UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

JAMES MICHAEL ELSIK

Respondent.

Docket Number: CG S&R 04-0501

CG Case No. 2078778

Order Ruling on Respondent's Motion for Sanctions

Issued: April 6, 2005

Issued by: Jeffie J. Massey, Administrative Law Judge

GENERAL BACKGROUND

This administrative proceeding was initiated on September 20, 2004, when the United States Coast Guard ("USCG" herein) filed a Complaint seeking the suspension of certain documents issued to Respondent James Michael Elsik, based on alleged acts of misconduct which allegedly occurred on and after May 10, 2004, while Respondent was serving as Master of the UTV JOHN G. MORGAN. After receiving an extension,

Respondent filed an Answer on November 23, 2004. The Respondent denied the factual allegations, and pled two affirmative defenses.

The original Complaint was filed pursuant to the statutory authority contained in 46 USC §7703 and the regulatory authority contained in 46 CFR §5.27 (Misconduct). Specifically, the Complaint alleged that the Respondent was operating as the Master of the UTV JOHN G. MORGAN on May 10, 2004 "when it allided with the Army Corps of Engineers Barge CE 869." The Complaint further alleged that the Respondent "did not make any notifications to Bayou Tugs Inc.[1] or the Coast Guard concerning the allision." As an apparent second allegation of misconduct, another paragraph of the first Count of the Complaint alleged that the Respondent, during the "subsequent investigation" stated "to the effect" that he had no knowledge of the allision "whereas Respondent did have knowledge of the allision." A sanction of six months suspension was proposed in the original Complaint.

On December 20, 2004, a telephonic Pre-Hearing Conference was conducted. During that conference, a number of procedural issues were addressed. In addition, the undersigned questioned the USCG as to how it proposed to get into evidence any statements made by the Respondent during the Marine Casualty Investigation conducted by the USCG, in view of the provisions of 46 CFR §5.101(b).[2] It was suggested that an

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[1] It appears from the record that Bayou Tugs, Inc. was the employer of the Respondent on May 10, 2004.

[2] 46 CFR §5.101(b) provides: "In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation under this part or part 4 of this title may be used against that person in a proceeding under this part, except for impeachment." Part 4 of Title 46 is entitled "Marine Casualty Investigations."

Amended Complaint would be in order. The USCG indicated that it would amend its Complaint on or before January 4, 2005.

An Amended Complaint was, in fact, filed on December 30, 2004. This Complaint invoked the statutory authority of 46 USC §7703(b) and the regulatory authority of 46 CFR §5.27 (Misconduct) and §5.29 (Negligence).Two separate allegations of Misconduct were alleged—each was materially different from the allegations in the original Complaint. Added to the charges was an allegation of Negligence.

Quickly following the filing of the Amended Complaint, the Respondent filed an Amended Answer, a Motion for Interrogatories, a Motion for Continuance (of the February 3, 2005 hearing date previously established), and a Motion to Dismiss (Counts 2 & 3 of the Amended Complaint. (All filed on or about January 3, 2005.)

On January 6, 2005, the undersigned issued an Order (1) granting the Motion for Continuance (and soliciting input from the parties for the establishment of a new hearing date), (2) allowing service of the Interrogatories, (3) establishing a briefing schedule for Memorandums of Law in support of and in opposition to the Motion to Dismiss; and, (4) requiring the parties to brief an additional issue concerning the applicability of the 5th Amendment privilege against self-incrimination to Marine Casualty Investigations.[3]

[3] The USCG has vigorously criticized the undersigned for acting so swiftly on the Respondent's Motion for Continuance and Motion for Interrogatories. Ironically, at the same time, the USCG has complained that this proceeding was not moved along in a suitably expeditious manner by the undersigned.

With respect to the Interrogatories, the undersigned established a shortened deadline for filing of objections (if any) to the Interrogatories, by the USCG. The purpose of this shortened deadline was to move along the proceeding as quickly as possible by resolving discovery disputes (if any) in the shortest possible time.[4]

On January 14, 2005, a Procedural Schedule was established for the proceeding by way of Order issued by the undersigned. On January 27, 2005, via certified mail, the undersigned received a document from the USCG entitled "Deadline for Interrogatory Objections." This document noted that the USCG's objections to Respondent's Interrogatories were due on January 22, 2005 (as the interrogatories had apparently been served on the USCG on January 7). This document went on to say that the USCG intended to object to the Interrogatories, and that their objections would be filed "within 30 days as required by the regulations." I note that this document was executed on January 24, 2005—or two days after the deadline I established had passed.

Sometime after January 31, 2005, the undersigned received from the USCG an "appeal" of the Order issued on January 6, 2005. At or near the same time (approximately February 3), the undersigned received the USCG's "responses" to the Interrogatories. I note that the "responses" were, in actuality, objections—the objections that were due on or before January 22, 2005.

