UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
	:	
UNITED STATES COAST GUARD	:	COMMANDANT
	:	
vs.	:	ON APPEAL
	:	
MERCHANT MARINER LICENSE	:	NO. 2691
and	:	
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: JACK ANTHONY JORY	:	

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

By a Decision and Order (hereinafter "D&O) dated December 5, 2008, Judge Bruce T. Smith, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Mobile, Alabama, revoked the Merchant Mariner Credentials of Mr. Jack Anthony Jory (hereinafter "Respondent") upon finding that the Coast Guard proved, by substantial evidence, that Respondent was a security risk that posed a threat to the safety or security of a vessel. The factual allegations supporting the Coast Guard's charge allege that "[o]n November 3, 2008, the Respondent did threaten the life of Jeff Cunningham, Master of the M/V SEA FOX...in violation of 46 USCA 7703(5)."

FACTS AND PROCEDURE

At all times relevant herein, Respondent was the holder of the Coast Guard issued Merchant Mariner Credentials at issue here. [D&O at 3; Coast Guard Exhibit 1]

On and before November 3, 2008, Respondent was employed by Global Industries Offshore, LLC (hereinafter "Global") as an able seaman aboard the M/V SEA FOX. [D&O at 3; Transcript (hereinafter "Tr.") at 22] The vessel was, at all relevant times, operating in the Gulf of Mexico under the command of Jeff Cunningham, who served as the master and security officer. [D&O at 3; Tr. at 20, 22] Before going off shift on November 3, 2008, Captain Cunningham informed Respondent that, due to expected higher seas and changes to direction of the vessel, the anchors might bang against the guard; he instructed Respondent to keep an eye on the ratchet binder to assure that it remained tight. [D&O at 3-4; Tr. at 26-27] At approximately 3:00 a.m., Captain Cunningham was awakened by an anchor loudly banging. [D&O at 4; Tr. at 27] He relayed instructions for Respondent to tighten the anchor line, but handled the task himself after Respondent radioed that he was having trouble finding a cheater bar. [D&O at 4; Tr. at 27] Thereafter, Captain Cunningham left the deck and later wrote a disciplinary report regarding Respondent's actions. [*Id.*]

A confrontation occurred when Captain Cunningham found Respondent in the galley and asked him to read and sign the report. [D&O at 4; Tr. at 27-31] Respondent responded with profanity and refused to read and sign the paper. [*Id.*] As Captain Cunningham turned to leave, Respondent lunged at him and tried to grab the paper, causing a pen to fall from his hand. [*Id.*] When Captain Cunningham admonished him about this behavior, Respondent answered with a belittling remark. [Tr. 30]

Captain Cunningham notified the relevant Global personnel of Respondent's behavior. [D&O at 5; Tr. at 30, 67-69; Coast Guard Exhibit 6] Upon receiving instructions from Global, Captain Cunningham informed Respondent that he was relieved

of duty and confined to quarters and that he would be put off the vessel as soon as possible. [D&O at 5; Tr. at 30-31] In response, Respondent refused and stated that Captain Cunningham "better never cross my path" or "I will kill you," adding "maybe not on the boat, but if I ever see you on land I will kill you." [D&O at 5; Tr. at 31]

The Coast Guard filed its Complaint, seeking temporary suspension of Respondent's mariner credentials, on November 3, 2008. [D&O at 2] Because the Coast Guard issued its Complaint under the temporary suspension provisions of 46 U.S.C. § 7702(d), it was authorized to immediately "take possession" of Respondent's mariner credentials "for not more than 45 days." *See* 46 U.S.C. § 7702(d)(1).

The Coast Guard's Complaint, which was amended for technical reasons, alleged that on November 3, 2008, Respondent threatened the life of Jeff Cunningham, Master of M/V SEA FOX, in violation of 46 U.S.C. §7703(5). [Amended Complaint at 2] On November 6, 2008, an expedited pre-hearing conference was conducted with the parties, pursuant to 33 C.F.R. §20.1207. [D&O at 2] At the conference, Respondent was advised of his rights, including his right to counsel, to have witnesses and documents subpoenaed, and to obtain discovery from the Coast Guard. [*Id.*] Thereafter, the ALJ issued an order scheduling the hearing and setting a deadline for discovery, which was in accordance with the time limits specified in 33 C.F.R. § 20.1207(e)(1)(2). [D&O at 2; Memorandum of Pre-Hearing Telephone Conference and Scheduling Order at 3]

The hearing in the matter was convened on November 20, 2008, in Mobile, Alabama [D&O at 2] During the hearing, the Coast Guard offered the testimony of three witnesses and entered eight exhibits into the record. In addition to testifying on his own

behalf, Respondent offered the testimony of two witnesses and entered one exhibit into the record. The ALJ's D&O was entered on December 5, 2008.

