is entirely without supporting authority, and have concluded that it is without merit. But a related point needs to be made—let us assume, *arguendo*, that there was some procedural glitch attendant to the issuance of the subpoena. What "right" does that bestow on the USCG? Does a procedural glitch in the issuance of a discovery order or subpoena entitle the party receiving the request to wholly ignore the request?

Without directly saying so, the USCG's posture in this proceeding seems to answer that question with a resounding "yes." With an annoyed tone that virtually jumps out of its pleadings[10], the USCG suggests that its motive or conduct in initiating S&R investigations, its decision to arbitrarily increase proposed sanctions in serial complaints, or its decision to ignore a subpoena issued to it by an ALJ, are all actions that are not subject to review (or possible sanctions) under any "due process" argument.

Although these are all issues brought up by the parties in the pleadings before me today, the only issue I need to decide is what sanction to impose for the USCG's failure to recognize my authority to issue a subpoena and its duty to comply with it.[11] From the plain

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[10] In a previously filed pleading, the USCG asserted that "animosity" was a normal bi-product of S&R proceedings. In its Response, this animosity is, at most, thinly veiled.

[11] This issue is clearly distinguishable from an issue the USCG attempted to raise—whether the Respondent has a "due process right."

language of the regulations, if a party receiving a subpoena has some objection to it, that party is entitled to file a Motion to Quash or Modify the subpoena, as detailed in 33 CFR §20.609. If a party successfully argues an issue of relevancy or unreasonableness, then the ALJ can decide to quash or modify the subpoena. In this proceeding, the Motion would have been due January 28, 2005.[12]

The USCG did not file a Motion to Quash or Modify. The USCG did not comply with the subpoena. The USCG did not inform anyone that they didn't intend to comply with the subpoena until they were asked during the February 3, 2005 telephonic Pre-Hearing Conference. As if it were some mitigating (or relevant) factor, the USCG stated in its February 4, 2005 filing that it was going to continue to provide the Respondent "with full discovery as required by 33 CFR §20.601 & 20.602."

The APA prohibits the imposition of a sanction "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantive evidence." 5 USC 556(d). I have taken considerable time to ponder the appropriate sanction in this proceeding. I have carefully considered each and every suggested sanction contained in 33 CFR §20.607. I have determined that none of the sanctions contained in §20.607, either alone or in combination, are an appropriate remedy for the situation encountered in this proceeding.

My decision about the appropriate sanction is based on my review of the entire record before me. I have re-read all of the pleadings, beginning with the Complaint, on through the last pleading filed by the Respondent on March 18, 2005. To give every benefit possible to the USCG, I have searched the record for some indication that the USCG had a legitimate

[12] Calculated per the provisions of 33 CFR §20.609(a)(2).

reason for derailing the procedural track of this case. I have sought to understand the rationale that would lead the USCG to conclude that it was appropriate to replace *my* judgment regarding appropriate discovery with its own. I conclude that this record is devoid of any legitimate rationale in support of the USCG's action in this proceeding.[13]

Taken as a whole, the record in this proceeding indicates that the USCG has concluded that I was without the authority to issue the subpoena requested by the Respondent.[14] Based on that conclusion, the USCG affirmatively passed up its regulatory right to request that the subpoena be modified or quashed. The practical result of the conduct of the USCG is that my ability, as the presiding judge, to implement the safeguards of the APA concerning the search for a "full and true disclosure of the facts" in this proceeding has been vitiated.

The right of the government to deprive a person of life, liberty, or property is subject to the general restrictions contained in both the Fifth and Fourteenth Amendments to the United States Constitution. Even when exercising a legitimate government interest—such as the monitoring of USCG issued mariner's credentials—the extent of the government's powers are not without limit.

When the USCG elected to have its S&R proceedings governed by the concepts of the APA, it guaranteed to every mariner a right to due process in those proceedings. The ALJ is the designated agency official empowered to preside over and regulate every aspect of S&R hearing procedures—including decisions concerning discovery. For the government—the agency—the USCG—to intentionally pursue a course of conduct that vitiates a presiding

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[13] I submit that the USCG could have—and should have—complied with the subpoena, then complained about its issuance in an appeal processed after the Decision & Order was issued.

[14] It would not be a stretch to say that the USCG's pleadings in this proceeding indicate it does not believe *any* discovery, past that required by 33 CFR §§20.601 & 602 is appropriate.

ALJ's duty and authority to preside over and regulate the course of S&R hearing procedures is unconscionable. So that the record is clear, this sanction is being imposed because the USCG chose to disrespect the system designed by the Agency, in compliance with APA requirements, for the conduct of S&R proceedings. Under the circumstances of this proceeding, to allow the USCG to proceed to hearing, while the Respondent's ability to present his case and defend against the allegations made against him has been immeasurably impaired, would be a mockery of the phrase "due process."

I need not find that a Respondent in an S&R proceeding has a "due process right to discovery" because a more basic right to due process exists—the right that flows from the structure of the hearing process itself. This right is dependent upon a presiding ALJ being allowed to exercise the discretion bestowed upon her by the regulations. This right is equally dependent upon the parties complying with the orders of the presiding ALJ—even when they strongly disagree with them.

Based on the entire record before me, the only appropriate remedy to counter the unconscionable action of the USCG in this proceeding, is to terminate their right to pursue this S&R proceeding against the Respondent, with prejudice.

ORDER

IT IS HEREBY ORDERED that the Complaint in this proceeding, filed on or about October 7, 2004, is dismissed with prejudice.

Done and dated March 25, 2005
New Orleans, Louisiana

JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
DEPT OF HOMELAND SECURITY--USCG

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded the attached document by First Class Mail postage paid, and by facsimile transmission where indicated, to the following persons:

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Jeffie J. Massey
Administrative Law Judge

Done and Dated on March 25, 2005 at
New Orleans, Louisiana