UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

JAMES MICHAEL ELSIK

Respondent.

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Docket Number: CG S&R 04-0501
CG Case No. 2078778

ORDER DENYING RESPONDENT'S VERIFIED APPLICATION FOR ATTORNEY FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Issued: February 20, 2007

Issued by: Walter J. Brudzinski, Administrative Law Judge

This matter came to be heard on Respondent's Verified Application dated January 12, 2007 for Attorney's Fees and Expenses under the Equal Access to Justice Act (EAJA) filed with the ALJ Docketing Center on January 16, 2007.

The EAJA has two parts: one involves fees awarded through judicial proceedings pursuant to 28 U.S.C. § 2412, and the other, at issue here, involves an award of fees by an administrative agency pursuant to 5 U.S.C.A. § 504(a)(1) (1991). The standards for recovery under both statutes are the same.

Pursuant to 5 U.S.C. 504 and 554, 49 CFR 6.13, 46 CFR 1.01-20, 33 CFR 20.201 and 20.202, the Chief Administrative Law Judge assigned this matter to the undersigned on January 24, 2007. [1]

[1] Sec. 103 (c) of the Homeland Security Act, Pub. L. No. 107-296, 116, Stat. 2135, 2144, 6 U.S.C. § 113 (c) transferred the Coast Guard from the Department of Transportation to the Department of Homeland Security. The Act's Savings Provisions at § 1512, 116 Stat. 2135, 2310 , 6 U.S.C. § 552, provide that completed administrative actions of an agency [e.g., regulations] shall not be affected by the enactment of this Act or the transfer of such agency to the Department but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

Background

On September 20, 2004, the Coast Guard at Morgan City, Louisiana issued a Complaint against Respondent alleging Misconduct, in violation of 46 U.S.C. 7703 and 46 CFR 5.33, in that on May 10, 2004, while serving under the authority of his license as master and operator of the UTV JOHN G. MORGAN, he allided with the Army Corps of Engineers Barge CE 869 and did not notify the Coast Guard or Bayou Tugs, Inc. concerning the allision and that Respondent stated he had no knowledge of the allision. The Coast Guard proposed that Respondent's license be suspended outright for a period of 6 months.

Respondent denied the allegations and demanded a hearing. On November 23, 2004, the case was assigned to Judge Jeffie J. Massey of New Orleans, Louisiana for adjudication.

On December 30, 2004, the Coast Guard amended its Complaint by adding one count of Negligence and one additional count of Misconduct concerning the events surrounding the alleged allision on May 10, 2004 and afterwards. Respondent also filed a timely Answer.

After considerable motion practice concerning discovery and sanctions, and prior to the scheduled hearing, the Honorable Jeffie Massey dismissed the three allegations in the Complaint in two separate orders dated April 6, 2005. The Coast Guard appealed. On May 17, 2006, the Vice Commandant of the Coast Guard vacated Judge Massey's Orders and remanded the case for further proceedings. Appeal Decision 2658 (ELSIK) (2006).

The Vice Commandant stated,

> The ALJ committed an error of law when she dismissed the Coast Guard's misconduct allegations for lack of jurisdiction. The fact that criminal violations were available for the charged offenses does not preclude the Coast Guard from initiating suspension and revocation action for the offenses. In addition, the ALJ abused her discretion and committed an error of law by dismissing the Coast Guard's negligence allegation, with prejudice, as a sanction for the Coast Guard's failure to respond to interrogatories ordered by the ALJ. Because the ALJ's Orders terminated the case without hearing, the case must be remanded for further proceedings. In addition, the ALJ acted arbitrarily and capriciously by failing to follow the applicable discovery rules when she ordered "further discovery" before "initial discovery" concluded. The record does not contain sufficient evidence to support a conclusion that the ALJ evidenced a bias against the Coast Guard in this case.
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> The ALJ's 'Order Ruling on Respondent's Motion to Dismiss' and her 'Order Ruling on Respondent's Motion for Sanctions are VACATED and REMANDED for further proceedings consistent with this decision.

