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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	VICE COMMANDANT
vs.	:	ON APPEAL
MERCHANT MARINER LICENSE	:	NO. 2681
Issued to: MURRAY RANDALL ROGERS	:	

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

By an "Order Ruling on Proposed Sanctions Based on Non-Compliance with Subpoena" dated March 25, 2005, (hereinafter "D&O"), an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, dismissed the Coast Guard's Complaint alleging both *misconduct* and *violation of law or regulation* against Murray Randall Rogers (hereinafter "Respondent"), with prejudice. The ALJ's dismissal of the case, an unprecedented action in Coast Guard Suspension and Revocation proceedings, was ordered as a remedy to Respondent for the Coast Guard's failure to comply with a subpoena for discovery of documents issued to the Investigating Officer (hereinafter "I.O.") by the ALJ.

PROCEDURAL HISTORY

On October 7, 2004, Coast Guard Marine Safety Office Morgan City, Louisiana, filed a Complaint alleging misconduct and violation of law or regulation against the Respondent. Respondent filed his Answer to the Complaint on October 28, 2004.

Thereafter, on November 22, 2004, the ALJ held a pre-hearing conference. During that conference, the ALJ ordered that all discovery, pursuant to 33 C.F.R. § 20.601, be submitted by December 6, 2004. The hearing date was set for January 5, 2005. On December 7, 2004, the ALJ entered an Order which confirmed the appearance of counsel for Respondent and granted an extension of time for discovery. Pursuant to that Order, Respondent was required to submit discovery by December 20, 2004, and the Coast Guard was required to make any additional filings, in response thereto, by December 27, 2004. Nonetheless, the hearing remained scheduled for January 5, 2005.

The hearing commenced on January 5, 2005; however, before any evidence was heard, Respondent moved to recuse the Coast Guard I.O., LCDR Patrick, because he was listed as a "may call" witness on Respondent's witness list and Respondent intended to call the I.O. as a witness at the hearing. [Transcript (hereinafter "Tr.") at 7-8] As a result, Respondent asserted that it would be improper for LCDR Patrick to serve as the I.O. in a proceeding in which he was also being called as a witness. [Tr. at 7-14] The Coast Guard opposed both Respondent's request that Respondent be allowed to call the I.O. as a witness at the hearing and Respondent's motion for recusal of the I.O. [Tr. at 8-19, 20-21]

After hearing argument on whether LCDR Patrick could be a witness for Respondent, including an "offer of proof" from Respondent as to what evidence was sought from LCDR Patrick[1] and whether he should be recused, over numerous objections

[1] Respondent's counsel offered the following as an offer of proof at the hearing:

> [I]t's our position that the so called settlement offer went beyond what would generally be considered a settlement offer and that it was more properly an attempt by the Coast Guard to utilize my client as a vehicle to get to a third party. The statements made as related to me are that Mr. Rogers was encouraged to sign a written statement providing testimony against his employer Omega Marine in exchange for receiving I believe a

by the Coast Guard, the ALJ determined that LCDR Patrick could be called as a witness by Respondent. [Tr. at 11-13] In similar fashion, the ALJ further determined that LCDR Patrick should be recused from his duties as I.O. from and after the point in the hearing when he testified, but that he could participate as I.O. until that time. [*Id.*] The ALJ further ruled that LCDR Patrick could not question Respondent at the hearing and granted the Coast Guard's request for a continuance of the hearing so that the assistant I.O., ENS Tilghman, could better prepare to take LCDR Patrick's place as I.O. from and after the point in the hearing when LCDR Patrick testified. [Tr. at 12-13, 16-19] LCDR Patrick asked that the Coast Guard be permitted to file a brief on whether he should be called as a witness for Respondent and whether he should be recused. [Tr. at 11-13] The ALJ granted LCDR Patrick's request and scheduled a new hearing for February 11, 2005, where further issues would be addressed. [Tr. at 21]

Meanwhile, unbeknownst to the Coast Guard, on January 5, 2005, Respondent faxed the written sworn testimony of a witness to the offices of the ALJ.[2] The ALJ

> [letter of] warning. In that sense, it's not strictly a settlement offer. It can more properly be classified as an attempt at coercion which played into additional actions on the part of the Coast Guard in the mind of the Respondent that created an antagonistic environment towards him personally. Furthermore, with respect to the complaints, as I appreciate the complaints, all three of them stem from the same factual basis, all three of them rely on the same legal authority, and all three of them have different escalating proposed orders as punishment against Mr. Rogers. LCDR Patrick as the signatory on all three of those complaints presumably had some information or knowledge about the reasoning for the escalating nature of the proposed orders which, again, has relevance as to how the Respondent was treated by the Coast Guard in this instance.

