UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

AARON CHRISTIAN,	§	
	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION NO. 1:13-CV-598
	§	
UNITED STATES DEPARTMENT	§	
OF HOMELAND SECURITY,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the court's Memorandum and Order (#30), signed January 30, 2015, granting the Defendant's Motion for Summary Judgment (#21), the court enters final judgment in favor of the Defendant. Plaintiff Aaron Christian shall take nothing by his suit.

THIS IS A FINAL JUDGMENT.

SIGNED at Beaumont, Texas, this 30th day of January, 2015.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

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Plaintiff,	§	
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UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	§	
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MEMORANDUM AND ORDER

Pending before the court are Plaintiff Aaron Christian's ("Christian") Motion for Summary Judgment (#22) and Defendant United States Department of Homeland Security's (the "Coast Guard") Motion for Summary Judgment (#21). Both parties move for summary judgment as to whether Christian is entitled to recover attorney's fees and expenses from the Coast Guard under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. Having reviewed the pending motions, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that summary judgment is favor of the Coast Guard is warranted.

I. Background

This case is an administrative appeal by Christian, who seeks review of a decision by an Administrative Law Judge ("ALJ"), affirmed by the Vice Commandant of the Coast Guard (the "Commandant"), denying Christian attorney's fees and expenses incurred in an adversary adjudication brought by the Coast Guard. Christian was employed by Higman Marine Services ("Higman") as a Coast Guard-licensed merchant mariner from September 2, 2005, to November 14, 2008, when Higman terminated him for violating company policy by reporting to work under

the influence of alcohol. On May 6, 2009, the Coast Guard filed an administrative complaint against Christian, alleging that he committed misconduct and violated a law or regulation by having a blood alcohol content level in excess of the Department of Transportation's breath alcohol standards. The Coast Guard's complaint sought "12 months outright suspension followed by 24 months probation." On August 18, 2009, the Coast Guard amended its complaint, dropping the claim that Christian violated a law or regulation, but maintaining that he committed misconduct by violating Higman's company policy, which prohibits employees from reporting to work under the influence of alcohol. Subsequently, Christian filed a motion for summary decision, which was denied, and a motion to dismiss, which was granted by the ALJ on October 27, 2009, dismissing the Coast Guard's complaint with prejudice.[1] The Coast Guard appealed the decision to the Commandant, who reversed the ALJ's dismissal and remanded the case back to the ALJ on February 28, 2011.[2] Following the remand, the Coast Guard moved to withdraw the charges,[3] and the ALJ dismissed the case with prejudice on April 8, 2011.

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[1] In an amended order dismissing the Coast Guard's administrative complaint, the ALJ found that Higman had violated the regulatory procedures for drug and alcohol testing of maritime personnel by administering a test to Christian in a non-random fashion and without reasonable cause, despite the complaint's allegation that Christian was chosen for testing at random.

[2] The Commandant reversed the dismissal on the ground that the ALJ improperly applied inapplicable regulations to Higman's alcohol testing procedures and held that Christian was not required to be tested at random.

[3] In its motion for withdrawal, the Coast Guard stated: "Well over two years have passed since the misconduct that gave rise to this administrative action was committed. Therefore, in the interest of justice and the efficient use of judicial resources, the Coast Guard moves to withdraw the charges against [Christian]."

One month later, on May 8, 2011, Christian filed an EAJA motion with the ALJ under 5 U.S.C. § 504(a)(1),[4] seeking an award of $38,150.00 in fees and expenses against the Coast Guard. The ALJ denied an award of fees, holding that Christian was a prevailing party, yet he was not entitled to fees or expenses because the Coast Guard was substantially justified in its position, both in fact and in law.[5] On appeal, the Commandant affirmed the ALJ's denial of fees, holding that "the ALJ did not err in denying [Christian's] motion for fees and costs under the EAJA." Christian then invoked 5 U.S.C. § 504(c)(2), asking this court to review the merits of the denial of an award of fees or expenses. Both parties filed motions for summary judgment, seeking a ruling by the court as to whether there is substantial evidence in the record below to support the Commandant's finding that the Coast Guard was substantially justified in bringing a case against Christian, thus precluding Christian from obtaining an award of fees or expenses.[6] This court finds that there is.