On July 14, 2007, the Chief Administrative Law Judge reassigned the case to the undersigned for adjudication. The matter was initially set for hearing to commence on December 5, 2006 but was continued on Respondent's motion to February 7, 2007.

On December 29, 2006, the Coast Guard filed its Motion for Withdrawal and, on January 5, 2007, the undersigned entered an Order Dismissing the Complaint Without Prejudice in accordance with 33 CFR 20.311(b). On January 12, 2007, counsel for Respondent filed his Verified Application for Attorney's Fees and Expenses under the Equal Access to Justice Act.

Respondent's Application

Respondent, (hereinafter referred to as "Applicant" or "Respondent-Applicant") states that "after years of expensive litigation, on December 29, 2006, the USCG filed a Motion to Withdrawal (sic) the Complaint." "On January 5, 2007 the ALJ granted that motion and dismissed the USCG's adversary adjudication against the Applicant. As such, the Applicant received a decision in his favor, as those terms are defined in the EAJA and implementing regulations, 46 (sic) C.F.R. Part 6."

Applicant continues,

> In accordance with the EAJA and implementing regulations, 46 (sic) C.F.R. Part 6, the Applicant submits that the USCG's position in this matter was not substantially justified, more specifically, as charged in the Complaint, that he was the operator of a towboat that allided with a Corps of engineer's barge on May 10, 2004. The USCG failed to identify any written statement from any witness stating that he observed the alleged allision. Further, the Applicant has steadfastly denied that the towboat which he allegedly was operating allided with the Corps of Engineer's barge in Houma, Louisiana, on May 10, 2004. In addition, the Corps of Engineer's Accident Report described the offending vessel as Unknown. The USCG also failed to produce or identify any scientific evidence linking the allision to the Applicant. In essence, the USCG's Complaint against the Applicant was nothing more than unsubstantiated conjecture and speculation of an over aggressive and over zealous administrative agency.

Respondent seeks Attorney's fees in the amount of $10,307.50 and attorney's expenses in the amount of $166.24, for a total award of $10,473.74. Respondent Applicant enclosed his sworn statement of net worth along with counsel's detailed timesheets and expense statements.

The Coast Guard's Answer

The Coast Guard filed its timely response on February 12, 2007. In the Answer, the Coast Guard stated it:

> had fully investigated the facts of the case and was ready to move forward and prove its allegations at any time and remains ready to do so. Both ALJ Massey and Respondent's counsel were aware of this. Among other things, on February 23, 2005, the Coast Guard provided its Witness and Exhibit list to ALJ Massey and Respondent's counsel. The witness list explained to both ALJ Massey and the Respondent that among those witnesses was an eyewitness who was in the wheelhouse at the time of the charged collision. It also explained that three other witnesses were going to tie the Respondent's vessel to the casualty through use of a time sequence as well as paint scrapings and paint flakes.

A copy of the Witness and Exhibit List is attached to the Answer. The Witness and Exhibit List is also included in the record file.

The Coast Guard Investigating Officer went on to say that Respondent should not be rewarded for his tactics because he sidetracked the Coast Guard's ability to litigate and prove the allegations in this case. Further, the Respondent submitted "a blizzard of frivolous motions" and "engaged in tactics to mislead ALJ Massey." Among those tactics the Coast Guard Investigating Officer mentioned was arguing a 9th Circuit case that "had been discredited by 19 different Commandant Decisions on Appeal . . . " "Respondent's counsel forcefully argued for, and convinced ALJ Massey to order, 'further discovery' despite the applicable regulations. The Vice Commandant found that, 'There can be no question that the ALJ's (Massey's) action, in that regard unnecessarily complicated these proceedings."

As noted above, Judge Massey dismissed the allegations without a hearing, the Coast Guard appealed, and the Vice Commandant vacated Judge Massey's Orders of Dismissal and remanded the case.

Law

These proceeding are covered by 5 U.S.C. 504 and 554 *et seq.* and the current implementing regulations at 49 CFR Part 6.