[Tr. at 10-11].

[2] There was some confusion in the record as to whether this was testimony by Respondent, himself, or someone else. This confusion could have been cured if Respondent's counsel had served a copy of the written testimony on the Coast Guard or if the ALJ had ordered it filed into the record. 33 C.F.R. § 20.205. This is particularly so once it was clear that the Coast Guard objected to this alleged *ex parte* communication. The burden was on Respondent to ensure that the witness statement was filed into the record. *See* 33 C.F.R. § 20.302(d). Additionally, it was incumbent on the ALJ to ensure that it was filed into the record as soon as it became clear that the Coast Guard objected to it and sought to disqualify the ALJ as a result of her having been privy to it. In fact, the record was devoid of the witness statement in

discovered the testimony when she returned to her office after the January 5, 2005, hearing. On January 12, 2005, pursuant to a January 11, 2005, request by Respondent, the ALJ issued a subpoena to LCDR Patrick, the I.O., commanding the production of numerous documents at the law offices of Respondent's counsel on January 28, 2005, at 9:00 a.m. [Respondent's Exhibit A] Prior to the issuance of the subpoena, Respondent did not file either a motion for discovery, as is required by 33 C.F.R. § 20.604, or a motion requesting the issuance of a subpoena, as is required by 33 C.F.R. § 20.608(a).

On January 19, 2005, the ALJ issued an "Order Confirming Ruling on Record and Addressing Filed Sworn Testimony of Respondent" (hereinafter "January 19, 2005, Order"). In her January 19, 2005, Order, the ALJ confirmed both that LCDR Patrick could be called as a fact witness by Respondent at the hearing and that she had granted Respondent's request to recuse LCDR Patrick, in part. [January 19, 2005, Order at 2-3] In addition, for the first time on the record, the ALJ addressed the written sworn testimony that was received from Respondent on January 5, 2005. [January 19, 2005, Order at 3-4] To that end, although she acknowledged receipt of the testimony, she expressly found that it had not been offered into evidence and reserved judgment on whether it would be admissible, if it was so offered. [*Id.*] On January 27, 2005, the Coast Guard filed a pleading styled "Motion to Appeal" (hereinafter "First Motion to Appeal") appealing the ALJ's January 19, 2005, Order.

In its First Motion to Appeal, the Coast Guard argued that the offer of proof made by the Respondent to justify calling LCDR Patrick as a witness did not cover any subject

---

question until what appears to be a duplicate original was attached as "Exhibit A" to "Respondent's Opposition to Coast Guard's Motion for Redress Due to Ex Parte Communications between Respondent and the Administrative Law Judge," dated February 4, 2005.

relevant to proving or disproving the charges and specifications alleged in the Coast Guard's October 7, 2004, Complaint against Respondent. [First Motion to Appeal at 5-6] The Coast Guard further argued that the offer of proof did not cover any subject relevant to any matter that the ALJ was permitted by regulation to consider in determining an appropriate sanction. [First Motion to Appeal at 6-7] Instead, the offer of proof was with respect to conversations that had allegedly occurred between Respondent and the I.O. regarding possible disposition of the case at other than a hearing, i.e. settlement, and the reasons for decisions the I.O. had made with respect to increasing the proposed sanctions in the several complaints filed in this case.[3]

On January 28, 2005, the appointed date for a return on the subpoena, the Coast Guard neither complied nor filed any document in the form of a motion or otherwise seeking relief. As a result, Respondent filed both a "Motion to Compel" and a "Motion to Continue the Hearing" on February 2, 2005. On February 3, 2005, the ALJ held a pre-hearing conference to discuss the status of the case and to determine whether the hearing would proceed as scheduled on February 11, 2005. Due to information provided during that conference, including the Coast Guard's continued refusal to comply with the ALJ's subpoena, following the conclusion of the pre-hearing conference, the ALJ issued an "Order Confirming Rulings Made and Deadlines Established During Pre-Hearing Conference" (hereinafter "Order Confirming Rulings"). The Order Confirming Rulings was composed of several orders, most notably, an order granting Respondent's "Motion to Continue the Hearing" set for February 11, 2005, because of the Coast Guard's failure