On December 15, 2008, Respondent timely filed a "Notice of Appeal" and a "Motion to Stay the Order for Revocation." On February 3, 2009, Respondent filed a timely Appeal Brief. The Coast Guard did not offer a reply. Accordingly, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard spokespersons were Mr. Robert W. Foster and LT Beth Gregorich of U.S. Coast Guard Sector Mobile, Alabama.

BASES OF APPEAL

Respondent appeals the ALJ's Order revoking his mariner credentials. Respondent's twenty-seven page Appeal Brief, submitted *pro se*, raises various issues that are, at times, difficult to distinguish, irrelevant, and repetitive. A prior Commandant Decision on appeal makes clear that "[w]hen acting on an appeal from an agency decision, the agency has all the powers which it would have in making the initial decision." *See* Appeal Decision 2610 (BENNETT) *citing* 5 U.S.C. § 557(b). Moreover, one of the powers of the agency "includes the exclusion of irrelevant, immaterial or unduly repetitious evidence." *Id. citing* 5 U.S.C. § 556, 46 C.F.R. § 5.537 and Fed. R. Evid. 402-403. Any other issues, points of discussion, or questions raised by Respondent, not enumerated below, are deemed immaterial, irrelevant or unduly repetitious and are hereby denied. Acccordingly, Respondent's assignments of error are summarized as follows:

I. *The ALJ erred in finding that Respondent committed an assault and, because Respondent was not charged with an assault on the Complaint, Respondent had no notice of the alleged violation;*

II. *The ALJ erred in relying on false testimony (perjury) in reaching his decision in the case;*

III. *The ALJ erred in failing to grant a subpoena to a witness who could corroborate Respondent's version of the incident;*

IV. *The ALJ erred in allowing Respondent's mariner credentials to be temporarily suspended on "security risk" grounds because such action is not authorized under the applicable Coast Guard regulations;*

V. *The ALJ erred in applying 46 U.S.C. § 7702 to Respondent because the statute's "security risk" provision should only be applied to terrorist activities; and*

VI. *The ALJ erred in broadly interpreting the "security risk" portion of 46 U.S.C. § 7702.*

OPINION

Standard of Review

On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. *See* 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001. "Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence." Appeal Decision 2685 (MATT). "The ALJ is the arbiter of facts" and it is "his duty to evaluate the testimony and evidence presented at the hearing." Appeal Decision 2610 (BENNETT). Under governing precedent, "the findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." Appeal Decision 2610 (BENNETT) *citing* Appeal Decisions 2557

(FRANCIS), 2452 (MORGRANDE) and 2332 (LORENZ). Moreover, "the ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeal Decision 2639 (HAUCK) *citing* Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH) and 2614 (WALLENSTEIN). *See also* 2628 (VILAS) ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious."). "The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." *See* Appeal Decision 2685 (MATT) *citing* Appeal Decisions 2395 (LAMBERT) and 2282 (LITTLEFIELD).

I.

The ALJ erred in finding that Respondent committed an assault and, because Respondent was not charged with an assault in the Complaint, Respondent had no notice of the alleged violation.

The first issue presented is whether there is substantial evidence in the record to support the ALJ's conclusion that Respondent assaulted the SEA FOX's master. Respondent takes issue with the ALJ's ultimate finding of fact that "Respondent did assault his ship's Master, Captain Jeff Cunningham, by lunging at him while trying to grab a paper out of Captain Cunningham's hand and thus striking his Captain's hand." [D&O at 13]

Under governing precedent, "the findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." Appeal Decision 2610 (BENNETT) *citing* Appeal Decisions 2557 (FRANCIS), 2452 (MORGRANDE) and 2332 (LORENZ).

In this case, the ALJ after hearing the testimony of the witnesses, found substantial evidence to support a conclusion that Respondent committed an assault. In these proceedings, an "assault" occurs when a mariner puts another person "in apprehension of harm when there is the apparent present ability to inflict injury whether or not the actor actually intends to inflict or is capable of inflicting harm." *See* Appeal Decision 2198 (HOWELL) *citing* Appeal Decision 1218 (NOMIKOS).