The pertinent part of The Equal Access to Justice Act, ("Act") Pub. L. 96-481, 94 Stat. 2325, codified at 5 U.S.C. 504, provides,

> **(a)(1)** An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that

the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

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5 U.S.C. 504.

Title 49 CFR 6.5 provides that the "Act" applies to "Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 7701 *et seq*" among other things. Section 6.7 provides, in pertinent part, that the applicant <u>must be a party</u> (emphasis added) to an adversary adjudication for which it seeks an award and that the applicant meets all conditions of eligibility set out in the regulations.

Title 49 CFR 6.9 provides, in pertinent part,

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with <u>a decision in favor of the applicant</u> (emphasis added) in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be

determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The 'position of the Department' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

Subpart B of Title 49 CFR Part 6 – Information Required from Applicants, lists the requirements for filing an application: a showing that the applicant has prevailed (emphasis added) and identifying the position of an agency that the applicant alleges was not substantially justified; a statement of the applicant's net worth; the amount of fees and expenses for which the award is sought; a written verification under oath that the information provided is true and correct; a net worth exhibit; and documentation of fees and expenses.

Subpart C of Title 49 CFR Part 6 – Procedures for Considering Applications, lists the requirements for filing and service which the Applicant has followed. It also provides that within 30 calendar days after service of an application, the agency counsel may file an answer to the application or a request for an extension of time to file answer. Failure to file an answer within the 30 day period may be treated as consent to the award request. The Coast Guard Investigating Officer filed a timely Answer. The remainder of the subpart provides that the parties may settle, and, if appropriate, additional proceedings may be held.

Finally, the regulations at 49 CFR 6.33 provide that the Administrative Law Judge shall issue an initial decision containing findings, if at issue, on whether the Department's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make and award unjust. (Emphasis added). Either party may seek review of the decision or the Department may decide to review the decision on its own initiative. Otherwise, the initial decision becomes final 30 days after it is issued.

Findings of Fact

1. As a respondent in a Coast Guard suspension and revocation proceeding conducted under 46 U.S.C 7701 *et seq.*, Applicant James Michael Elsik is a "party" within the meaning of 5 U.S.C. 504(b)(1)(B) and 49 CFR 6.7.

2. The Complaint in the underlying suspension and revocation proceeding was Dismissed Without (emphasis added) Prejudice.

Ultimate Findings of Fact and Conclusions of Law

1. A Dismissal Without Prejudice allows the Coast Guard to refile the Complaint. Therefore, it is not an adjudication on the merits in Applicant's favor.

2. Because there has been no adjudication in Applicant's favor, Applicant has not made a showing that he has prevailed in the underlying Coast Guard suspension and revocation proceeding as required by 5 U.S.C. 504 (a)(1) and 49 CFR 6.17.

3. Absent a showing that he has prevailed in the underlying Coast Guard suspension and revocation proceeding, Applicant does not met the standards to file for an award as set forth in 5 U.S.C. 504 (a) (1) and 49 CFR 6.9 (a). Therefore, the application must be DENIED.

4. The Coast Guard's position in the underlying proceeding had a reasonable basis in law.

5. The Coast Guard's position in the underlying proceeding had a reasonable basis in fact.

6. Even if it could be subsequently construed that a Dismissal Without Prejudice is an adjudication on the merits in Applicant's favor, the Coast Guard's position was substantially justified because the Coast Guard had a reasonable basis in both law and fact to initiate the underlying proceedings.

7. Having found that the Applicant has not made a showing that he has prevailed in the underlying suspension and revocation proceeding and also having found that the Coast Guard's position was substantially justified, the fee application must be DENIED.

8. Having denied the fee application on the grounds listed in 7 above, it is not necessary to find also that the Applicant unduly protracted the proceedings; nor is it necessary to find also that special circumstances would make an award unjust. See 5 U.S.C. 504(a)(1); 49 CFR 6.33.

Discussion

Applicant is not a prevailing party. The EAJA states at 5 U.S.C. 504 (a)(1), an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

The standards for making an award under EAJA are found in 49 CFR 6.9. Section 6.9(a) provides:

> (a) 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 in a proceeding covered by this Part, unless the decision of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust.