[3] There were three complaints in this case–the first was inadvertently not filed with the ALJ Docketing Center, the second was dismissed by the ALJ, and the third and final one was filed on October 7, 2004. Each contained a more severe proposed sanction than the one preceding it.

to respond to the subpoena or follow the specified procedures for challenging same.[4] In addition, the ALJ's Order gave the Coast Guard until February 4, 2005, to file a motion to quash the subpoena and Respondent until February 11, 2005, to file his response thereto. The Order further indicated that a new hearing date would be set following resolution of the expected challenge to the subpoena.

On February 9, 2005, the ALJ issued three subsequent orders in the case, an "Order Requesting Proposed Sanctions Based on Non-Compliance with Subpoena by United States Coast Guard," an "Order Denying Motion of USCG for Redress Due to Ex Parte Communications Between Respondent and Administrative Law Judge," and an "Order Denying Motion of United States Coast Guard For Reconsideration of Previous Orders." The end result of these orders was to confirm that Respondent could call LCDR Patrick as a witness at the hearing, deny the Coast Guard's motion for recusal of the ALJ based upon alleged *ex parte* communications between Respondent and the ALJ and to require Respondent to submit proposals for sanctions against the Coast Guard for its failure to comply with the ALJ's subpoena by March 2, 2005.

On March 1, 2005, Respondent submitted a motion to dismiss the matter, with prejudice, arguing that the sanctions provided by regulation for failure to comply with a duly issued subpoena, 33 C.F.R. § 20.608, were insufficient. The Coast Guard filed its

[4] During the pre-hearing conference held on February 3, 2005, when ENS Tilghman was queried as to what the Coast Guard's intention was with respect to the subpoena, Mr. Jim Wilson, Senior I.O., Coast Guard Marine Safety Office Morgan City, Louisiana refused to allow Mr. Tilghman to respond to the question and asserted that the Coast Guard did not intend to comply with the subpoena and that a document challenging the subpoena had been filed. When advised that no such challenge had been received, Mr. Wilson reiterated that it was the intention of the Coast Guard not to comply with the subpoena. When the ALJ asked that ENS Tilghman be allowed to respond to her inquiries, Mr. Wilson informed all parties that Mr. Tilghman was not the Lead Investigator and that a Lead Investigator had not been named in the case. When queried as to when this might occur, Mr. Wilson responded: "The lead investigator will be whoever shows up at the hearing." [Order Confirming Rulings Made and Deadlines Established During Pre-Hearing Conference at 3]

opposition to Respondent's Motion to dismiss on March 8, 2005. Ultimately, the ALJ agreed with Respondent and, via her D&O, dismissed the Coast Guard's Complaint against Respondent, with prejudice.

The Coast Guard filed a notice of appeal from the ALJ's D&O on March 25, 2005, and perfected its appeal by filing the requisite Appellate Brief on May 20, 2005. Respondent filed his reply to the Coast Guard's Appellate Brief on June 17, 2005. Accordingly, this appeal is properly before me.

APPEARANCE: Voorhies & Labbé, W. Gerald Gaudet and James P. Doherty, 700 St. John Street, Suite 400, Lafayette, La., 70502, for Respondent. The Coast Guard Investigating Officers were LCDR Ronnie D. Patrick and ENS Timothy S. Tilghman, stationed at United States Coast Guard Marine Safety Office Morgan City, Louisiana.

FACTS

Respondent, at all pertinent times, was the holder of a Coast Guard issued Merchant Mariner License authorizing him to serve as Master of uninspected towing vessels. The Complaint alleges that Respondent, while acting under the authority of his Merchant Mariner License and while serving as Master of the M/V BAILEY ANN (O.N. 560944) on June 22, 2004, was guilty of misconduct by wrongfully absenting himself from the wheelhouse, leaving the responsibility of navigation of the vessel and tow to an unlicensed deckhand. [Complaint at 2] The complaint also alleges an act of violation of law and regulation, in that Respondent, during the period 20 – 22 June 2004, while serving under the authority of the aforementioned license on board the M/V BAILEY ANN, did engage an individual to serve aboard with unsupervised direction and control of the vessel without a valid Coast Guard license, in violation of 46 C.F.R. §15.401. [*Id.*]

For the reasons discussed below, further discussion of the factual allegations supporting the Coast Guard's Complaint is unnecessary at this time.

