**UNITED STATES OF AMERICA**
**DEPARTMENT OF HOMELAND SECURITY**
**UNITED STATES COAST GUARD**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | VICE COMMANDANT |
| v. | : | ON APPEAL |
| | : | NO. 2701 |
| MERCHANT MARINER CREDENTIAL | : | |
| Issued to: AARON LOUIS CHRISTIAN | : | |

**DECISION OF THE COMMANDANT ON APPEAL FROM DENIAL OF APPLICATION FOR ATTORNEY'S FEES FROM THE UNITED STATES COAST GUARD**

This appeal is taken in accordance with 5 U.S.C. § 504 and 49 C.F.R. Part 6.

By order dated July 21, 2011, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard denied Aaron Louis Christian's (hereinafter "Respondent's") application for attorney's fees and expenses incurred as a result of defending himself against a charge of misconduct brought by the Coast Guard against his merchant mariner credentials. Through its original Complaint, the Coast Guard alleged that Respondent committed misconduct and violation of law or regulation by manifesting a blood alcohol content level in excess of the Department of Transportation's Breath Alcohol standards. The Coast Guard subsequently amended its Complaint to remove the "violation of law or regulation" allegation. The allegation of misconduct remained and was a pending charge throughout all stages of the proceeding against Respondent's merchant mariner credentials. The misconduct allegation alleged that Respondent violated a company policy which prohibits employees from reporting to work under the influence of alcohol.

The hearing in the matter convened on September 22, 2009, in Houston, Texas. At the start of the hearing's second day, Respondent moved to dismiss the matter and the ALJ granted the Coast Guard an opportunity to submit a brief in opposition. The Coast Guard filed its opposition brief on October 8, 2009, and Respondent filed a reply to that brief on October 26, 2009. On October 27, 2009, the ALJ issued an order granting Respondent's Motion to Dismiss, with prejudice. The Coast Guard appealed the ALJ's decision and, on February 28, 2011, I reversed the ALJ's decision and remanded the matter for further proceedings. On April 4, 2011, the Coast Guard moved to withdraw the charges against Respondent. The Coast Guard's motion was granted by the ALJ, and the matter was dismissed with prejudice, on April 8, 2011.

On May 8, 2011, Respondent, through counsel, filed a timely Motion under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(2) ("EAJA"), for an award of fees and costs against the United States Coast Guard. Respondent seeks an award of $38,150.00 in attorney fees. The Coast Guard filed an answer that sought to establish substantial justification for filing the Complaint and to relieve the Government of liability for the fees and expenses claimed under EAJA.

The ALJ found that there was a basis in fact for the Coast Guard's initiation of charges against Respondent. In his Order Denying Respondent's Motion for Costs and Fees Under EAJA, the ALJ stated as follows regarding the factual basis for the Coast Guard's allegation:

> Testimony and evidence adduced at the underlying hearing revealed that before November 14, 2008 (the day he was selected and tested), Respondent had signed a Higman drug and alcohol policy and a testing consent form.
>
> Respondent's employer testified that on November 14, 2008, the Respondent was randomly selected for alcohol and drug testing. The Amended Complaint alleged that on November 14, 2008, Respondent was administered two breath alcohol tests which resulted in findings that Respondent had a blood alcohol content of .103 and .097 – both of which were in excess of the employer's definition of a positive drug test in the employment policy manual. Those positive results lead to the charges of Misconduct levied by the Coast Guard.

(internal citations omitted) [ALJ's Order Denying Respondent's Motion for Costs and Fees Under EAJA at 8-9]

The ALJ also found that there was a basis in law for the charge against Respondent's merchant mariner credentials. As the ALJ correctly noted, the applicable regulations provide that misconduct is:

> human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

46 C.F.R. § 5.27.

In its case-in-chief, the Coast Guard alleged that Respondent committed misconduct when he violated a Higman policy that proscribed an employee from having certain levels of alcohol in his blood. In his analysis, the ALJ questioned whether a company policy can provide the formal, duly established rule contemplated in the definition of the term "misconduct." However, he concluded that "it is certainly reasonable to conclude that there was a reasonable legal basis for the Coast Guard to proceed under that theory." [Order Denying Respondent's Motion for Costs and Fees Under EAJA at 13]

EAJA mandates an award when an agency fails to prevail in an adversary adjudication, unless the ALJ determines that special circumstances render an award unjust, or the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1).

The Government bears the burden of demonstrating that fees should not be awarded in a given case. *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982). "Substantially justified" means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Put another way, a position is substantially justified if it has a "reasonable basis both in law and fact." *Id.* "The reasonableness of the government's litigation position is determined by the totality of the circumstances, and we eschew any single-factor approach." *Essex Electro Engineers, Inc. v. United States (Essex)*, 757 F.2d 247, 253 (Fed. Cir. 1985).

In 49 C.F.R. § 6.5(a) the Department of Transportation[1] acknowledged the applicability of EAJA to Coast Guard Suspension and Revocation proceedings. The regulation provides: "No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail." 49 C.F.R. § 6.9. The regulation further states: "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." *Id.*

Appeal Decision 2312 (HITT) noted:

> With the passage of the Equal Access to Justice Act, Congress intended to ensure that agencies such as the Coast Guard would carefully evaluate their cases and elect not to pursue those which were weak or tenuous. At the same time, the language of the Act clearly protects the government agency when its case, though not prevailing has a reasonable basis in law and fact.

In this case, the ALJ was clearly correct when he said, "If the Coast Guard's underlying legal analysis is correct—that an employer's drug and alcohol policy can form the basis for a charge of Misconduct under 46 C.F.R. § 5.27 . . . – then I find that the Coast Guard had a reasonable factual basis to initiate the underlying proceedings. [Order Denying Respondent's Motion for Costs and Fees Under EAJA at 9]

As to a reasonable basis in law, the ALJ went on to consider that legal analysis. While expressing doubt, as noted above, he concluded that there was a reasonable legal basis for the Coast Guard to proceed under that analysis. The proposition is supported by Appeal Decision 1567 (CASTRO), which states: "A company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct." Higman's policy regarding the use of intoxicants and the levels of intoxicants present in an employee's system has a clear nexus to vessel safety and thus provides a valid basis for judging misconduct within 46 C.F.R.

[1] Title 49 of the Code of Federal Regulations governs activities by the Department of Transportation. 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 provide that regulations shall not be affected by the enactment of the Act or the transfer of an agency to the Department, but shall continue in effect until changed in accordance with law. 6 U.S.C. § 552(a).

§ 5.27. Thus, the ALJ did not err in finding that the Coast Guard's position had a reasonable basis in law.

Accordingly, the ALJ did not err in denying Respondent's motion for fees and costs under EAJA.

**ORDER**

The ALJ's "Order Denying Respondent's Motion for Costs and Fees Under EAJA" is AFFIRMED.

J.P. CURRIER
Vice Admiral, U.S. Coast Guard

Signed at Washington, D.C. this 22 day of July 2013, ~~2013~~.