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[4] Section 504 is a companion statute to 28 U.S.C. § 2412, also part of the EAJA. 93 AM. JUR. 2d *Trials* § 39 (Supp. 2014). Section 504 allows an administrative agency to award fees against the agency in an "adversary adjudication," whereas section 2412 applies to fee awards by federal courts. *See* 5 U.S.C. § 504; 28 U.S.C. § 2412; 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.172[1][b] (3d Ed. 2014). Because this court is reviewing the denial of a fee award in an adversary adjudication, section 504 controls. *See* 5 U.S.C. § 504(b)(1)(C) (defining an adversary adjudication).

[5] The ALJ found that the Coast Guard had a basis in fact to bring charges of misconduct against Christian because there was evidence that the results of his two alcohol tests were in excess of the Higman employee policy limitation. Further, the ALJ found that the Coast Guard had a basis in law because a reasonable person could conclude that Higman's alcohol policy constituted a "rule" that could form the basis of a charge of misconduct under 46 C.F.R. § 5.27.

[6] The final administrative decision is that of the agency—in this case, the Coast Guard—therefore, the Commandant's decision is the decision reviewed under the EAJA. *See* 5 U.S.C. § 504(a)(3); *see also Lion Unif. Inc., Janesville Apparel Div. v. N.L.R.B.*, 905 F.2d 120, 123 (6th Cir. 1990); *United Bhd. of Carpenters & Joiners of Am. v. N.L.R.B.*, 891 F.2d 1160, 1164 (5th Cir. 1990) (reviewing the National Labor Relations Board's decision, not the ALJ's).

II. Attorney's Fees—Equal Access to Justice Act

A. Standard of Review

Section 504(a)(1) of the EAJA allows a prevailing party in an adversary adjudication to collect "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." 5 U.S.C. § 504(a)(1). The parties here do not dispute that Christian was the prevailing party or that the underlying proceeding was an adversary adjudication.[7] Rather, Christian argues that he should have been awarded fees because the Coast Guard's position in the proceeding was not substantially justified.

In an EAJA action, the agency bears the burden of proving that its position was substantially justified—that it was "justified to a degree that could satisfy a reasonable person"—and its position must be substantially justified not only at the filing of the charge but throughout the course of the litigation. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see Sims v. Apfel*, 238 F.3d 597, 602 (5th Cir. 2001); *Gate Guard Servs. L.P. v. Perez*, 14 F. Supp. 3d 825, 836 (quoting *Baker v. Bowen*, 839 F.2d 1075, 1080 (5th Cir. 1988)). Moreover, the agency's position is substantially justified only if it has a "reasonable basis both in law and fact." *Pierce*, 487 U.S. at 565; *see Davidson v. Veneman*, 317 F.3d 503, 506 (5th Cir. 2003) ("Substantial justification is a higher burden then [sic] that of sanctions for frivolousness; the Government's position must have a reasonable basis both in law and fact.") (citation omitted).

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[7] The Coast Guard's motion for summary judgment states: "The ALJ found [Christian] to be a prevailing party for purposes of the EAJA. While [the Coast Guard] disagrees with this finding, the prevailing party status was not addressed by the [Commandant's] Decision, and thus this brief focuses solely on the issue of substantial justification."

In other words, "the position of the government will be deemed to be substantially justified 'if there is a genuine dispute . . . or if reasonable people could differ as [to the appropriateness of the contested action]." *Davidson*, 317 F.3d at 506 (quoting *Pierce*, 487 U.S. at 565) (alteration in original) (internal quotation marks omitted). Thus, it is not up to this court to decide if the Coast Guard was correct in its position, but only to determine whether "a reasonable person could countenance the Coast Guard's position in the particular context of this dispute." *Bruch v. U.S. Coast Guard*, 749 F. Supp. 688, 694 (E.D. Pa. 1990).[8]

The EAJA further permits a litigant who is dissatisfied with the Commandant's denial of fees to appeal that decision "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." 28 U.S.C. § 504(c)(2). In hearing the appeal, any determination by this court must "be based solely on the factual record made before the agency," and the fees or expenses award may be modified "only if the court finds that the failure to make an award of fees or other expenses . . . was unsupported by substantial evidence." *Id.*; *United Bhd. of Carpenters & Joiners of Am.*, 891 F.2d at 1162. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce*, 487 U.S. at 565 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229) (1938)) (internal quotation marks omitted); *see Aquatek Sys. Inc. v. Occupational Safety & Health*

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[8] The Coast Guard contends that it is entitled to a presumption of substantial justification because it survived two dispositive motions—a motion for summary decision and a motion to dismiss—in the original proceeding. The Coast Guard cites *United States v. Thouvenot, Wade & Morerschen, Inc.*, wherein the United States Court of Appeals for the Seventh Circuit stated: "[T]here is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." 596 F.3d 378, 382 (7th Cir. 2010). Because this court finds that there was substantial evidence in the record as whole for the Commandant to base his finding that the Coast Guard was substantially justified in bringing a charge of misconduct against Christian, this issue need not be addressed further.