BASES OF APPEAL

The Coast Guard appeals the ALJ's D&O, dismissing, with prejudice, the Complaint against Respondent on the following grounds:

I. The ALJ acted arbitrarily and capriciously when she issued subpoenas for discovery abdicating the discovery process;

I. The ALJ incorrectly denied a motion for disqualification on the basis of ex parte communication with Respondent; and,

II. The ALJ was biased against the Coast Guard.

The relief requested was that the case be remanded to a different ALJ, presumably after reversing the D&O of dismissal, with prejudice.

OPINION

As a preliminary matter, I wish to comment on three general matters: first, the Coast Guard's conduct in refusing to comply with the ALJ's subpoena; second, the issuance of subpoenas to the Government; and third, the ALJ's authority to dismiss this case with prejudice. With respect to the first matter, the Coast Guard's action in unilaterally determining LCDR Patrick would not comply with the subpoena rather than filing a motion to quash or modify the subpoena was not proper under the rules governing these proceedings. The I.O.'s "Subpoena Response" simply announcing the Coast Guard's unilateral refusal to comply with the subpoena, rather than following the rules of procedure for challenging the subpoena, as provided in 33 C.F.R. § 20.609, is inexcusable. There is a right way and a wrong way to challenge a subpoena; the I.O. and his supervisor in this case inexplicably chose the wrong way. That choice complicated

the proceedings unnecessarily and ultimately led to the ALJ's dismissal of the case with prejudice. It is my hope that I will not see such conduct emulated by Coast Guard I.O.s or their supervisors in the future.

I will now address the second matter, the issuance of subpoenas to the government. Like most other federal agencies, the Department of Homeland Security (hereinafter the "Department") has promulgated regulations providing the procedures to be followed when an agency employee is subpoenaed. *See* 6 C.F.R. Part 5. These regulations, which expressly apply to Coast Guard employees, afford the Department the discretion to determine whether the disclosure of the information sought is appropriate and require that any requests for the disclosure of information, including subpoenas, be served on the Department.

Although the procedures in 6 C.F.R. Part 5 were not followed in this case, it is reasonable to conclude that the Department would have declined the ALJ's subpoena and, in so doing, would have created a thorny enforcement situation. To enforce the subpoena, the ALJ would have had to institute an action against the Coast Guard in a district Court, resulting in a Coast Guard v. Coast Guard action. *See* 46 U.S.C. § 7705(b); 46 U.S.C. § 6305(b). The Coast Guard addressed this point in footnote 5 of its Appellate Brief as follows:

> The issuance of subpoenas against the Coast Guard raises the prospect of a potential conflict between the ALJ and the Coast Guard. Subpoenas to the Coast Guard are governed by the regulations in 6 CFR Part 5. Section 5.41 specifically makes the issuance of subpoenas applicable to suspension and revocation proceedings. Further, when the Coast Guard determines that the information sought should not be disclosed, but the ALJ declines to cancel or amend the subpoena, section 5.47 requires that the party to whom the subpoena was issued respectfully decline. If the process as outlined in 33 CFR Subpart F is followed, and discovery is

> made via motion then the issue of noncompliance with a subpoena would be less likely to occur.

[Coast Guard Appellate Brief at 19] Given the outcome of this case, it is unnecessary for me to address the potential enforcement issues raised by the applicability of 6 C.F.R. Part 5 to these proceedings, but the Coast Guard's conclusion that similar enforcement issues are likely to be avoided by adherence to the procedural rules in 33 C.F.R. Part 20 is well founded and is reiterated here.

I will now address the third matter: whether the ALJ had the authority to dismiss the Coast Guard's case against Respondent, with prejudice, as a sanction for the Coast Guard's failure to comply with the ALJ's subpoena. The record shows that in its brief, the Coast Guard addressed only the subsidiary issues outlined above as bases of appeal. However, irrespective of that failure, a review of the record shows that the issue was addressed in both Respondent's brief and in the ALJ's D&O. Under such circumstances, the issue is properly before me.

