

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
LICENSE NO. 954670	:	
and	:	NO. 2640
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
<u>Issued to: ANTHONY R. PASSARO</u>	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and 33 CFR Part 20.

By a Decision and Order (D&O) dated March 19, 2002, an Administrative Law Judge (ALJ) of the United States Coast Guard at Alameda, California, suspended Mr. Passaro's (Respondent's) license and document for twelve (12) months, six (6) months outright and the remaining six (6) months remitted on twelve (12) months probation, upon finding proved a charge of *misconduct*. The specifications found proved alleged that on February 8, 2001, Respondent, while serving as duty engineer aboard the M/V LIBERTY WAVE and while acting under the authority of the above-captioned license and document, responded to two separate high water alarms by pumping bilge water directly overboard, bypassing the Oily Water Separator (OWS), in direct violation of the Vessel Instruction Manual and Chief Engineer's Standing Order requiring that all overboard discharges be passed through the OWS.

PROCEDURAL HISTORY

The hearing in this matter commenced in Alameda, California, on November 20, 2001. Respondent appeared personally and elected to represent himself. At the hearing, Respondent admitted all jurisdictional and factual allegations but raised the affirmative defense that he was verbally ordered by the Chief Engineer to commit the admitted acts. The Coast Guard Investigating Officers introduced into evidence the testimony of four (4) witnesses and thirteen (13) exhibits. While Respondent neither called witnesses nor introduced exhibits into evidence, he testified on his own behalf and actively cross-examined the Government's witnesses. Following the hearing, the ALJ admitted I.O. Exhibit Fourteen (14), a diagram of the M/V LIBERTY WAVE, into evidence without objection.

The ALJ issued the D&O on March 19, 2002. Respondent filed his Notice of Appeal on April 10, 2002, and, on May 12, 2002, wrote a letter to the ALJ Docketing Center indicating that he was having difficulty securing professional representation for his appeal. The ALJ Docketing Center treated Respondent's letter of May 12, 2002, as both a request for extension of time and a request for a temporary license. On May 16, 2002, the ALJ issued an Order granting Respondent's request for extension of time until June 24, 2002; however, at that time, the ALJ did not issue a determination as to Respondent's request for a temporary license. On May 21, 2002, the Coast Guard filed a motion objecting to the issuance of a temporary license and, on May 22, 2002, the ALJ issued an Order requiring Respondent to file an Answer to the Coast Guard's objection by May 30, 2002. Respondent filed his Answer concerning the issuance of a temporary license on June 21, 2002. In his Answer, Respondent acknowledged his failure to meet

the deadline set by the ALJ, but explained that he continued to experience difficulty in securing professional representation. On July 18, 2002, the ALJ issued an Order granting Respondent's request for a temporary license. Because Respondent's initial Notice of Appeal dated April 10, 2002, stated both the basis of his appeal and the reasons supporting it, that notice has been treated as his appellate brief. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by LT(jg) Lance Lindgren, USCG, and LT(jg) Timothy Calister, USCG, Marine Safety Office San Francisco, California.

FACTS

At all times relevant herein, Respondent served under the authority of the above-captioned license and document.

Respondent joined the crew of the M/V LIBERTY WAVE, on January 12, 2001, when he signed the Ship's Articles. [I.O. Exhibit 2] Respondent was hired by Liberty Maritime Corporation (Liberty), owner of the M/V LIBERTY WAVE, to serve as the Second Assistant Engineer aboard the M/V LIBERTY WAVE during voyage number 70 from Singapore to Cristobal, Panama. [Transcript (Tr.) at 17-18; I.O. Exhibit 11] During the initial stages of the voyage, Respondent familiarized himself with the vessel and its operating practices; on January 15, 2001, Respondent certified that he had read the Chief Engineer Instruction Manual and the other publications encompassing the Company's Safety Management System; and, on January 23, 24, and 25, 2001, Respondent certified that he had familiarized himself with the vessel's engine room equipment (including the

bilge pumping arrangements and OWS) and the Chief Engineer's instructions and Standing Orders, including Liberty's policy prohibiting the pumping of bilge water directly over the side of the vessel without first passing it through the OWS. [Tr. at 18, 57, 60-61, 92-4; IO Exhibits 6, 7, 8]