46 CFR 69.(a). The award of attorney fees is not automatic. See Appeal Decision 2623 (LOVE) (2001). Under EAJA, a party seeking an award of fees and other expenses is required to submit

an application showing that the party is a "prevailing party" and is eligible to receive an award. See 5 U.S.C. 504(a)(2).

The term "prevailing party" is not defined by statute or regulation. The legislative history makes clear that prior judicial interpretations of other attorney fee awarding statutes are informative in determining whether to award attorney fees under EAJA. Austin v. Dep't Commerce, 742 F.2d 1417, 1419 (Fed. Cir. 1984) (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 USCCAN 4953, 4984, 4990); Shultz v. United States, 918 F.2d 164, 166 n. 2 (Fed. Cir. 1990).

The Supreme Court of the United States Supreme gave meaning to the term "prevailing party" as it is used in the Fair Housing Amendments Act of 1998 (FHAA), codified at 42 U.S.C. 3601 *et. seq*., and the Americans with Disabilities Act of 1990 (ADA), codified at 42 U.S.C. 12101 *et. seq*. See Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 601 (2001). The Court rejected the "catalyst theory" and held that a party is a "prevailing party" if that party receives "relief on the merits of [its] claim." Id at 603-04. "[R]elief on the merits" requires that the party obtain a court order materially changing the legal relationship of the parties." Id. at 604-05. The United States Court of Appeals for the Federal Circuit ("Federal Circuit") extended the Supreme Court's ruling in Buckhannon to EAJA. See Brickwood Contractors, Inc. v. United States, 288 F.3d 1371, 1377-79 (Fed.Cir.2002).[2, 3]

There is no clear precedent in these administrative proceedings as to whether a dismissal without prejudice based on the Coast Guard's voluntary motion to withdraw the complaint makes Respondent a "prevailing party" for purposes of awarding attorney fees and costs under EAJA. The Federal Circuits ruling in Rice Services, Ltd. v. United States, 405 F.3d 1017 (Fed. Cir. 2005) is instructive.

In Rice, a bid protest action was brought against the government in the Court of Federal Claims. The government voluntarily undertook remedial action and sought dismissal of the underlying protest claim without prejudice. The Court of Federal Claims issued an Order describing the government's proposed plan and dismissed the action "without prejudice to the assertion of any new protest action" and the court subsequently awarded attorney fees under EAJA. Id. at 1026 n. 5. On appeal, the Federal Circuit held that the bid protester was not a "prevailing party" under EAJA because the government "voluntarily abandoned its position" and the "[trial] court did not state that it was entering the order as a merit adjudication." Id. at 1027; but see Highway Equip. Co. v. FECO Ltd., 469 F.3d 1027, 1035 (Fed.Cir.2006) (holding that a dismissal with prejudice makes a party a "prevailing party").

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[2] The FHAA provides that "the court, in its discretion, may allow the prevailing party ··· a reasonable attorney's fee and costs." 42 U.S.C. 3613(c)(2). The ADA similarly states that "the court ···, in its discretion, may allow the prevailing party ··· a reasonable attorney's fee, including litigation expenses, and costs." Id. at 12205.

[3] The "catalyst theory" allows a party to recover attorney's fees as a "prevailing party" if the party "achieves the desired result because the lawsuit brought about a voluntary change in the [opposing party's] conduct." Buckhannon, 532 U.S. at 601.

Similarly, in NLRB v. Boyce, the Merit System Protection Board (MSPB) held that respondents were not "prevailing parties" under EAJA where the government withdrew its complaint seeking authority to furlough certain employees. 51 M.S.P.R. 295. The MSPB found that the withdrawal of the complaint was causally related to Congress' action of passing a new budget agreement, it was not due in any part to the defense provided by the respondents; therefore, the respondents were not deemed prevailing parties. Id. at 300-01.