The Respondent filed a response to the USCG's "appeal" of the January 6, 2005 Order and a "Motion to Compel Answers to Interrogatories and Motion for Sanctions." As relief, the Respondent requested that I enter an order striking the USCG's objections, compelling them to answer the Interrogatories, and ordering the USCG to pay attorney's fees associated with the Motion.

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[4] See pages 2 & 3 of Order, and footnote 1.

On February 14, 2005, I issued two separate Orders. In one Order, I explained why the USCG's attempt to unilaterally amend the due date for objections to the Interrogatories had no legal force and overruled their objections to the interrogatories because they were not timely. The same Order went on to explain why each of the USCG's objections to the Interrogatories were substantively deficient and why they must be overruled. I ordered the USCG to submit sworn answers to the Interrogatories on or before February 23, 2005. I further ordered the USCG to refrain from submitting "further objections or requests for review" of that Order. Lastly, I set a date for the Respondent to file a report with me concerning the USCG's compliance or non-compliance with my Orders, including a request for sanctions, choosing from those available under the regulations.

The other Order issued on February 14, 2005, denied the USCG's "appeal" of the January 6, 2005 Order. That Order dealt with, one by one, the various reasons the USCG gave for wanting to/needing to "appeal" the January 6, 2005 Order. All of their arguments were found to be baseless and without merit.

On or about February 23, 2005, the USCG submitted a discovery package to the undersigned, as required by the previously established Procedural Schedule. The package, that was supposed to comply with the requirements of 33 CFR §20.601, did not contain copies of any of the proposed exhibits (five in number) or any explanation as to why the USCG was not complying with the provisions of the regulation.

SPECIFIC BACKGROUND

On or about February 28, 2005, the Respondent submitted the report required by the February 14 Order detailed above. In addition, the Report contained a Motion for

Sanctions. Specifically, the Respondent requested that I dismiss, with prejudice, the [Amended] Complaint, per the authority granted to me in 33 CFR §20.311(d)(1). The Respondent argued:

> The Coast Guard's multiple failures to comply with the ALJ's orders in this case calls for and justifies a dismissal with prejudice of its Complaint against Mr. Elsik. If not, then the fox will truly be guarding the hen house. [footnote omitted][5]

On March 7, 2005, the undersigned received the USCG's response to the Motion for Sanctions. The first argument made by the USCG was a restatement, renewal and preservation of its prior objections to the Respondent's Interrogatories. The gist of the USCG's arguments thereafter appears to be that the Interrogatories were "not appropriate" because the parties had not exchanged witness lists prior to the issuance of the Interrogatories. They further complained about the shortening of the time frame for objections, and then they argued, again, that their objections were not baseless, etc. In closing the USCG requested—again—that I reconsider my prior rulings and set the matter for hearing "as soon as possible." [6]

DISCUSSION

Before me for consideration today is the Respondent's Motion for Sanctions, i.e., the Respondent's request that I dismiss the Amended Complaint in this proceeding as a sanction for the USCG's refusal to substantively respond to the Interrogatories that I twice ordered must be answered. Under separate Order, also issued today, the

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[5] Motion at page 4.

[6] Notably, the USCG never substantively responded to the Respondent's proposed sanction--that the proceeding be dismissed as a sanction for the USCG's refusal to cooperate in the discovery process.

Respondent's Motion to Dismiss the two Misconduct allegations contained in the Amended Complaint has been granted. As a result, the *only* Count remaining in the Amended Complaint is the Negligence allegation.

In each Order I have issued on this long and winding road that has been the procedural history of this proceeding, I have explained the circumstances of the Order and the reasons I have made the rulings made on each issue before me at the time. While many of those Orders contribute to an overall understanding of the USCG's obstreperous attitude in this proceeding, I am not going to rehash those issues or my Orders. To the extent they are relevant, I incorporate them into this Order, as if each one was reproduced in its entirety in this document. To any reader of this Order who is not already familiar with those Orders, I highly recommend you read each of those Orders, so as to be able to put *this* Order into its proper perspective.

It needs to be mentioned, as well, that on March 22, 2005, I took the unusual step of holding an on-the-record in-person conference. At said conference, considerable time was spent discussing the issues raised by the Respondent's Motion to Dismiss. However, some salient points relevant to the USCG's interpretation of the regulations governing discovery were also uncovered during this conference. Without a doubt, the most important revelation was that the USCG personnel who have been participating in this proceeding were/are unaware that the USCG has embraced the Administrative Procedure Act with respect to the procedures governing every aspect of Suspensions & Revocation ("S&R" herein) proceedings—including discovery.[7] Actually, it would be more precise

[7] See, for example, 46 USC §7702(a), "Administrative Procedure" which provides: "Sections 551-559 of title [sic] 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document."

to say they didn't appreciate the fact that application of the Administrative Procedure Act ("APA" herein) meant that Due Process applies to S&R proceedings.[8] I found this revelation to be somewhat shocking. However, ignorance of the law is usually not an excuse, and that adage holds true in this proceeding. The USCG's lack of understanding about the application of Due Process to S&R proceedings does not excuse or justify its conduct in this proceeding—most particularly its refusal to comply with my Orders to answer the Respondent's Interrogatories. Nor does the USCG's lack of knowledge about a key aspect of S&R proceedings operate to mitigate the sanction that must be rendered in this proceeding, as will be apparent from the discussion, *infra*.