Before voyage number 70 commenced, the M/V LIBERTY WAVE underwent repairs at a Singapore shipyard. [Tr. at 111] During those repairs, steel plates were replaced in the vessel's number four hold. [*Id.*] In the initial stages of voyage number 70, the replaced plates "fractured...allowing the ingress of ballast water into the duct keel," causing the duct keel to flood. [*Id.*] The flooding of the duct keel was "so severe" that the LIBERTY WAVE's "engine room bilge pump had to be operated approximately every two hours to remove the water...from the duct keel area." [Tr. at 112] To remedy the situation, the water from the duct keel was pumped directly over the side of the M/V LIBERTY WAVE, without first being passed through the OWS, in part because the Chief Engineer determined that the water in the duct keel was ballast water which could properly be pumped directly overboard without being passed through the OWS and also because the vessel's "system could not handle the amount of water that was ingressing into the duct keel." [Tr. at 112-113] As a result of the flooding, the Chief Engineer instructed his First Assistant Engineer to inform all of his personnel, including Respondent, to rectify the situation by pumping the water from the duct keel directly over the side of the M/V LIBERTY WAVE, using the vessel's centrifugal bilge pump. [Tr. at 113-116]

On the evening of February 8, 2001, Respondent was serving as duty engineer aboard the M/V LIBERTY WAVE and was, among other things, responsible for addressing any alarms that sounded during his watch. [Tr. at 18-19, 36-37, 51] That night, Respondent answered two alarms that resulted from high water levels in the starboard forward bilge well; the first occurred at 10:45 p.m. and the second occurred at 11:20 p.m. [D&O at 5; Tr. at 19-20; I.O. Exhibit 5] Respondent reacted to each alarm by pumping the contents of the forward bilge well directly over the side of the vessel without first pumping them through the OWS. [D&O at 5; Tr. at 18, 51-55, 57] These actions were in direct violation of both the Chief Engineer's Standing Orders and the vessel's instruction manual. [D&O at 3, 5; I.O. Exhibits 6, 7, 8] As a result, Respondent was fired from his position aboard the M/V LIBERTY WAVE on February 9, 2001. [I.O. Exhibits 9 & 11]

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of *misconduct*. In his brief, Respondent asserted eleven (11) bases of Appeal. Because many of Respondents arguments are based upon similar legal theories and require similar legal analysis, I have combined several of Respondent's bases of appeal. Therefore, Respondent's consolidated bases of appeal are as follows:

- I. *The decision of the ALJ was not supported by substantial evidence because the diagram of the ship (I.O. Exhibit 14) was not available during the hearing. As a result, it was impossible to properly understand what the situation was, and what had been taking place.*
- II. *The decision of the ALJ was not supported by substantial evidence because the record clearly shows that all orders given with respect to pumping the bilges were not properly conveyed.*

- III. *The ALJ erred because he did not consider the fact that it is not unlawful to pump clean water, including bilge water, directly overboard when the ship is in distant international waters.*
- IV. *The ALJ erred by concluding that the water pumped directly overboard by the Chief Engineer from the duct keel was NOT bilge water. Therefore, because the Captain gave the Chief Engineer permission to violate the standing orders, Respondent did not commit any acts of misconduct and the ALJ erred by rejecting Respondent's affirmative defense.*
- V. *The ALJ erred by considering Respondent's employment history, including previous acts of uncharged misconduct in reaching his decision because Respondent has no disciplinary record with the Coast Guard.*
- VI. *The ALJ erred by failing to consider the fact that: 1) Respondent has accepted responsibility for his actions and cooperated fully with the Coast Guard; 2) Respondent acted in good faith, believing that he had been instructed to discharge the bilge water directly overboard; 3) no pollution occurred, no one was injured, no machinery was damaged, and no detrimental event resulted from the incident; 4) and, Respondent has shown remorse and never attempted to justify his actions.*

OPINION

I.

The decision of the ALJ was not supported by substantial evidence because the diagram of the ship (I.O. Exhibit 14) was not available during the hearing. As a result, it was impossible to properly understand what the situation was, and what had been taking place.

Respondent first contends that the ALJ's decision was not based upon substantial evidence because a diagram of the vessel was not available to the ALJ during the hearing.

I do not agree.