The evidence in the record, including the testimony of Captain Cunningham, supports the ALJ's conclusion that the incident constituted an assault. Indeed, Captain Cunningham testified as follows with regard to the incidents aboard the SEA FOX:

> I went and took care of some paperwork and wrote out a disciplinary report and went down to the galley, where Jack was, and I held it out for him and asked him to read and sign it. His response was f*** you. I ain't signing nothing. I said well, okay, I'll write on here refused to sign.
>
> I turned around to go back up to the wheelhouse and he lunged at me, trying to grab the paper out of my hand. He actually knocked my hand down and back and the pen came out of my hand, but the paper didn't.

[Tr. at 29] A review of the record shows that, in finding that Respondent committed an assault, the ALJ expressly found "Captain Cunningham's testimony to be credible." [D&O at 10] Given the evidence contained in the record and the great deference accorded to an ALJ's findings of fact, the ALJ was not arbitrary, capricious, or clearly erroneous in finding that Respondent committed an assault.

Respondent further contends that because the Complaint in the case did not allege that an assault occurred, Respondent's due process rights were violated because he was not afforded the opportunity to fully develop a defense to the Coast Guard's allegations. I do not agree.

While the record shows that the factual allegations of the Coast Guard's complaint did not charge assault, a review of the specification shows that it provided Respondent with a clear and unmistakable picture of the events surrounding the charged violation. In these proceedings, if Respondent was fairly apprised that his conduct would be held against him, and if he was then permitted a fair opportunity to defend himself, he cannot now claim that he has been denied due process. *See* Appeal Decision 2152 (MAGIE) *citing Kuhn v. Civil Aeronautics Bd.*, 183 F.2d 839 (D.C. Cir 1950). Moreover, "[f]indings that lead to the suspension or revocation of a...[license]...can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated." Appeal Decision 2608 (SHEPHERD) *citing Kuhn*, *supra* and Appeal Decisions 2578 (CALLAHAN), 2545 (JARDIN), 2422 (GIBBONS), 2416 (MOORE) and 1792 (PHILLIPS).

The record shows that Respondent was informed of the events surrounding the incident throughout the course of these proceedings. In fact, the Coast Guard's witness and exhibit list, which was provided to Respondent as part of the discovery process, contained a disciplinary report for Respondent (subsequently entered into the record as Coast Guard Exhibit 6) that fully explained the circumstances surrounding the incident. Notably, the report expressly stated that after Respondent refused to sign his write up,

Respondent "attempted to tear it out" of Captain Cunningham's hand. *See* Coast Guard Exhibit 6.

The record further shows that the events constituting the assault—Respondent lunging at Captain Cunningham—were litigated throughout the course of the hearing. As support for the allegation, the Coast Guard offered the testimony of Captain Cunningham which, as has already been discussed herein, described the manner in which Respondent lunged at him. The record shows that Respondent actively cross-examined Captain Cunningham. In this respect, the record shows that Respondent was aware of the relevant allegations and that he was prepared to defend against them. Accordingly, Respondent's first assignment of error is not persuasive.

II.

The ALJ erred in relying on false testimony (perjury) in reaching his decision in the case.

On appeal, Respondent insists that Captain Cunningham not only lied on the witness stand, but also that he lied in his correspondence discussing the incident with Global. [Respondent's Appeal Brief at 5-6] Respondent specifically argues that Captain Cunningham lied about the incidents leading to the ALJ's determination that an assault occurred. In so doing, Respondent questions the ALJ's credibility determination with regard to Captain Cunningham.

"The Administrative Law Judge is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeal Decision 2519 (JEPSON). This is because "[t]he Administrative Law Judge as the presiding official at the hearing can fully observe the response, character and demeanor of the witness in issue." Appeal Decision 2519 (JEPSON) *citing*

Appeal Decisions 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2474 (CARMIENKE), 2472 (GARDNER), 2212 (LAWSON), and 2052 (NELSON). Therefore, "appellate review of this type is limited in scope. Absent a clear showing of arbitrary and capricious action by the trier of fact concerning this issue, his determination will not be disturbed." Appeal Decision 2159 (MILICI). As has already been discussed herein, the ALJ found Captain Cunningham to be a credible witness after carefully reviewing his testimony. The ALJ's determination as to Captain Cunningham's credibility was reasonable and within his discretion. Therefore, the ALJ's finding to that end will not be disturbed here.