The authority of an ALJ to order sanctions is provided by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, (hereinafter "APA") and via agency regulations implementing that Act. I have searched in vain for express authorization in the APA for an ALJ to order dismissal of a charge with prejudice as a sanction for failure to comply with a discovery subpoena. There is no such express provision of authority. In addition, while 33 C.F.R. § 20.607 states that "the ALJ may take such action as is just," if a party fails to provide or permit discovery, the list of available sanctions provided by the regulation focuses on ALJ action with respect to the admissibility of the evidence that

would have been obtained through discovery,[5] not dismissal of the action. In addition, while Coast Guard regulations state that "dismissal resides within the discretion of the ALJ" and allow the parties to an action to move for dismissal for failure to comply with an order of the ALJ, the regulations do not specify whether the resulting dismissal would be with or without prejudice. *See* 33 C.F.R. § 20.311(d) and 33 C.F.R. § 20.311(e).

Because Coast Guard regulations do not specify whether dismissal with prejudice is an authorized sanction for a failure to comply with a discovery subpoena, the APA, as interpreted by the courts and other government agencies, must be looked to for guidance. The only provision in the APA that mentions "sanctions" is 5 U.S.C. § 558. That section does not expressly authorize dismissal with prejudice as a sanction for failure to comply with a discovery subpoena. Rather, 5 U.S.C. § 558(b) provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." As noted in the Attorney General's Manual on the APA, the original draft of this section limited the available sanctions to only those authorized by statute. However, when enacted, the clause, "as authorized by law" was substituted. Thus, the change from "statute" to "law" was intentional; it refers to law as reflected in treaties, statutes, regulations or judicial decisions. It also was intended to refer to the powers and authorities agencies possessed under existing law, whether expressed or implied.[6] 5 U.S.C. § 556(d) provides that the agency may, consistent with

---

[5] Specifically, 33 C.F.R. 20.607 states that the "just" action of the ALJ may include: (a) infer that the testimony, document, or other evidence would have been adverse to the party; (b) order that, for the purposes of the proceeding, designated facts are established; (c) order that the party not introduce into evidence the evidence that was withheld; (d) order that the party not introduce into evidence information obtained in discovery; and, (e) allow the use of secondary evidence to show what the evidence withheld would have shown.

[6] Attorney General's Manual on the Administrative Procedure Act, p. 88 (U.S. Department of Justice 1947).

the law, authorize an adverse decision against a party who violates the provisions of the APA with respect to *ex parte* communications with the ALJ. These two sections are the only places in the APA that "sanctions" are mentioned.

The policies behind 46 U.S.C. Chapter 77 are also relevant in determining whether an ALJ is empowered to dismiss a complaint with prejudice for failure of a party to comply with a discovery subpoena. 46 U.S.C. § 7701(a) states that "[t]he purpose of suspension and revocation proceedings is to promote safety at sea." The dismissal of this case for failure to comply with a discovery subpoena does not promote safety at sea because it terminates the government's ability to proceed against a mariner's credential without a full hearing at which the government puts forth the evidence on which the charges and specifications were founded. In this regard, I find that the sanctions provided in 33 C.F.R. § 20.607 are adequate for failure to comply with a discovery subpoena, notwithstanding the ALJ's unexplained and unsupported finding to the contrary.

Moreover, the APA requires that a party seeking specific enforcement of a subpoena must do so in court, and the court may punish failure to comply as contumacious conduct.[7] Thus, the APA contemplates that a party seeking specific enforcement of a subpoena must seek an order from a court, not the ALJ. The court is empowered to enforce its orders by contempt proceedings (imposition of contumacious sanctions); an ALJ is not. This statutory scheme—specific enforcement coupled with an ability to punish as a contempt being reserved to a court, vice the ALJ—coupled with the Coast Guard's provided sanctions for failure to comply with a discovery order or subpoena, preserves the rights of both the respondent and the government in the context

[7] 5 U.S.C. § 555(d).

presented here. It strikes the proper balance between a respondent's right to the discovery of evidence for use in cross-examination, and the right of the government to proceed to the merits of charges and specifications at a hearing. The foregoing may explain why Coast Guard regulations do not specify that an ALJ may dismiss a complaint with prejudice for failure to comply with a discovery subpoena. In the absence of such a regulatory authorization, which I note would seem to be contrary to the goal of these proceedings concluding after hearing, I will not permit an ALJ to establish such a rule of law by judicial fiat.