As will be discussed more fully in Argument IV, Respondent asserts the affirmative defense that he was authorized by the Chief Engineer to violate Liberty's Company policy when he was told to bypass the OWS and pump water from the duct keel directly over the side of the M/V LIBERTY WAVE during the initial stages of the voyage. To that end, Respondent argues that the duct keel contained bilge water that

was, per Liberty's company policy, required to be pumped through the OWS before being discharged. Both the Coast Guard and Respondent's employers stated, however, that the duct keel contained ballast water, the direct discharge of which did not violate Liberty's company policy. [Tr. at 106-09; 113-122] As a result of Respondent's assertion, the contents of the duct keel became a key issue at the hearing.

After Respondent asserted that the duct keel was "part of the [vessel's] bilges," the ALJ asked to view a diagram of the ship. [Tr. at 28] Given Respondent's assertion that his being told to pump the contents of the duct keel directly overboard authorized the conduct at issue, the ALJ concluded that he could not ascertain the veracity of Respondent's argument without a "schematic" in front of him. [Tr. at 68] Although the ALJ elected to continue the hearing without the ship's diagram, he specifically stated that he would not "make a ruling against the respondent, or for the respondent for that matter, unless...[he could]...understand what's going on...[and determine]...that either misconduct was committed or it wasn't." [Tr. at 68-69]

I have long held that it is the sole purview of the ALJ to determine the weight of evidence and to make credibility determinations as to that evidence. Appeal Decisions 2156 (EDWARDS), 2116 (BAGGETT), and 2472 (GARDNER). In the instant case, it is true that conflicting testimony exists; however, the conflicting evidence was sufficiently addressed by the ALJ in his D&O. I do not find that the ALJ's determinations, in this regard, were arbitrary, capricious, or an abuse of his discretion.

Only in exceptional circumstances, will I disturb the ALJ's resolution of conflicting evidence. The rule in this regard is well established:

[w]hen...an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, the determination will not be disturbed unless it is inherently incredible.

Appeal Decisions 2472 (GARDNER), 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986), 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), 2302 (FRAPPIER), and 2275 (ALOISE). In fact, I have long held that the findings of the ALJ need not be completely consistent with all the evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decision 2492 (RATH), Appeal Decision 2282 (LITTLEFIELD).

The record shows that a diagram of the vessel was presented to the ALJ after the hearing but before he issued his D&O. [Tr. at 68-9] It is clear from the transcript that the diagram was entered into the record—albeit after the close of the hearing—as I.O. Exhibit 14, with the full knowledge of Respondent and without his objection. [D&O at 4] Although I agree with Respondent that the ALJ did not consider the diagram of the vessel *during the hearing*, the record demonstrates that the ALJ did consider it before reaching his decision. In his D&O, the ALJ specifically stated, “[e]ach exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.” [D&O at 2] Given the ALJ’s statements, and because I see nothing in the record to the contrary, I find Respondent’s first argument to be without merit.

II.

The decision of the ALJ was not supported by substantial evidence because the record clearly shows that all orders given with respect to pumping the bilges were not properly conveyed.

Although Respondent's second argument is not clear on its face, after reviewing the full record it appears that he is asserting that even if the ALJ did not err in rejecting his affirmative defense, Respondent should not be found to have committed misconduct because he did not understand the Chief Engineer's order concerning the pumping of the duct keel. As will be discussed more fully in Argument IV, Appellant asserts the affirmative defense that he was expressly authorized by the LIBERTY WAVE's Chief Engineer to violate Liberty's company policy and pump the contents of the vessel's bilge system directly overboard when he was initially told to pump the duct keel in that manner. Respondent's conclusion was based upon his beliefs that the duct keel was a part of the LIBERTY WAVE's bilge system and that the Chief Engineer's pumping instruction referred to the vessel's bilge system in general, not the duct keel alone. To that end, Respondent contends that his confusion as to the meaning of the order was understandable because the order was given orally and not anywhere put in writing. At the hearing, Respondent testified that "[t]hey didn't put it in writing; [the instruction as to the pumping of the duct keel] and they should have. Now if...there had been a miscommunication at that point, then they [Liberty] should not have fired me, they should have given me a letter of warning, that would have been fair if there was a miscommunication there." [Tr. at 253] Respondent further asserted that, when a vessel's Standing Orders are to be violated, "they put it on the status board and then they put a letter from the Chief saying that this is – 'We're not following standing orders because...' therefore, if there is confusion, they can pull it out and say, 'Well look, here we had this letter, it's in the log'; but there's none of that [in this case], it's all verbal." [Tr. at 233]

As I have already stated, I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence.

Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff' NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMLENKE). While Respondent may have been confused by the verbal order concerning pumping the duct keel, the record does not indicate that his employers were required to convey orders in any particular method, regardless of their significance. In fact, the LIBERTY WAVE's Chief Engineer testified that orders on board the vessel were "mostly verbal." [Tr. at 219] Respondent's argument would carry more weight if it could be shown that the verbal communication of the orders given really caused confusion. At the hearing, the Chief Engineer testified that Respondent was "the only one that didn't understand...[the order to pump the duct keel even though]...there was two other—or three other people who were on board there and they understand it quite clearly." [Tr. at 205] Because the personnel similarly situated to Respondent were able to comprehend the orders at issue and because Respondent has not shown that his employers had a duty to put such orders in writing, I find Respondent's second argument to be without merit.

III.

The ALJ erred because he did not consider the fact that it is not unlawful to pump clean water, including bilge water, directly overboard when the ship is in distant international waters.

Respondent next contends that the charge of misconduct should not have been found proved because it was not illegal to discharge water, including bilge water, directly overboard while the M/V LIBERTY WAVE was in distant international waters.

Pursuant to 46 C.F.R. § 5.27, “misconduct” is “human behavior which violates some formal, duly established rule.” The regulation makes clear that such “established rule(s)” may be found in a variety of sources including “among other places, statutes, regulations, the common law, the general maritime law, a ship’s regulation or order, or shipping articles and similar sources.” 46 C.F.R. § 5.27. The Coast Guard’s complaint stated that the misconduct charge resulted from the fact that “[e]ach of the two overboard discharges was a direct violation of Liberty Maritime Corporation’s company restrictions on pumping bilges as set forth in the Vessel Instruction Manual and the Chief Engineer’s Standing Order 11.” Therefore, whether the discharges were “illegal” is of no relevance to this case. Instead, to effectively prove the misconduct alleged, the Coast Guard must show that Respondent violated Liberty Maritime’s Company policy, without justification, when he twice discharged bilge water directly over the side of the M/V LIBERTY WAVE. Therefore, I find Respondent’s argument to be without merit.

IV.

The ALJ erred by concluding that the water pumped directly overboard by the Chief Engineer from the duct keel was NOT bilge water. Therefore, because the Captain gave the Chief Engineer permission to violate the standing orders, Respondent did not commit any acts of misconduct and the ALJ erred by rejecting Respondent’s affirmative defense.

Respondent’s next argument centers on his affirmative defense. Although Respondent does not deny twice pumping bilge water directly overboard, without passing it through the OWS, he contends that his supervisors specifically told him to do so. As a

result, he contends that he was ordered to violate Liberty's standing orders and cannot, therefore, be found to have committed misconduct. I do not agree.

The record indicates that, at some point during the initial stages of the voyage, a crack in one of the LIBERTY WAVE's ballast tanks began to leak ballast water into the duct keel, causing a high-level alarm to sound. [Tr. at 97-106] At the hearing, Respondent asserted that the First Assistant Engineer, Mr. Harold Evans, showed him how to clear the alarm by using the vessel's electric bilge pump to pump the water from the duct keel directly over the side of the vessel, without first passing it through the OWS. [Tr. at 104-06] As a result of his conversations with Mr. Evans, Respondent concluded that it would be acceptable to pump *any* bilge water directly overboard. As I noted above in Argument I, Respondent's conclusion was based upon his belief that the water in the duct keel was "not ballast water any more...[it was]...bilge water because...[the crew was]...using the bilge system...[to pump it overboard] ...and ...[because the water was]...in the duct keel bilges." [Tr. at 106-09; 119] Although neither Mr. Evans nor the Chief Engineer, Mr. Cle Collins, deny that Respondent was told to pump water from the duct keel directly over the side of the vessel, both assert that the water in the duct keel was not bilge water, as Respondent contends, but rather, that it was ballast water that could properly be pumped over the side of the vessel without first being passed through the OWS. [Tr. at 113-122] As I noted above, a determination as to the contents of the duct keel centers on which testimony the ALJ deemed credible. As I have already noted, it is the ALJ's responsibility to determine the weight of evidence and to make credibility determinations. Appeal Decisions 2156 (EDWARDS), 2116 (BAGGETT), and 2472 (GARDNER). Again, although conflicting testimony exists, I

see no evidence in the record to indicate that the ALJ's rejection of Appellant's affirmative defense was arbitrary, capricious, or an abuse of his discretion.