III.

The ALJ erred in failing to grant a subpoena to a witness who could corroborate Respondent's version of the incident.

On appeal, Respondent argues that the ALJ erred in refusing to grant a subpoena that Respondent requested on January 20, 2009, more than one month after the ALJ's D&O was issued. Respondent avers that he could not "defend against a lie" and that he was prejudiced by the ALJ's refusal to grant the subpoena because he "did not have a proper opportunity to answer or obtain the evidence...[that he needed]...to counter and/or prove" that Captain Cunningham was lying. [Respondent's Appeal Brief at 8] Respondent's assertion to this end is unpersuasive.

Pursuant to 33 C.F.R. § 20.902, the ALJ's decision is issued after the record is closed. In this case, the record was closed on December 5, 2008, when the ALJ issued his D&O. Respondent requested issuance of a subpoena to the SEA FOX's cook on January 20, 2009, more than one month after the record was closed. Under the applicable regulations, "[a]ny party may request the ALJ to issue a subpoena for the attendance of a

person, the giving of testimony, or the production of books, papers, documents, or any other relevant evidence *during discovery or for any hearing.*" 33 C.F.R. § 20.608(a) (emphasis added). Since the subpoena that Respondent requested was not sought "during discovery" or "for any hearing," the ALJ did not err in refusing to grant the subpoena. It is worth noting that the record shows that while the case was pending before the ALJ several subpoenas were properly issued on Respondent's behalf. In any event, the record shows that Respondent was, via the Coast Guard's witness and exhibit list, informed that Captain Cunningham would testify at the hearing. The Coast Guard's witness and exhibit list further informed Respondent of the general nature of the Captain's expected testimony. Prior to the hearing, Respondent did not request that any rebuttal witnesses be called on his behalf, even though he was aware of the nature of Captain Cunningham's expected testimony. The record further shows that even though Respondent actively cross-examined Captain Cunningham, he made no request for rebuttal testimony during the hearing. As such, Respondent's arguments regarding a perceived inability to present rebuttal evidence are simply not persuasive.

IV.

The ALJ erred in allowing Respondent's mariner credentials to be temporarily suspended on "security risk" grounds because such action is not authorized under the applicable Coast Guard regulations.

Respondent's next assignment of error concerns the charge at issue in this proceeding. Respondent correctly points to a distinction between the grounds for temporary suspension listed in 46 U.S.C. § 7702, the statute that governs temporary suspensions of merchant mariner credentials, and the grounds for suspension listed in 33 C.F.R. § 20.1201, the Coast Guard regulation that applies that statute. 46 U.S.C. §

7702(d)(1)(iv) permits the Coast Guard to suspend a mariner credential without a hearing for 45 days if the individual performs a safety function on a vessel and probable cause exists to believe he is a security risk that poses a threat to the safety or security of a vessel. 33 C.F.R. § 20.1201, however, does not include a clause that allows the Coast Guard to temporarily suspend a mariner credential for being a security risk. Respondent thus questions how the Coast Guard could charge him with being a "security risk" when the governing regulation does not include that as a possible ground for suspension or revocation action.

Respondent's argument fails if the relevant portion of 46 U.S.C. § 7702 is self-executing. A self-executing statute does not require regulatory implementation. *See U.S. v. Paul*, 23 F.3d 365, 367 (11th Cir. 1994) (The plain language of the statute and its legislative history make clear that it is a self-executing statute, requiring no regulatory implementation); *Geneva Inv. Co. v. City of St. Louis*, 87 F.2d 83, 89 (8th Cir. 1937) (statutory provision is complete in itself, needs no legislation to put it in force, and, hence, is self-executing). Self-executing statutes may be analogized to self-executing constitutional provisions. As the Supreme Court stated:

> Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles...it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself.

Davis v. Burke, 179 U.S. 399, 403 (1900).

Self-executing statutes may also be analogized to self-executing treaties. "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal

law upon ratification." *Medellin v. Texas*, 128 S.Ct. 1346, 1356 n.2 (2008). "Self-executing treaties do not require implementing legislation and become effective as domestic law immediately upon entry into force." *ITC Ltd. v. Punchgini, Inc.*,482 F.3d 135, 161 n.21 (2d Cir.2007).