As I explained, in detail, in the Order I issued on February 14 denying the USCG's "appeal" of my January 6 Order, I approved the service of Respondent's Interrogatories on the USCG because I believed them to be appropriate, based on the record before me at that time. Nothing I have read or heard since then has altered my judgment on that issue. Had the USCG answered the interrogatories as ordered, I can think of no reason why discovery under the procedural schedule would not have been completed as contemplated, and both parties could have been and would have been ready for hearing on May 2, 2005. True, in light of the other Order I have issued today, there would have only been one viable count left to go to hearing, but at least every one would have been ready to go forward on that allegation.

Instead, at every conceivable step of the way, the USCG has chosen to obstruct the procedural course I have set in this case. At every turn, my authority to guide and direct the course of this proceeding—including discovery—has been the target of their

[8] That's "Due Process" as in "the guarantee of" that flows from the 5th and 14th Amendments of the United States Constitution.

obstructions. Their filing of frivolous motions, documents, and objections has cost the Respondent untold dollars in attorneys fees and taken up hours and hours of my time that otherwise could have been spent on other matters. And what is their justification for their actions? They didn't believe that I had the authority to order the service of interrogatories until there had been an "exchange" of discovery pursuant to 33 CFR §20.601.

How did they arrive at the conclusion that this exchange had to take place before I was authorized to order "further" discovery? Were they relying on a specific Commandant Decision on Appeal? No—they have admitted that no such opinion exists. Were they relying on the plain language of the regulations in Subpart F of Part 20 (of 33 CFR)? No—they have failed to point to any such language—because it does not exist. Were they relying on explanatory remarks made in the Federal Register when the regulations were being amended in 1998? No—the Respondent has pointed out that the remarks in the Federal Register speak of the production of "final" witness and exhibit lists.[9] In other words, the exchange of witness/exhibit lists under §20.601 is *the end* of the discovery process, not the beginning. Do they have an explanation for why the regulations say "further discovery may occur only by order, and then only when the ALJ determines that—[certain conditions are present]" rather than "further discovery may occur only by order, *and then only after witness/exhibit lists have been exchanged by the parties*"? No—they do not have an explanation for that, either. The *only* articulated explanation seems to be: traditionally, there has been limited discovery in S&R hearings, so that is the way it has to remain.

I do not dispute that, prior to the amendments and reorganizations of 1999 that affected discovery in S&R proceedings, there was limited and inconsistent discovery in S&R proceedings. That system was not working well. How do I know this? From the contents of the Federal Register publication that announced the intention of the USCG to revise its regulations. Relevant passages include:[10]

> Background and Purpose
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> This rulemaking is necessary as part of a Coast Guard effort to improve both: (1) the administrative efficiency of all Coast Guard adjudicative procedures; and (2) specific procedures related to actions involving mariners' credentials. It follows an overall Coast Guard initiative to streamline its resources, yet maintain effectiveness in all affected areas.
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> * * *
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> This rulemaking . . . seeks to remove those procedures that impede the efficient handling of cases. In addition, it would amend those rules which are not consistent with relevant legal standards and practices. . . . It seeks to employ the use of rules that are more familiar to civilian attorneys. . . . It would also enable the Coast Guard to maintain regulations in keeping with modern rules of civil and criminal procedure, where applicable.
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> * * *
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> 3. Changes in the Rules of Evidence
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> This rule proposes to apply the Administrative Procedures Act (APA) rules of evidence as the standard for evidence brought in S&R cases.

What does the APA say about "the standard of evidence (§556(d))?"

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to

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[9] See 63 FR 16731-01, beginning at "6. Changes in the Rules of Discovery" April 6, 1998. Also see 64 FR 28055, May 24, 1999.

[10] See 63 FR 16731-01, *supra.*

> conduct such cross-examination as may be required for a full and true disclosure of the facts.

It appears that, in this proceeding, the USCG was satisfied with the old status quo. Unfortunately for them, I do not see my role as enforcing what "used to be done"—rather, I see my role as following the plain language of the regulations and the APA. When the Respondent made his request for interrogatories in this proceeding, I reviewed the appropriateness of those interrogatories in the context of the record before me.