A "dismissal without prejudice" does not have the necessary judicial impetus required to confer "prevailing party" status. A "dismissal without prejudice . . . does not operate as an adjudication upon the merits." Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 396 (1990) (citing Fed. R. Civ. P. 41(a)(1)). An "adjudication on the merits" is distinguished from a "dismissal without prejudice." Semtek Intern. Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001). An "adjudication upon the merits" bars the refiling of the complaint, whereas a "dismissal without prejudice" does not preclude the complainant from refiling the complaint at a later date. Id. at 505-506. According to Black's Law Dictionary (8th ed. 2004), "dismissed without prejudice" means "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim." Conversely, according to Black's, "dismissed with prejudice" means "removed from the court's docket in such a way that the plaintiff is foreclosed from filing a suit again on the same claim or claims."

In the instant case, the Applicant is not a "prevailing party." The case was dismissed without prejudice based on the filing of the Coast Guard's motion to withdraw the complaint. A motion to withdraw a Complaint followed by an Order Dismissing the Complaint Without Prejudice, as set forth in 33 CFR 20.311(b), is not unlike a voluntary dismissal, nonsuit, or discontinuance of an action. They all have one thing in common – no adjudication on the merits. According to 47 Am. Jur. 2d, Judgments § 551 (May 2006), a single voluntary dismissal, nonsuit, or discontinuance of an action is generally regarded as a mere withdrawal of the plaintiff's claim which does not have the effect of an adjudication on the merits and does not bar the plaintiff from maintaining another action on the same cause of action.

In conclusion, the Applicant has failed to establish that he is a "prevailing party" in accordance with 5 U.S.C. 504(a)(2). Accordingly, the application for an award of attorney fees and costs under EAJA is subject to denial.

Substantial justification. The application for an award of attorney fees and costs under EAJA is also subject to denial because the government's position was "substantially justified." Title 49 CFR 6.9(a) provides that "[a]n eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified . . . ."

The standard for "substantial justification," within the meaning of EAJA, is simply one of reasonableness. To avoid award of fees, the proceeding must have a reasonable basis in law and fact. It is necessary to examine both the state of the law and the facts in the record to determine whether there was substantial justification for the agency's position. Frey v. Commodity Futures Trading Commission, 931 F.2d 1171,1174 (7th Cir. 1991), *rehearing and rehearing en banc*

denied. (Commodity Futures Trading Commission's enforcement proceeding against commodities broker for price manipulation had reasonable basis in law and fact and, thus, broker was not entitled to attorney fees under EAJA for fees incurred in successfully defending himself).

At the administrative level, the burden is on administrative agency to prove that an attorney fee award should not be made under EAJA. Charger Management, Inc. v. N.L.R.B., 768 F.2d 1299, 1301 (11th Cir. 1985). For instance, in Bruch v. United States Coast Guard, an application for an award of attorney fees and costs under EAJA was denied even though the docking masters in the underlying action successfully defended against misconduct citations for allegedly docking boats without the requisite license. 749 F.Supp. 688 (E.D.Pa.1990). On appeal, the critical question for the district court judge was whether the Coast Guard's position -- the stance it took in the administrative hearing, its basic rationale for the issuance of the citations -- was "substantially justified." Id. at 693. The district court held that the test is not whether the Coast Guard's position was ultimately correct but only whether a reasonable person could countenance the Coast Guard's position in the particular context of the dispute. Id

In holding that the Coast Guard's position was substantially justified, the district judge relied on Pierce v. Underwood, 487 U.S. 552 (1988). In Pierce, Justice Scalia, in writing for the majority, stated that the phrase "substantially justified" does not mean "justified to a high degree," but rather "justified in substance or in the main-that is, justified to a degree that could satisfy a reasonable person." Bruch , 749 F.Supp. at 694 (citing Pierce, 487 U.S. at 556). Justice Scalia noted that "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.,* for the most part) justified if a reasonable person could think it correct; that is, if it has a reasonable basis in law and fact." Id. (citing Pierce, 487 U.S. at 566 n. 2; see also Russell v. Heckler, 866 F.2d 638 (3d Cir.1989)).

Applying the facts to the law

A review of the entire administrative record shows that the Coast Guard had a reasonable basis in both law and fact to initiate these proceedings.