Accordingly, I find that the ALJ abused her discretion and committed an error of law by dismissing this case, with prejudice, as a sanction for the Coast Guard's failure to comply with the subpoena. Having so determined, I will now focus on the specific bases of appeal raised within the Coast Guard's Appellate Brief.

I.

The ALJ acted arbitrarily and capriciously when she issued subpoenas for discovery abdicating the discovery process.

On appeal, the Coast Guard contends that the ALJ erred in failing to follow the Coast Guard's discovery regulations in that she granted Respondent's request for further discovery without the requisite motion for further discovery and without determining that such discovery was appropriate under Coast Guard regulations. To that end, the Coast Guard correctly notes that the applicable discovery regulations, at 33 C.F.R. Subpart F, require that discovery beyond that set out in 33 C.F.R. § 20.601(a) and (b),[8] so called "further discovery," only occur upon order of the ALJ after specific and detailed findings

[8] Pursuant to 33 C.F.R. § 20.601, "[u]nless the ALJ orders otherwise," the parties to an action are required to exchange witness lists [including narrative summaries of the witness' testimony] and exhibit lists at least 15 days before the hearing.

are made. *See* 33 C.F.R. § 20.601(d). In addition, the Coast Guard correctly notes, pursuant to 33 C.F.R. § 20.601(e), that the ALJ may grant "further discovery," only upon a motion setting forth the circumstances warranting the discovery, the nature of the information sought and the proposed method and scope of the discovery, together with the time and place where the discovery will occur.

In this case, the record shows that the ALJ permitted the use of "further discovery" without first receiving the requisite motion for such discovery. The "further discovery" at issue here—the subpoena issued to the I.O.—was precipitated upon a letter that Respondent sent to the ALJ on January 12, 2005. In that letter, Respondent simply requested that a subpoena be issued to LCDR Patrick for documents described within the letter. The letter specified the time and place for return on the subpoena—at the offices of Respondent's counsel on or before January 28, 2005. The record shows that the original letter was sent to the ALJ by both facsimile and U.S. mail, with a copy to the Coast Guard by facsimile.

In his Reply Brief, Respondent admits that no "formal motion" was filed with respect to the "further discovery," but he argues that his letter request should be regarded as substantial compliance with the regulatory requirements. A review of Respondent's letter shows that it did not contain the showings required by 33 C.F.R. § 20.601(d)[9] to support the use of further discovery. Likewise, the ALJ did not address the factors articulated in 33 C.F.R. § 20.601(d) in granting Respondent's request for further

[9] 33 C.F.R. § 20.601(d) states that the ALJ may grant further discovery only when it is shown that: (1) further discovery will not unreasonably delay the proceeding; 2) the information sought is not otherwise obtainable; 3) the information sought has significant probative value; 4) the information sought is neither cumulative nor repetitious; and 5) the method or scope of the discovery is not unduly burdensome and is the least burdensome method available.

discovery; rather, the ALJ simply issued the subpoena to the I.O. In so doing, the ALJ did not afford the Coast Guard the opportunity to be heard on the factors that the Respondent was required to demonstrate prior to the ALJ determining whether Respondent's "motion" for further discovery should have been granted.

It is well-settled in these proceedings that I may only reverse the ALJ's decision if his or her findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decision 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). In this case, the Coast Guard contends that Respondent's request for further discovery should have been denied by the ALJ and, tangentially, that the Coast Guard could not have erred in failing to comply with an improperly issued subpoena. The record shows that the ALJ discussed the issuance of the subpoena as follows:

> [B]ased on the record before me on January 12, 2005, I made the determination that the documents and things identified by the Respondent in his subpoena request constituted a search for evidence which would assist him in presenting his case, defending his position, and ultimately, supporting the full and true disclosure of facts in this proceeding.