Review Comm'n, 223 F. App'x 404, 405 (5th Cir. 2007); *Broussard v. Bowen*, 828 F.2d 310, 311-12 (5th Cir. 1987). Therefore, in this initial judicial review of the Commandant's denial of an award of fees or expenses to Christian, the court applies the substantial evidence standard.[9] *See Lion Unif. Inc., Janesville Apparel Div.*, 905 F.2d at 123; *United Bhd. of Carpenters & Joiners of Am.*, 891 F.2d at 1162.

B. The Commandant's Decision

The Commandant, in affirming the ALJ's denial of an award of fees or expenses, found that the Coast Guard was substantially justified in bringing and maintaining a charge of misconduct against Christian. Reviewing the "administrative record, as a whole," the Commandant concluded that the Coast Guard had a reasonable factual and legal basis for initiating the proceedings. Specifically, the Commandant held that "Higman's [alcohol] policy . . . provides a valid basis for judging misconduct within 46 C.F.R. § 5.27," and that the Coast Guard was substantially justified in finding that Christian violated Higman's policy.

Christian, however, argues that the Coast Guard was not substantially justified in bringing a suspension hearing against him either in law or in fact. Regarding the Coast Guard's basis in fact, Christian contends that: (1) the alcohol test administered to Christian was not administered

[9] Christian did not provide the court with guidance regarding the applicable standard of review, and the Coast Guard asserted that the standard should be a "deferential, abuse-of-discretion" standard. The case upon which the Coast Guard relies for this proposition, *Bruch v. U.S. Coast Guard*, adopted the abuse-of-discretion standard instead of the substantial evidence standard based on the United States Supreme Court's holding in *Pierce v. Underwood*. *See* 487 U.S. at 560-61; *Bruch*, 749 F. Supp. at 694 n.7. The Court in *Pierce*, however, was addressing the standard for an appellate court's review of a district court's grant or denial of an award under 28 U.S.C. § 2412, rather than 5 U.S.C. § 504, which governs review of an administrative adjudication. *Pierce*, 487 U.S. at 559 (noting the difference between the two statutes). Furthermore, the Fifth Circuit has articulated that the proper standard in an "initial review of an administrative ruling by an article III court" is the substantial evidence test. *United Bhd. of Carpenters & Joiners of Am.*, 891 F.2d at 1162. Therefore, this court will analyze the underlying proceedings under the substantial evidence standard.

on a random basis; (2) the Coast Guard "proceed[ed] with [a suspension and revocation] hearing knowing their facts were wrong;" (3) Christian was not "reporting to work" on November 14, 2008, therefore he could not have violated Higman's alcohol policy; and (4) "Christian has not read, signed for, or ever been given a copy of [Higman's] policy manual." Further, Christian argues that the Coast Guard lacked a legal basis to bring its charge because: (1) the ALJ and the Commandant did not have jurisdiction over the initial proceeding; and (2) Higman's alcohol policy does not constitute a "formal, duly established rule" upon which a charge of misconduct can be based. The Coast Guard disputes each of these claims and maintains that this court should find that the record contains substantial evidence upon which the Commandant based his denial of an award.

C. Basis in Fact

1. Administrative Complaint Allegations

Christian asserts that the Coast Guard was not substantially justified in charging him with misconduct because the alcohol test that was given to him on November 14, 2008, was not administered randomly. As a result, Christian argues, there were problems with the allegations in the complaint. Christian also avers that the Coast Guard filed the administrative complaint in bad faith, knowing that it could not support a charge of misconduct.

In the original proceeding, Christian filed a motion to dismiss the administrative complaint because the alcohol test was not random. The ALJ agreed with Christian and dismissed the case, holding that 46 C.F.R. § 16.230 required the test subjects to be selected by a scientifically valid method, which was not used by the Coast Guard in this instance. The Commandant, on appeal, reversed the ALJ's decision, holding that "there are no regulations that govern the maritime

industry's selection of mariners for random alcohol testing" and that the ALJ "committed an error of law and thereby abused his discretion" by "strictly applying an inapplicable regulation"—46 C.F.R. § 16.230. The Commandant then remanded the case back to the ALJ for further proceedings.

