

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. 2686
	:	
	:	
	:	
<u>Issued to: VLADIMIR SALAMON</u>	:	

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.

FACTS & PROCEDURAL HISTORY

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner license at issue in this proceeding.

By a Decision and Order (hereinafter "D&O") dated May 2, 2008, Coast Guard Chief Administrative Law Judge (hereinafter "CALJ") Joseph N. Ingolia, dismissed the Coast Guard Complaint against the Merchant Mariner License of Vladimir Salamon (hereinafter "Respondent") upon finding that the Investigating Officer (hereinafter "IO") failed to follow required regulations. The Complaint from which the D&O resulted alleged that on August 14, 2007, Respondent committed misconduct by failing to report a marine casualty as required by 46 C.F.R. § 4.05-1(a). Additionally, the Complaint alleged he committed acts of negligence by failing to sound the proper sound signals and

obtain early warning of the risk of collision as prescribed by 33 U.S.C. §§ 2035(c) and 2007(b).

On November 15, 2007, Respondent executed a “Good Faith Deposit” with the IO whereby the Coast Guard received possession of Respondent’s license while the IO continued his investigation into the marine casualty. The terms of the Good Faith Deposit specified that if the Coast Guard did not issue a complaint in this matter, then the license would be returned. If, however, a complaint was issued and an ALJ ordered a suspension of the credential, the agreement specified that the Coast Guard would recommend that the ALJ credit the time the license had been on deposit toward the suspension.<sup>1</sup>

On March 10, 2008, the Coast Guard filed a Complaint against Respondent’s license alleging one act of misconduct and one act of negligence. [Complaint at 2] The Complaint was personally served on Respondent and a copy faxed to the ALJ Docketing Center. [Appellate Brief at 3; Complaint at 5]<sup>2</sup> On March 20, 2008, Respondent filed his Answer, admitting all jurisdictional and factual allegations. [Answer] Respondent also indicated that he agreed with the proposed order of a four-month outright suspension against his Merchant Mariner’s License. [*Id.*]

On March 24, 2008, (four months after the execution of the Good Faith Deposit agreement and 13 days after filing the Complaint) the IO returned Respondent’s license. [Receipt for U.S. Coast Guard Credential]

<sup>1</sup> The agreement also stated that the ALJ was not bound by the agreement and could choose not to accept the Coast Guard’s recommendation.

<sup>2</sup> The Complaint was date stamped as being received by the ALJ Docketing Center on March 11, 2008 and a second complaint was received by the ALJ Docketing Center on March 25, 2008. This second complaint was marked in ink as “Amended.” The record shows (consistent with the explanation of the Coast Guard provided in footnote 2 of its Appellate Brief at 3) that the two complaints are identical with the only difference being that the version received by the ALJ Docketing Center on March 25<sup>th</sup> contains Respondent’s signature acknowledging receipt.

On May 2, 2008, the CALJ issued the D&O dismissing the Complaint after finding that the IO failed to follow required regulations. The CALJ further ordered that the Respondent's official record not reflect the marine casualty or the resultant four-month voluntary suspension and that the Coast Guard make certain that IOs are properly trained and supervised. [D&O at 3]

The record contains no indicia that either the Coast Guard or Respondent filed a motion to dismiss the action. Moreover, there is no indication that the CALJ conducted any conferences with the parties. There appear to have been no factual disputes and the CALJ did not hold a hearing in the proceeding prior to issuing the D&O. On May 30, 2008, the Coast Guard filed a Notice of Appeal in the matter and subsequently perfected its appeal by filing an Appellate Brief on July 1, 2008. Therefore, this appeal is properly before me.

APPEARANCE: Respondent did not appear. The Coast Guard Investigating Officer was LTJG Greg Loveless of Sector Los Angeles / Long Beach. LCDR Chris Tribolet and LT Jonathan Alexander of the Eleventh Coast Guard District Legal Office filed the appellate brief.

#### BASES OF APPEAL

The Coast Guard appeals the CALJ's Order dismissing the Complaint against Respondent. After a thorough review of the Coast Guard's filings, the assignments of error are summarized as follows<sup>3</sup>:

---

<sup>3</sup> Unfortunately, the Coast Guard did not specifically identify the issues they wished to appeal in their brief, leaving it to me to divine the issues discussed herein. Appealing parties are encouraged to specifically frame issues in their brief. Based on the outline of the Coast Guard's argument in its brief, the assignments of error were identified as: 1) The ALJ erred as a matter of law in asserting that the IO failed to follow the appropriate regulations (Appellate Brief at 4); 2) The ALJ erred as a matter of law in asserting that Good Faith Deposits require oversight by an ALJ (*Id.* at 6); 3) The ALJ erred as a matter of law in