[D&O at 5] In so stating, the ALJ did not explain why the documents requested by Respondent would have had significant probative value, that 33 C.F.R. § 20.601(d) requires as a threshold matter. Indeed, a review of the types of documents requested by Respondent—most general in nature—does not support a conclusion that those documents were either relevant, or in the words of the regulation, of "significant probative value" to justify the further discovery ordered by the ALJ.[10] Perhaps, had

[10] For example, Respondent requested "any documents related in any way to the boarding of the *Bailey Ann* in June 2004," "any Coast Guard policy and procedure manual or other internal Coast Guard documents

Respondent followed and the ALJ enforced the clearly enunciated process for further discovery in 33 C.F.R. § 20.601(d), the record would contain sufficient evidence to support the ALJ's conclusion that further discovery was appropriate in this case. However, because neither the ALJ nor Respondent followed the applicable regulatory requirements, such evidence was not developed in the record and, as a result, there is insufficient evidence in the record to support the ALJ's conclusion that further discovery was appropriate in this case.

II.

The ALJ incorrectly denied a motion for disqualification on the basis of ex parte communication with Respondent

As I noted in the Procedural History portion of this decision, above, the Coast Guard alleged that Respondent engaged in an improper *ex parte* communication with the ALJ on January 5, 2005, when he forwarded a sworn witness statement to the ALJ without providing a copy of the same to the Coast Guard. On appeal, the Coast Guard contends that as a result of the *ex parte* communication, the ALJ should have recused herself from the proceedings.

A review of the record shows that the ALJ neither addressed the issue of the *ex parte* communication in her D&O, nor did she make the alleged *ex parte* statement part of the record, as is required by the APA.[11] Respondent's oral explanation of the circumstances surrounding how the statement was prepared and was transmitted to the

---

related to, regarding, or discussing Coast Guard operating procedure when boarding vessels," and "any Coast Guard policy and procedure manual or other internal Coast Guard documents related to, regarding, or discussing Coast Guard operating procedure and/or suggested handling of a situation involving purported violations of the '12-hour rule' as found in 46 U.S.C. 8104(h) and 46 C.F.R. 15.705."

[11] 5 U.S.C. §557(d)(1)(C)(i) requires that "a[n] administrative law judge who is … involved in the decisional process of [an S&R proceeding] who … receives …a[n] [ex parte communication] shall place on the public record of the proceeding: all such written communications."

ALJ made at a subsequent hearing was not transcribed into the record. The parties differ on the facts surrounding the transmission of the sworn affidavit of a witness that Respondent intended to call at the hearing, Ms. Theresa Gordon.[12] Accordingly, I recite what I understand the facts to be based on my review of the record.

The record shows that Respondent addresses the issue on page 21 of his Reply Brief as follows:

> Upon being informed that one of his witnesses would not be able to attend the hearing, respondent sought to preserve Ms. Gordon's testimony for submission at the hearing by having an attorney with his firm prepare an affidavit for Ms. Gordon's signature. The document was e-mailed to Ms. Gordon; she printed it, and executed it before a Notary Public and two witnesses. The affidavit was then faxed by Ms. Gordon to the ALJ's office.

In addition, in her "Order Confirming Decision on the Record" the ALJ stated that she had not considered the contents of Ms. Gordon's affidavit, and further that she would determine the relevance and admissibility of any such testimony only when it was offered by Respondent at a hearing.

As stated, the record does not reflect that the ALJ included this affidavit in the record; nor does it reflect that the ALJ or counsel for Respondent sent a copy to the Coast Guard until February, 2005. The ALJ's and counsel's failure to follow the rules in this respect, while regrettable, did not prejudice the Coast Guard, given the ALJ's statements in her Order of February 9, 2005, nor does the receipt of the Affidavit, whether it was

[12] The Coast Guard alleges that the written testimony was transmitted to the ALJ by the facsimile transmission by the Respondent through his counsel; the Respondent alleges that it was transmitted to the ALJ by the witness following its execution by the affiant, the witnesses and the notary. The ALJ apparently adopted the Respondent's version as her own when she concluded that it was transmitted "on behalf of the Respondent." [Order Confirming the Ruling Made on Record and Addressing Filed Sworn Testimony of Respondent dated January 19, 2005]

from Respondent's counsel or sent on behalf of Respondent's counsel, in and of itself, establish a reason why the ALJ should be recused.

III.

The ALJ Was Biased Against the Coast Guard.