A review of the plain language of the 46 U.S.C. § 7702(d) supports a conclusion that the statute is self-executing; action can be taken under the statute without implementing regulations because the statute is complete in and of itself. Therefore, Respondent's assignment of error is not persuasive.

V.

The ALJ erred in applying 46 U.S.C. § 7702 to Respondent because the statute's "security risk" provision should only be applied to terrorist activities.

Citing portions of the legislative history of the Coast Guard and Maritime Transportation Act of 2004 (hereinafter "the Act"), Respondent asserts that the Act, and any provision enacted through it, was intended solely to combat terrorism. As a consequence, Respondent contends that the ALJ erred in finding that Respondent posed a security risk to a vessel because there is no evidence in the record to suggest that Respondent was a terrorist or that he committed acts of terrorism. I do not agree with Respondent's interpretation of the intent of the Act.

While the Act broadens the Coast Guard's authorities with regard to maritime transportation security, it also contains numerous provisions that are not related to either terrorism or maritime security, such as provisions to make appropriations to the Coast Guard and provisions addressing Coast Guard management. *See* Pub. L. 108-293, 118 Stat. 1028. On appeal, Respondent cites a Federal Register Notice to support his contention that the Act was enacted solely to prevent terrorism. *See* Implementation of

National Maritime Security Initiatives, 68 Fed. Reg. 39,240-01 (July 1, 2003)(to be codified at 33 C.F.R. pts. 101 and 102). Contrary to Respondent's contention, the Notice does not address changes to Coast Guard suspension and revocation statutes; it solely addresses regulations, at 33 C.F.R. Parts 101 and 102, that are meant to foster Coast Guard maritime security initiatives. Moreover, a review of the comments that Respondent cited in his closing brief shows that those comments were not made in reference to the portions of the act which would be codified at 46 U.S.C. § 7702(d)(1)(B)(iv). Rather, the comments citied by Respondent address general concerns as to a perceived change in the Coast Guard's missions. *See generally* 149 Cong. Rec. H10396 (daily ed. Nov. 5, 2003). Accordingly, Respondent's assertion that the Act was intended solely to combat terrorism is not persuasive.

VI.

The ALJ erred in broadly interpreting the "security risk" portion of 46 U.S.C. § 7702.

The key issue presented is whether the ALJ was correct in construing 46 U.S.C. § 7702(d)(1)(iv) broadly so as to support a conclusion that Respondent presented such a security risk under the statute to warrant a temporary suspension of his mariner credentials.

In addressing this issue, it is helpful to review court decisions regarding statutory interpretation. The courts have held that in matters of statutory interpretation, in discerning congressional intent, a court must start by looking to the plain language of the statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Furthermore, courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Therefore, if the

terms of the statute are unambiguous, the "judicial inquiry is complete," and the court's job is simply to enforce those terms. *Id* at 254. However, in so doing, the court must look at the statute as a whole and not merely as individual isolated phrases. *See United States v. Morton*, 467 U.S. 822, 828 (1984).

The statutory section at issue here, 46 U.S.C. § 7702(d)(1)(B)(iv), states, in relevant part, as follows:

> The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license...or merchant mariner's document held by an individual if:
>
> (A) that individual performs a safety sensitive function on a vessel...and
>
> (B) there is probable cause to believe that the individual—
>
> (iv) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

A review of the applicable law and regulations shows that the term "security risk" is not defined.

The ALJ addressed Respondent's argument with regard to the provision, as follows:

> Respondent's post-hearing submission raises the question of whether 46 U.S.C. § 7701, *et seq.* intends to define "security risk" as inclusive of seamen aboard a marine vessel...While no appellate case law construes the phrase, I am confident that the term "security risk" broadly encompasses a wide variety of contingencies defined by the Coast Guard, tradition and law of the sea and by the Master's own judgment.

[D&O at 12] Under a plain language reading of the statute, the ALJ did not err in concluding that the term "security risk" encompasses more than just individuals who

present a risk of terrorism. It is consistent with the plain language of the statute and will not be disturbed here.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision to revoke Respondent's merchant mariner credentials was not arbitrary, capricious, or clearly erroneous. Because competent, substantial, reliable, and probative evidence exists to support the ALJ's decision to suspend the Respondent's merchant mariner credentials, I am not persuaded by Respondent's bases of appeal.

ORDER

The order of the ALJ, dated December 5, 2008, at New Orleans, Louisiana, is AFFIRMED.

Sally Brice-O'Hara, VADM U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 22nd day of Dec, 2010.