In the findings of fact portion of his D&O, the ALJ stated that "Mr. Evans [Respondent's direct supervisor] testified that he instructed...Respondent to pump ballast or clean ocean water from the duct keel directly over the side. However, Mr. Evans emphatically denies ordering the Respondent to pump bilge (dirty water possibly containing oil) over the side by bypassing the OWS." [citations omitted] [D&O at 3]

Pursuant to 33 C.F.R. § 20.702, Respondent "bears the burden of proof" in asserting his affirmative defense. The record clearly indicates that, based upon his review of the record, the ALJ rejected Respondent's affirmative defense because he found the testimony of Respondent's supervisors to be more credible than Respondent's testimony. [D&O at 3] To that end, the ALJ found "Respondent's testimony that he was instructed by the first assistant engineer, Mr. Harold Evans, to pump bilge water over the side bypassing the OWS...[to be]...not credible." [*Id.*]

I will only disturb the ALJ's resolution of conflicting evidence in exceptional circumstances. Appeal Decisions 2472 (GARDNER), and 2390 (PURSER), *aff'd sub nom Commandant v. Purser*, NTSB Order No. EM-130 (1986), 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), 2302 (FRAPPIER), and 2275 (ALOISE). As I have already noted, I have long held that the findings of the ALJ need not be completely consistent with all the evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decisions 2492 (RATH) and 2282 (LITTLEFIELD). Therefore, I find the ALJ's determination that the duct keel contained ballast water to be sufficiently supported by evidence in the record. As a

consequence, the ALJ did not commit error by rejecting Respondent's affirmative defense and concluding, in effect, that Respondent was not authorized to violate the LIBERTY WAVE's Standing Orders.

V.

The ALJ erred by considering Respondent's employment history, including previous acts of uncharged misconduct, in reaching his decision because Respondent has no disciplinary record with the Coast Guard.

To support his affirmative defense, discussed more fully in Argument IV, Respondent testified that "there was hostility on the ship," that his employers "set him up," and that he had not ever been fired for similar reasons. [Tr. at 233, 238, 255, 258] During the cross-examination of Respondent, the Coast Guard I.O. offered I.O. Exhibit 12, a packet of information concerning Respondent's past employment record, to rebut Respondent's testimony. The I.O. argued that "it's his testimony that he hasn't been fired for this same reason where, in fact, several times he's been fired for very similar reasons." [Tr. at 264] The ALJ subsequently admitted I.O. Exhibit 12 into evidence and, in the "Findings of Fact" portion of his D&O, noted that "Respondent has been fired or reprimanded on numerous occasions for failure to follow directions, inability to understand how to complete tasks, and failure to follow standard operating procedures" [D&O at 3]. On appeal, Respondent contends that it was improper for the ALJ to consider the evidence contained in I.O. Exhibit 12 in reaching his decision because he had a clean record with the Coast Guard. I do not agree.

33 C.F.R. § 20.804(a) makes clear that "[n]o party may raise an objection to the admission or exclusion of evidence on appeal unless he or she raised it before the ALJ." At the hearing, I.O. Exhibit 12 was admitted into evidence without objection by

Respondent. [Tr. at 267] Therefore, because Respondent did not object to the admission of the evidence at the hearing, he has waived his right to do so here.

Even if Respondent had not waived his right to question the admissibility of the evidence at issue, I would not find that the ALJ erred by considering that evidence in reaching his decision. Section 556(d) of the APA provides that “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” [5 U.S.C. § 556(d)] Mirroring the intent of the APA, the Coast Guard’s procedural rules state that the ALJ “shall regulate and conduct the hearing so as to bring out all relevant and material facts and to ensure a fair and impartial hearing” and that “[t]he ALJ may admit any relevant oral, documentary, or demonstrative evidence, unless privileged.” 46 C.F.R. § 5.501. Relevant evidence is defined as “evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence.” 33 C.F.R. § 20.802. Therefore, the key issue remaining in this case is whether evidence of Respondent’s uncharged acts of misconduct (I.O. Exhibit 12) was relevant to the ALJ’s decision to reject Respondent’s affirmative defense.