- I. *The CALJ abused his discretion in dismissing the Complaint after declaring that the IO failed to follow the appropriate regulations by accepting a good faith deposit of a license;*
- II. *The CALJ abused his discretion by issuing an ultra vires order to have the Respondent's official record cleansed of any mention of the marine casualty or the resultant four-month voluntary suspension period.*

### OPINION

*I. The CALJ abused his discretion in dismissing the Complaint after declaring that the IO failed to follow the appropriate regulations by accepting a good faith deposit of a license.*

#### A.

The Coast Guard's appeal hinges on whether the CALJ abused his discretion in dismissing the Complaint at the stage of the proceeding where the action was taken. A prior CDOA has outlined the test for abuse of discretion:

The standard of review for abuse of discretion is highly deferential. A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion ... [A]buse of discretion occurs where a ruling is based on an error of law or, where based on factual conclusions, is without evidentiary support. 5 Am. JUR. 2D *Appellate Review* § 695 (1997) (footnotes omitted). Appeal Decision 2610 (BENNETT).

The CALJ issued the D&O in this proceeding after Respondent filed his Answer, but before any conferences or hearings were held. Actions available to an ALJ are discussed in 33 C.F.R. Subpart I. In particular, 33 C.F.R. § 20.902(a) states that "[a]fter closing the record of the proceeding, the ALJ shall prepare a decision containing . . . [a]

---

asserting that the IO failed to timely file the Complaint with the ALJ Docketing Center (*Id.* at 8); and 4) The ALJ's order to redact the marine casualty from respondent's record was *ultra vires* (*Id.*). The second and third assignments of error are within the scope of the first, and the first assignment of error is actually an argument for abuse of discretion vice an error of law. The assignments of error are summarized accordingly.

finding on each material issue of fact and conclusion of law, and the basis for each finding....” In addition, the regulations discuss ALJ orders as follows:

The Administrative Law Judge enters an order which recites the disposition of the case. When the finding is *not proved*, the Administrative Law Judge issues an order *dismissing* the proceeding with or without prejudice to refile. When the finding is *proved*, the Administrative Law Judge may order an *admonition*, *suspension* with or without probation, or *revocation*.” (Emphasis in original). 46 C.F.R. § 5.567(a).

A review of the CALJ’s D&O in the context of these regulations shows that the D&O does not contain “a finding on each material issue of fact and conclusion of law, and the basis for each finding” as required by 33 C.F.R. § 20.902. The ALJ can choose to accept the proposed order within the Complaint as agreed to within the Answer, or determine his own, but first he must rule on whether the Complaint was proved. Here, the CALJ dismissed the Complaint without ever determining whether the Coast Guard’s allegations were proved or not proved. *Contra.*, 46 C.F.R. § 5.567.

The only other way the ALJ could have dismissed the action would have been a ruling in response to a motion to dismiss by the Respondent, pursuant to 33 C.F.R. § 20.311(d), but there was no motion to dismiss the action filed by either party.<sup>4</sup> While 33 C.F.R. § 20.311(e) provides that “a dismissal resides within the discretion of the ALJ,” that section must be read in the context of § 20.311(d). A motion must be filed before the ALJ has authority to dismiss the action; it cannot be done *sua sponte*.

In the absence of a finding on the merits, a motion for withdrawal by the Government or a motion to dismiss by the Respondent, the CALJ had no basis in law for

---

<sup>4</sup> Rather than a motion to dismiss, the Coast Guard may file a “notice of withdrawal” pursuant to 33 CFR § 20.311(b).

dismissing the Complaint. Therefore, it was an abuse of discretion for the CALJ to issue the D&O ordering dismissal.

Absent a motion from Respondent citing a basis for dismissal as well as evidence to support it, the options available to the CALJ were limited to requiring a prehearing conference between the parties to identify the issue (33 C.F.R. § 20.1207(c)(i)), hold a hearing, or review the Complaint and Answer and issue a D&O finding the allegations proved or not proved. None of these actions occurred. The case must be remanded.

B.

Even if the Respondent had filed a motion to dismiss, an ALJ's discretion to dismiss an action is limited. 33 CFR § 20.311(d) states that:

Any respondent may move to dismiss a complaint, the government may move to dismiss a petition, or any party may lodge a request for relief, for failure of another party to—

- (1) Comply with the requirements of this part or with any order of the ALJ;
- (2) Show a right to relief based upon the facts or law; or
- (3) Prosecute the proceeding.