Basis in law. To promote safety at sea, 46 U.S.C. §§ 7701 *et seq.* provides the legal authority for the Coast Guard to initiate suspension and revocation proceedings. Section 7703 provides that licenses, certificates of registry, or merchant mariner's documents may be suspended or revoked for "misconduct" and "negligence," among other things. Title 46 CFR sections 5.29 and 5.33 define negligence and misconduct respectively. The allegations described above in the Complaint and the Amended Complaint conform to the requirements of 46 U.S.C § 7703 and 46 CFR 5.29 and 5.33. Therefore, I find that the Coast Guard has a reasonable basis in law to initiate the underlying proceedings.

Basis in fact. According to the Coast Guard's Witness and Exhibit List filed on February 23, 2005, the Investigating Officer listed four witnesses and five exhibits that he intended to use in proving the allegations at hearing. It is noteworthy that the eye-witness, who was present on the bridge when Respondent-Applicant was operating the UTV JOHN G. MORGAN, would testify that Respondent-Applicant stated that he (Respondent-Applicant) hit the Army Corps of

Engineers' Barge CE869. The eye-witnesses would also testify that Respondent-Applicant left the scene of the allision without making any notifications or rendering assistance.

An Army Corps of Engineers witness would testify to discovering the damage to its barge and to attempting to locate the vessel that allided with the barge. The third witness would testify to collecting paint scrapings from the barge and the UTV JOHN G. MORGAN. That witness would also testify that the paint scrapings match. Also, the witness would testify that Respondent-Applicant denied any allision occurred. The fourth witness would testify to the time that the UTV JOHN G. MORGAN arrived at the Bayou Boeuf Locks and how the paint flakes were observed on the starboard rake of JOHN G. MORGAN's barge.

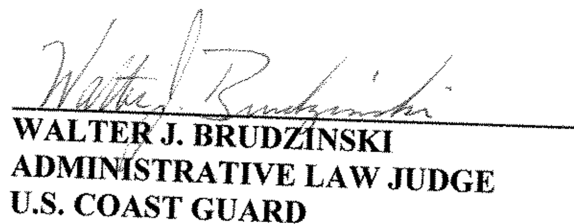
The exhibit list shows that Investigating Officer Exhibit 1 is a Report of Marine Accident, Injury, or Death, (CG-2692) containing Respondent-Applicant's statement that he had no knowledge of the allision. Investigating Officer Exhibit 2 is an Army Corps of Engineers incident report of the damage to the Corps' barge. Exhibit 3 contains 5 photographs depicting the damage to the Corps' barge. Exhibits 4 and 5 contain the paint scrapings from the Corps' barge and the UTV JOHN G. MORGAN. Therefore, I find that the Coast Guard had a reasonable basis in fact to initiate the underlying proceedings.

ORDER

IT IS HEREBY ORDERED that having found no adjudication in Applicant's favor, the fee application is **DENIED.**

IT IS FURTHER ORDERED that having found the Coast Guard's position "substantially justified," the fee application is **DENIED.**

Done and dated February 20, 2007
New York, NY



WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

APPEAL RIGHTS

49 CFR 6.35 Agency review.

Where Department review of the underlying decision is permitted, either the applicant or agency counsel, may seek review of the initial decision on the fee application, or the Department may decide to review the decision on its own initiative. If neither the applicant nor the agency counsel seeks review within 30 days after the decision is issued, it shall become final.

Certificate of Service

I hereby certify that I have this day serviced the forgoing ORDER upon the following parties and entitles via facsimile:

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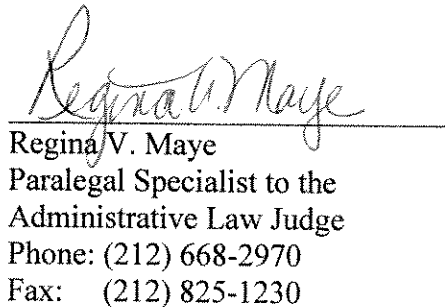
Done and dated February 20, 2007
New York, New York



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