As I have already indicated, Respondent asserted the affirmative defense that, because he was told to discharge water from the duct keel directly over the side of the M/V LIBERTY WAVE, he was expressly authorized to violate Liberty’s company policy and discharge bilge water directly over the side of the vessel. To support his affirmative defense, Appellant argued, in effect, that a hostile environment existed aboard the vessel and insinuated that Liberty “set him up” to lose his job over the incident. [Tr. at 255] Among other things, the transcript indicates that Respondent “speculat[ed]” that he may

have been fired to allow other engineers aboard the M/V LIBERTY WAVE to get his “penalty time, which was a lot of money, a couple thousand bucks.” [Tr. at 238] Based on Respondent’s arguments, evidence like that contained in I.O. Exhibit 12, especially evidence tending to show that he had been fired and/or reprimanded before as a result of his inability to follow orders, was clearly relevant to the ALJ’s determination whether to accept or reject his affirmative defense. Because it is the ALJ’s responsibility to determine the weight of evidence and to make credibility determinations, I do not find that the ALJ erred in considering I.O. Exhibit 12 in rejecting Respondent’s affirmative defense. The ALJ’s decision to admit I.O. Exhibit 12 into evidence and to consider that evidence in reaching his decision was not arbitrary, capricious, or an abuse of his discretion. Therefore, I am not persuaded by Respondent’s fifth argument.

VI.

The ALJ erred by failing to consider the fact that: 1) Respondent acted in good faith, believing that he had been instructed to discharge the bilge water directly overboard; 2) Respondent has accepted responsibility for his actions and cooperated fully with the Coast Guard; 3) no pollution occurred, no one was injured, no machinery was damaged, and no detrimental event resulted from the incident; 4) and, Respondent has shown remorse and never attempted to justify his actions.

Respondent’s final argument centers on his belief that the ALJ did not consider the evidence that he submitted in mitigation in reaching his decision. I do not agree.

In his D&O, the ALJ stated that his “findings of fact and conclusions of law...[were]...prepared upon...[his]...analysis of the entire record, and applicable regulations, statutes, and case law” and that “[e]ach exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.” Since I have already determined that there is substantial evidence in the

record to support the ALJ's rejection of Respondent's affirmative defense, the issue remaining is whether the sanction imposed by the ALJ is appropriate in light of the evidence submitted in mitigation.

The selection of an appropriate order is the responsibility of the ALJ and he has wide discretion as to the choice of the appropriate sanction. *See* 46 C.F.R. § 5.569(a); Appeal Decisions 2543 (SHORT), 2609 (DOMANGUE), and 2618 (SINN). While the ALJ may look to the Suggested Range of an Appropriate Order Table, 46 C.F.R. Table 5.569, for information and guidance as to the typical order associated with a particular charge, he may increase or decrease the sanction as he sees fit. 46 C.F.R. § 5.569; Appeal Decision 2618 (SINN). To that end, I have long held that an ALJ's order will only be modified on appeal if it is clearly excessive or an abuse of discretion. Appeal Decisions 2245 (MATHISON), 2256 (BURKE), 2422 (GIBBONS), 2391 (STUMES), 2362 (ARNOLD), and 2313 (STAPLES).

The record evidences that the ALJ considered all of the issues raised at the hearing in his selection of an appropriate order. [D&O at 3-5] Although the ALJ noted both that Respondent did not have a prior record and that the sanction suggested by the Coast Guard was in excess of the one suggested by Table 5.569, he found, "based upon all of the record evidence...[that]...the Coast Guard's proposed sanction ... [was] ...reasonable." [Tr. at 4] He further stated that he found Respondent's employment history to be "quite troubling" and added that his "justification for his actions...[led him]...to wonder whether he...willfully lied in this proceeding or is incapable of performing his job duties properly or both." [*Id.*] Whether Respondent acted in good faith, caused pollution, or attempted to justify his actions, or not, I agree with the ALJ

that “there can be no doubt that the Respondent must complete assigned tasks as ordered, follow directions, and employ standard operating procedures or risk losing his profession.” [*Id.*] Therefore, given Respondent’s history of similar incidents and the fact that the ALJ did not err by rejecting his affirmative defense, I will not disturb the sanction imposed by the ALJ. There is simply no evidence in the record to indicate that the ALJ abused his discretion in choosing the sanction at issue and, given the facts of the case, I do not believe that the ALJ’s order is excessive. Therefore, I am not persuaded by Respondent’s final argument and I will uphold the sanction imposed by the ALJ.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ’s decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find that Respondent’s bases of appeal are without merit.

ORDER

The order of the ALJ, dated at Alameda, California, on March 19, 2002, is

AFFIRMED.

//S//

T. J. BARRETT
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 31st of August, 2003.