Thus, Christian's argument that the Coast Guard was not substantially justified in charging him because the alcohol test was not random is puzzling at best. First, the Commandant held that the test was not required to be random, a decision that Christian does not now contest. Further, the Coast Guard's complaint alleges that Christian committed misconduct by violating Higman's alcohol policy, which prohibits employees "from reporting to work . . . under the influence of alcohol, regardless of when or where the prohibited substance entered the person's system." Although the complaint states that Christian "failed to follow company policy by testing positive during a random alcohol test with a BAC of .109," the Coast Guard's allegations are not ill-founded or made in bad faith solely because the test was not administered randomly. Finally, Christian's claim that the Coast Guard had "no real basis in law or in fact to support a misconduct charge" is contrary to the evidence presented in the record, which contains testimony regarding Higman's alcohol policy and Christian's awareness of the policy, testimony that Christian tested positive for high alcohol levels, and testimony that Christian was reporting to work for a crew change on the day of the testing. Thus, there was substantial evidence in the record for the Commandant to find that the Coast Guard's position had a basis in fact.

2. Higman's Alcohol Policy

Christian further asserts that the Coast Guard was not substantially justified in charging him with misconduct because he was unaware of Higman's alcohol policy, and he did not violate the policy because he was not "reporting to work" on November 14, 2008.

The Coast Guard brought the charge under 46 C.F.R.§ 5.27, which defines "misconduct" as:

> 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. The administrative complaint alleges that Higman's alcohol policy constitutes a "formal, duly established rule," and that Christian violated the policy. The regulation does not expressly require that the "rule" be knowingly violated, and the court has been unable to unearth case law stating that the Coast Guard must prove Christian knew of the policy to be in violation of it. In any event, the evidence presented before the ALJ showed that Christian received Higman's employee policy on September 6, 2005, and signed a separate Alcohol and Drug Screen Consent form, which restated Higman's policy in different terms.

Higman's alcohol policy provides:

> [T]he Company prohibits all employees and contract employees from reporting to work having used illegal or unauthorized drugs or under the influence of alcohol, regardless of when or where the prohibited substance entered the person's system. The possession, use, or consumption of alcohol beverages, illegal or unauthorized drugs, or other controlled substances while on Company, or company customer's premises is strictly prohibited.

The separate Alcohol and Drug Screen Consent form, signed by Christian, maintained the spirit the policy, stating in capital letters at the top of the form: "This company strictly prohibits the

use, possession or transfer of illegal drugs, drug paraphernalia or alcohol aboard company vessels or on any other company property." Accordingly, there is substantial evidence in the record to support the conclusion that Christian was aware of the alcohol policy on the date of his termination.

Christian also maintains that he could not have violated Higman's alcohol policy because he was not "reporting to work," as the policy requires. Christian asserts that he was not due to return to work on November 14, 2008; rather, he was on Higman property merely to check the schedule for his return date. The record contains evidence that Higman crew members operate on a variety of schedules: either working a 20-day shift with 10 days off between shifts (a "20/10 shift"), a 28-day shift with 14 days off between shifts ("a 28/14 shift"), or a 30-day shift with 15 days off between shifts ("a 30/15 shift"), depending on the vessel to which the crew member is assigned. *See, e.g.*, U.S.C.G. Supp. 0036-37, Transcript of Record at 138, 141, 145. The parties also refer to this as a "two day on, one day off policy." *See id.* at 0039, Transcript of Record at 151.

The parties do not contest that Christian worked a total of 38 consecutive days, spending 10 days on the *Freeport* vessel and 28 days on the *Chesapeake* vessel. The parties dispute, however, the day on which Christian was due back: Christian argues that he had 19 days off, according to the two day on, one day off policy, resulting in a return date of November 19; the Coast Guard asserts that he had only 14 days off, due to the *Chesapeake*'s 28/14 shift schedule, resulting in a return date of November 14. Thus, Christian asserts that he could not have been reporting to work when he was not scheduled to be back until November 19. Lastly, Christian

points out that he was not paid or assigned to an identified vessel on November 14 as evidence that he was not reporting to work on that date.