The CALJ dismissed the Complaint on the basis of his determination that the IO "failed to follow the required regulations," presuming that the pre-Complaint "Good Faith Deposit" of his license somehow prejudiced the Respondent, [D&O at 3], and in the belief that dismissal was justified pursuant 33 C.F.R. 20.311(d)(2) for the IO's failure to "comply with the requirements of this part" because of a perceived right to relief.<sup>5</sup>

---

<sup>5</sup> In analyzing this case under 33 C.F.R. § 20.311(d)(1), I note that the regulations for the surrender or voluntary deposit of a license or document are found in Title 46 C.F.R., Part 5, §§ 5.201-03, not Title 33, Part 20, e.g., not "this Part" for the purposes of such an action. That would therefore present an obstacle to finding noncompliance with Part 20 to the degree that those regulations are in question.

In order for the CALJ to dismiss the complaint under 33 C.F.R. § 20.311(d)(2), the Respondent upon moving to dismiss the complaint would have to "show a right to relief based upon the facts or the law." In this case, that would mean that the Respondent must show that his agreement to deposit his license in exchange for a specific recommendation by the IO at the hearing, which the CALJ characterized as voluntary, was within the jurisdiction of the ALJ in the first instance, and if it was, that the deposit was either specifically prohibited by law, and thus void *ab initio*, or the actions of the IO in brokering the Good Faith Deposit were so violative of either due process or public policy concerns that the complaint cannot stand. Even if the Respondent had moved to dismiss here, and the CALJ had jurisdiction to consider the voluntary deposit, I cannot conclude that the agreement between the Respondent and the Coast Guard violated the law, due process, or public policy.

Coast Guard regulations allow for two types of deposits of licenses or documents. First, "[a] holder may deposit a credential or endorsement with the Coast Guard in any case where there is evidence of mental or physical incompetence." 46 C.F.R. § 5.201(a). "A voluntary deposit is accepted on the basis of a written agreement . . . which specifies the terms and conditions upon which the Coast Guard will return the credential or endorsement to the holder." *Id.* Second, "[a]ny holder may surrender a credential or endorsement to the Coast Guard in preference to appearing at a hearing. 5 C.F.R. § 5.203(a). However, if such action is taken, the license is surrendered permanently and no hearing occurs. 5 C.F.R. § 5.203(b).

The agreement between the IO and the Respondent does not precisely fall within either of the actions described in the regulations. The present action most closely

resembles the voluntary deposit described in 5 C.F.R. § 5.201, except the basis for the deposit was not physical or mental incompetence (i.e., some medical disability), but instead based on allegations of negligence and misconduct.<sup>6</sup> The fact that the basis for the deposit differed from those affirmatively specified in the regulations does not make such action prohibited where the regulations do not preclude such arrangements. The Coast Guard and Respondent are free to come to terms on a proposed order prior to submission of the Complaint and Answer, particularly where a respondent obtains a perceived benefit. Moreover, there is no evidence that the surrender was other than wholly voluntary.

This analysis should not however, be read to condone the IO's decision to accept a Good Faith deposit from Respondent prior to filing the Complaint. Because of the potential for abuse, pre-complaint Good Faith Deposits should not be executed unless specific procedures or regulations allowing for such action are promulgated by the Coast Guard. However, in this case there is nothing in the record that indicates the Respondent's rights were abused, or that a pre-Complaint Good Faith Deposit violates the public policy of maintaining standards for competence and conduct essential to the promotion of safety at sea<sup>7</sup> while preserving the due process rights of the mariner.<sup>8</sup> The Respondent is entitled to the benefit of his bargain, which was obtaining the Coast Guard's agreement in advance of the Complaint to seek no greater penalty at hearing.

The CALJ indicates that by accepting a good faith deposit from Respondent and holding onto the credential for most of the full four months ultimately agreed to by the

---

<sup>6</sup> Likewise, the action here does not compare with a voluntary surrender under 5 C.F.R. § 5.203, as the Respondent expected (1) to receive his license back at some point and (2) to attend a hearing.

<sup>7</sup> See, 46 C.F.R. § 5.5

<sup>8</sup> See, The Administrative Procedure Act, 5 U.S.C. § 551, *et. seq.*

parties prior to filing the complaint, the IO prevented the CALJ from ensuring “the [R]espondent received full due process.” [D & O at 2-3]. On the facts here, I cannot conclude that the Coast Guard’s pre-Complaint actions and the wholly voluntary actions of the Respondent implicated any due process issue. I do not reach the question here whether pre-Complaint actions of the Coast Guard might so infect the post-Complaint proceedings, or so invade the prerogative of the ALJ that an ALJ could or should, upon motion, dismiss the case.