What did I see? I saw a rather complicated Amended Complaint—one different in every way from the original Complaint in this proceeding. I saw that the allegations in the Amended Complaint involved incidents that occurred in multiple locations on the waterways. I saw the involvement of multiple witnesses. I saw a set of circumstances which were entirely appropriate for the use of pre-hearing discovery as a tool to discover relevant witnesses, documents, and possibly expert opinions. More importantly, I saw a hearing that would be not be completed without postponements to allow for development of evidence discovered during cross-examination of USCG witness if these matters were not parsed out *in advance* of the hearing.

Because witnesses relocate and become unavailable—because memories fade—it is better to secure their recollections sooner rather than later. At the time the request for interrogatories was made, almost seven months had elapsed since the events in question. To secure the Respondent's right to Due Process in this proceeding (the right to "a full and true disclosure of the facts" as it is expressed in the APA), it was necessary and proper to allow the Respondent to take all necessary action to undertake his discovery as soon as possible. I was not required by the regulations to wait until "final" witness or exhibit lists had been exchanged and I saw no need to do so, based on the record before

me at the time. I stand by that decision as the correct one, based on the regulations and the facts before me at the time.

During my deliberative process, I have carefully considered all of the available sanctions. I have carefully considered the sanctions contained in 33 CFR §20.607. Subsection (a) is not appropriate because I cannot infer that the testimony, document, or other evidence the USCG did not produce would have been adverse to it, because I don't know exactly what it is. (It could have been a witness whose testimony is diametrically opposed to that of witnesses being called by the USCG. It could have been a report generated by a USCG investigator or a private party involved in the incident or a witness to the incident that documented the fact that someone else was responsible for the alleged damage to the Corps of Engineer's barge. It could have been an analysis of paint chips that concluded the paint chips did not match any vessel allegedly involved in the alleged allision. These are just three examples of a potentially large universe of information that could have been/would have been discovered if the USCG had truthfully answered the Respondent's interrogatories.)

Subsection (b) is not appropriate because I don't know what facts might have been revealed through truthful answers to the interrogatories, so I cannot determine what facts to designate as established.

Subsection (c) is not appropriate because I don't know what evidence was withheld—therefore I cannot identify what evidence to exclude.

Subsection (d) is not appropriate because it is designed to exclude evidence already received by a party during discovery—in this proceeding, the problem is that evidence responsive to the interrogatories was *not* received.

Subsection (e) is not appropriate because, again, I don't know what the evidence would have shown—so I can't allow the substitution of secondary evidence in its place.

In sum, the sanctions available to me under §20.607 are not appropriate for use in this proceeding, based on the circumstances before me. The problem created by the USCG's refusal to comply with my discovery Orders is of much greater magnitude than the withholding of a single document or witnesses' name—a document or name that is identified at a later time. The problem created by the USCG's refusal to comply with my discovery Orders is that it prohibits me from being able to insure for the Respondent "a full and true disclosure of facts" as required by the APA.

In a Due Process proceeding, it is *not* required that each party agree with every Order of the Presiding Judge. What *is* required is that each party comply with the orders of the Presiding Judge so as to maintain the balance being created by those orders—after all, balance is a key and crucial component of Due Process. To keep the playing field level, a Respondent who faces the full weight and authority of the federal government is entitled to some protections. That is the whole point of "Due Process" provisions, such as those in the APA—those same provisions adopted by the USCG for S&R proceedings.

In this respect, the Presiding Judge of those proceedings—an APA Judge such as myself—is the gatekeeper for Due Process. Under the regulations applicable to S&R proceedings, it is the Presiding Judge who has "all powers necessary to the conduct of fair, fast, and impartial hearings," including the power to order discovery.[11] If a party disagrees with an Order of the Presiding Judge, the appropriate action is that the party complies with the Order, then complains about it on appeal after a final decision is issued by the judge. In this proceeding, the USCG refused to comply with my Orders and kept

insisting that the proceeding go to hearing. Clearly, the USCG was not interested in maintaining a sense of "Due Process" in this proceeding.

So what sanction does the conduct of the USCG merit them in this proceeding? For all the reasons discussed herein and based on the entire record before me, it appears reasonable and appropriate to me that I invoke the authority granted to me by 33 CFR §20.311(d)(1) and dismiss with prejudice the remaining count of the Amended Complaint.

ORDER

IT IS HEREBY ORDERED that the remaining Count of the Amended Complaint—the allegation of Negligence--is dismissed with prejudice.

Done and dated April 6, 2005
New Orleans, Louisiana

JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
DEPT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

[11] See 33 CFR §20.202.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded the attached document to the parties by the methods indicated:

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Administrative Law Judge

Done and Dated on April 6, 2005 at
New Orleans, Louisiana