I have already indicated that the ALJ's D&O will be reversed because she did not possess the legal authority to dismiss this case with prejudice as a sanction for failure of the Coast Guard to comply with the subpoena. It remains for me to decide whether the record, taken as a whole, indicates that this ALJ has evidenced sufficient bias against the Coast Guard's position as to warrant an order that she not hear this case on remand.

Pursuant to Coast Guard regulation, a Respondent may request that the ALJ withdraw from the proceedings on the grounds of personal bias or other disqualification. 33 C.F.R. § 20.204(b). After making such a request, the party seeking disqualification carries the burden of proof. Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665 (1982). The courts have long stated that there is a rebuttable presumption that hearing officers are unbiased and that bias is required to be of a personal nature before it can be held to taint proceedings. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). Prejudgment also serves as a basis for disqualification. As a result, a proceeding is subject to challenge if it appears that the action has been prejudged. Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). In order to establish a disqualifying prejudgment, a respondent must demonstrate that the mind of the ALJ is "irrevocably closed" on the particular issue being decided. FTC v. Cement Institute, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Accordingly, a hearing officer should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matter critical to the

disposition of the proceeding. Association of National Advertisers v. FTC, 617 F.2d. 1151 (D.C. Cir. 1979).

A review of the record shows that the ALJ viewed the Coast Guard's actions in refusing to comply with the subpoena with much disfavor. It is also my reading of the ALJ's D&O that the ALJ did not view with any favor the Coast Guard's various positions on any of the issues in this case, and voiced that disfavor in sometimes derogatory terms. On appeal, the Coast Guard notes that Respondent received no similar adverse rulings nor was the subject of acrimonious statements during the course of these proceedings, and concludes that these actions show that the ALJ was biased against the Coast Guard. I disagree.

As I stated above, bias is required to be of a personal nature before it can be held to taint proceedings. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). In this case, the Coast Guard bore the burden of proving that the mind of the ALJ was "irrevocably closed" on the particular issues being decided. The fact that the ALJ did not rule in the Coast Guard's favor and addressed the I.O. in sometimes derogatory terms does not show that the ALJ had a personal interest in the case or that she had an unalterably closed mind about the facts and issues raised. Much of the ALJ's disfavor was the direct result of the Coast Guard's own substandard conduct in not complying with the ALJ's subpoena. Simply put, the record does not show by clear and convincing evidence that the ALJ has an unalterably closed mind on matters critical to the disposition of this case. Absent such a showing, I cannot agree that the ALJ was biased and, accordingly, I do not find the Coast Guard's third basis of appeal persuasive.

CONCLUSION

The ALJ abused her discretion and committed an error of law by dismissing this case, with prejudice, as a sanction for the Coast Guard's failure to comply with the subpoena. Because the ALJ terminated the case without hearing and without making any findings as to whether the charge was proved, the case must be remanded for further proceedings. The ALJ committed an error of law when she did not immediately file into the record the *ex parte* sworn testimony of the witness, but this error did not, in and of itself, prejudice the Coast Guard. The record does not support a conclusion that the ALJ was biased against the Coast Guard.

ORDER

The ALJ's D&O dismissing this case, with prejudice, is REVERSED, and the case is remanded for further proceedings consistent with this decision.

//s//

V. S. CREA
Vice Admiral, U. S. Coast Guard
Vice Commandant

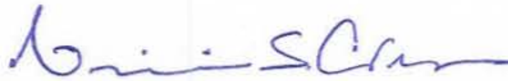
Signed at Washington, D.C., this 30th day of April, 2008.

CONCLUSION

The ALJ abused her discretion and committed an error of law by dismissing this case, with prejudice, as a sanction for the Coast Guard's failure to comply with the subpoena. Because the ALJ terminated the case without hearing and without making any findings as to whether the charge was proved, the case must be remanded for further proceedings. The ALJ committed an error of law when she did not immediately file into the record the *ex parte* sworn testimony of the witness, but this error did not, in and of itself, prejudice the Coast Guard. The record does not support a conclusion that the ALJ was biased against the Coast Guard.

ORDER

The ALJ's D&O dismissing this case, with prejudice, is REVERSED, and the case is remanded for further proceedings consistent with this decision.



V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 30th day of April, 2008.