*II. The CALJ abused his discretion by issuing an ultra vires order to have the Respondent’s official record cleansed of the marine casualty and the resultant 4-month voluntary suspension period.*

The CALJ’s D&O ordered that “the [R]espondent’s official record will not reflect this marine casualty or the resultant four month voluntary suspension period respondent completed on March 24, 2008.” [D&O at 3] The Coast Guard interprets this order to mean that all traces of the marine casualty must be erased from the Coast Guard’s “massive, cross-referenced database.” [Appellate Brief at 9, including footnote 3] For purposes of deciding this appeal it is not necessary to interpret the order so broadly. Rather, the CALJ’s order is interpreted to be limited in scope to Respondent’s official merchant mariner record maintained by the National Maritime Center (NMC). The issue then becomes whether the CALJ abused his discretion or committed an error of law in ordering that Respondent’s NMC record not reflect this marine casualty or the associated four-month “voluntary” suspension.

The Coast Guard cites Appeal Decision No. 2658 (ELSIK) to support the proposition that sanctions awarded by an ALJ must be “specifically ‘authorized by law.’” [Appellate Brief at 8] The requirement that a sanction be “authorized by law” comes

from § 558(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* The Coast Guard argues that ordering the records to be redacted is *ultra vires* since this sanction is not specifically authorized by law. [*Id.*] Black's Law Dictionary defines the term "sanction" as "a penalty or coercive measure that results from failure to comply with a law, rule, or order." BLACK'S LAW DICTIONARY 1341 (7<sup>th</sup> ed. 1999). The authorities cited by the Coast Guard are misplaced insofar as they pertain to sanctions that can be taken against a respondent. *See* 5 C.F.R. §§5.567 - 69 (addressing sanctions that can be taken against a mariner). The action in this case actually would benefit the mariner by having his record appear "cleaner" than it actually is. This sanction is against the Coast Guard, but sanctions against the Coast Guard can only be ordered for failure to follow discovery rules. 33 C.F.R. § 20.607. Accordingly, I cannot conclude that the order of the ALJ was within his authority to make.

Moreover, the content of a merchant mariner's NMC record is a matter within the jurisdiction of the Coast Guard, not the ALJ. Specifically, 46 U.S.C. § 7502 states that "[t]he Secretary shall maintain computerized records on the issuances, denials, *suspensions, and revocations* of licenses, certificates... documents, and endorsements..." (emphasis added).<sup>9</sup> As such, the CALJ's order is better understood as an effort to maintain the accuracy of the record (given his dismissal of the Complaint and refusal to adopt the Coast Guard's proposed order for suspension) rather than a sanction against the Coast Guard for failure to comply with the appropriate regulations.

However, neither the statutes governing maintenance of mariner's records, nor the rules of practice and procedure for suspension and revocation proceedings allow for the issuance of an order by an ALJ requiring that a mariner's record be altered. Indeed, the

---

<sup>9</sup> This authority has been delegated to the Coast Guard by Homeland Security Delegation No. 0170.1.

ALJ has no mechanism or recourse for enforcing such an order. Instead, the D&O can reflect that the mariner's record *should* be amended.<sup>10</sup> If the NMC fails to do so, the mariner can request that the records be corrected, and can appeal any action taken or not taken in that regard to the Assistant Commandant for Prevention Policy pursuant to 46 C.F.R. § 10.204. Also, in the interest of maintaining accurate records the Respondent's NMC record must reflect the disposition of this case. A complaint was filed and a D&O issued. Reflecting these facts in the Respondent's NMC record is appropriate.

### CONCLUSION

The CALJ's D&O is not supported by the record as it dismisses the Complaint without a finding that the allegations were not proved and absent a motion from the Respondent to dismiss, with sufficient evidence to support the motion. Therefore, the CALJ erred as a matter of law in ordering the Complaint dismissed at this stage of the proceeding. The CALJ also was without authority to order that Respondent's record not reflect his involvement in a marine casualty or accurately reflect the administrative proceedings that occurred.

### ORDER

The D&O of the CALJ dated May 2, 2008, is VACATED. The case is REMANDED for further proceedings consistent with the applicable regulations and this decision. The Respondent is entitled to four months credit for the deposit of his license in any order issued against the license.

---

<sup>10</sup>The CALJ's order was that "respondent's official record will not reflect this marine casualty." [D&O at 3] I note that the existence of the marine casualty is not at issue in this case, and in the interest of maintaining accurate records, the Respondent's NMC record may reflect the existence of the marine casualty.

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

*D.P. Pekoske*

D.P. PEKOSKE  
Vice Admiral, U.S. COAST GUARD