Evidence in the record supports each party's claim. Indeed, there is evidence that Christian worked 38 days and that, per the two day on, one day off policy, he would not have been due back for 19 days. *See* U.S.C.G. Supp. 0039, Transcript of Record at 151. There is also evidence that he was "filling in"—or, working extra days—on the *Freeport*, that he was paid for these 10 days, and that they would not affect his 28/14 schedule on his assigned vessel—the *Chesapeake*. *See* U.S.C.G. Supp. 0040-41, Transcript of Record at 157-158. Likewise, the record indicates that Christian was going to be boarding a vessel on November 14, although the precise vessel had not yet been determined, and that Christian would have been paid for November 14, had he not been terminated that day. *See* U.S.C.G. Supp. 0023, Transcript of Record at 87-88; U.S.C.G. Supp. 0038, Transcript of Record at 148-49. Therefore, the Commandant could have reasonably concluded that Christian was "reporting to work" on November 14, 2008, based on substantial evidence found in the record. Accordingly, the Commandant's finding that the Coast Guard had a basis in fact for maintaining a charge against Christian is supported by substantial evidence.

D. Basis in Law

Next, this court must determine whether the Coast Guard's position was reasonable in law—that is, whether there is substantial evidence in the record as a whole from which the Coast Guard could bring an action for suspension of Christian's license based on his violation of the Higman company alcohol policy. *See Pierce*, 487 U.S. at 561 (stating that the question before the court is "not what the law now is, but what the Government was substantially justified in believing it to have been"). This court holds that there is adequate evidence.

1. The ALJ's Jurisdiction Over the Original Administrative Complaint

Christian first asserts that the ALJ did not have jurisdiction over the underlying license suspension and revocation hearing. The Coast Guard charged Christian with violating 46 U.S.C. § 7703(1)(B), which provides: "A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder (1) when acting under the authority of that license, certificate, or document . . . (B) has committed an act of misconduct or negligence." The governing regulations provide further explanation:

> (a) A person employed in the service of a vessel is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is:
>
> (1) Required by law or regulation; or
>
> (2) Required by an employer as a condition for employment.
>
> * * *
>
> (c) A person does not cease to act under the authority of a credential or endorsement while on authorized or unauthorized shore leave from the vessel.

46 C.F.R. § 5.57; *see Ailsworth*, EM-211 N.T.S.B., 2011 WL 7141395, at *29, n.17 (2011).

Christian argues that the ALJ lacked jurisdiction because Christian was not "acting under the authority" of his license at the time he allegedly committed misconduct. According to Christian, jurisdiction must be based upon the second prong—the "condition of employment" prong—and, in this case, the requirements of this prong are not met because the "character of [his] employment at the time of the offense [did not] involv[e] the scope of the license or document issued." In support of his argument, Christian asserts that he "was not aboard a vessel, was not assigned to a vessel, and was not due to be onboard a vessel" on November 14, 2008.

Despite these claims, Christian did not contest the ALJ's jurisdiction at the outset of the proceeding. *See* U.S.C.G. Supp. 0011, Transcript of Record at 39. In any event, this court finds that the ALJ had jurisdiction over the original proceeding under the "condition of employment" prong. Courts addressing jurisdiction under this prong have held that "one is acting under the authority of a license where the employer requires possession of the license to serve aboard the vessel." *Williams*, EM-181 N.T.S.B., 1996 WL 30281, at *6 (1996) (citing *Guizzotti*, 2497 C.G.C.D.A., 1990 WL 10011222 (1990); *Simmons*, 2411 C.G.C.D.A., 1985 WL 668768 (1985); *Ougland*, 1131 C.G.C.D.A., 1960 WL 63693 (1960)). The record contains evidence that Higman requires such licensing for its steersmen, the position that Christian held at the time of his termination,[10] stating that all steersmen must hold: "[a] valid and current license as Master of Towing Vessels with a current Radar Observer Endorsement [and a] valid and current Tankerman-PIC license." *See* U.S.C.G. Supp. 0321, Higman Policy and Procedures Manual at 5-15. Furthermore, the regulations specifically state that "[a] person does not cease to act under the authority of a credential or endorsement while on authorized or unauthorized shore leave from the vessel." 46 C.F.R. § 5.57(c). Therefore, Christian's allegations that he was not aboard, assigned to, or due to be onboard a vessel are of no consequence.

2. Higman's Policy as a Formal, Duly Established Rule

As stated before, Christian could be charged with misconduct only if he violated some "formal, duly established rule." 46 C.F.R. § 5.27. The regulation explains that "[s]uch rules are

[10] Christian was hired as a tankerman on September 2, 2005. *See* U.S.C.G. Supp. 0452. At that time, he held a valid Tankerman-PIC license, which was required to begin work as a tankerman under Higman's Policy and Procedures Manual. *See* U.S.C.G. Supp. 0324, 0456 On July 3, 2008, he was promoted to steersman after he received his Steersman of Towing Vessels license. *See* U.S.C.G. Supp. 0482. The Coast Guard's amended complaint states that Christian acted under the authority of his Tankerman license when committing misconduct. *See* U.S.C.G. 0481.

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." *Id.* The ALJ found that Higman's alcohol policy was not a statute, regulation, the common law, the general maritime law, or shipping articles, and the Commandant found no error in this finding. Rather, the ALJ focused on "a ship's regulation or order," and compared Higman's alcohol policy to employment policies in two cases, *Passaro* and *Castro*. *See Passaro*, 2640 C.G.C.D.A., 2003 WL 22937932 (2003), *aff'd*, EM-199 N.T.S.B., 2004 WL 817119 (2004); *Castro*, 1567 C.G.C.D.A., 1966 WL 87832 (1966).

In *Passaro*, Anthony Passaro's ("Passaro") license and merchant marine document were suspended on a charge of misconduct. The Coast Guard alleged that Passaro committed misconduct by violating the Vessel Instruction Manual and Chief Engineer's Standing Order when he pumped bilge water directly overboard, instead of passing it through the oily water separator first. Passaro appealed the ALJ's suspension to the Commandant, who affirmed, finding that the Vessel Instruction Manual and Chief Engineer's Standing Order constituted a "formal, duly established rule" under which a misconduct charge could be maintained. *Passaro*, 2003 WL 22937932, at *6. The decision was further affirmed by the National Transportation Safety Board. *See Passaro*, 2004 WL 817119, at *1.

Castro, like *Passaro*, involved a charge of misconduct resulting in a suspension of Juan Castro's ("Castro") seaman documents. Castro was serving as a deck maintenance man aboard a vessel when his supervisors discovered that he had liquor bottles in his possession. He was charged with misconduct, but protested the charge, claiming that the hearing was actually seeking to "enforce regulations of a steamship company rather than a Federal rule or regulation." *Castro*,

1966 WL 87832, at *1. The Commandant rejected this assertion, stating: "A private steamship company's policy for maintenance of order and good safety conditions aboard a vessel, governing the conduct of the crew, is precisely the kind of rule that does establish standards for the invocation of the 'misconduct' provision of R.S. 4450." *Id.* at *2. The Commandant further explained: "A company policy as to the conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct."

Christian challenges the ALJ and the Commandant's reliance on these cases because Passaro and Castro were both aboard their respective vessels when they committed acts in violation of their companies' policies. Here, by contrast, Christian was not aboard a vessel, although the Coast Guard alleges that he was due to be aboard a vessel that day. The ALJ recognized this distinction, stating: "This court is of the opinion that corporate employment manuals/drug policies are not of the character of documents referred to in *Passaro* and *Castro*." Nonetheless, the ALJ determined that "reasonable minds might differ on that point," and that the Coast Guard was "certainly reasonable" in concluding that Higman's alcohol policy could be of equal character when bringing a charge of misconduct against Christian, noting that "plainly it can be argued that alcohol has a potential impact upon the *operational command and control of a vessel*." (emphasis in original). Furthermore, the Commandant agreed with the ALJ and elaborated on the connection between alcohol use and safety: "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. § 5.27." While the Commandant in *Castro* found that a company policy addressing crew member actions and clothing while ashore "could have no connection with safety aboard the ship," Higman's

policy in this case dealt not with clothing or "act[ing] in certain ways," but with drug and alcohol intoxication—a rule that reasonably could be perceived as having a safety connection. Therefore, the Commandant's findings in this case are not clearly contrary to those in *Castro*, where the Commandant found that "a 'company policy' designed to achieve safety at sea can, when so treated by the master of the vessel, become a lawful order of the master." *Castro*, 1966 WL 87832, at *2.

In sum, the Commandant found that the Coast Guard was substantially justified in making the inference that the term "misconduct" included the violation of rules contained in company policies. As stated previously, there is substantial evidence in the record to support this finding. The Commandant, therefore, adopted an interpretation of "misconduct" supported by substantial evidence in the record when he found that the Coast Guard had a legal basis on which to base its charge. Accordingly, summary judgment in favor of the Coast Guard is warranted.

III. Conclusion

Consistent with the foregoing analysis, the Coast Guard's motion for summary judgment is granted. Christian's motion for summary judgment is denied.

SIGNED at Beaumont, Texas, this 30th day of January, 2015.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE