0U N I T E D S T A T E S O F A M E R I C A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	VICE COMMANDANT
	:	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 776593	:	NO. 2610
Issued to Walter J. Bennett	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.607.

By a Decision and Order ("D&O") dated January 28, 1998, the Chief Administrative Law Judge (ALJ) of the United States Coast Guard at Baltimore, Maryland declared the Master 1600 Gross Ton Inland license ("Master 1600") of Mr. Walter J. Bennett ("Appellant") *void ab initio* and suspended Appellant's Master 500 Gross Ton Inland license ("Master 500") for six months and thereafter placed Appellant on a twelve month probationary period based upon finding proved one specification of misconduct.

The specification for the charge of misconduct alleged that Appellant, while acting under the authority of his Master 500 license, did wrongfully, knowingly, and fraudulently submit and sign a letter that falsely claimed sea time that Appellant needed in order to qualify for an upgrade of his license (from Master 500 to Master 1600).

The suspension and revocation hearing was held on June 19 - 20, 1997, in Baltimore, Maryland. On March 16, 1998, Appellant filed a petition to reopen his

hearing ("Petition"). On March 25, 1998 Appellant also filed an appeal ("Appeal") to the Chief ALJ's D&O. Appellant subsequently requested to amend that Appeal to add an additional argument and to include additional information that Appellant claimed was newly discovered evidence. By an order ("Order") dated May 22, 1998, the Chief ALJ of the United States Coast Guard at Baltimore, Maryland denied the Appellant's Petition.

In an undated letter, postmarked May 30, 1998, to Chief, Office of Maritime and International Law, Appellant expressed, *inter alia*, his desire not to appeal the Order denying his Petition. Appellant's decision not to appeal the Order was based on his belief that the evidence he presented in support of his Petition had become part of the record of the suspension and revocation hearing. In a letter ("letter") dated June 16, 1998, the Chief, Office of Maritime and International Law advised Appellant that the evidence Appellant presented in support of his Petition was admitted only for the purpose of deciding Appellant's Petition and was not part of the record of the suspension and revocation hearing. See footnote 3, Order at 3. In addition, Appellant was further advised that if he wished to appeal the Order denying his petition to reopen, he had 30 days from receipt of the letter to do so. Appellant received the letter on June 19, 1998. On June 22, 1998, Appellant filed his notice of appeal and appellate brief ("Brief") appealing the Chief ALJ's Order denying his petition to reopen. In this decision, I address both the appeal from the denial of the petition to reopen and the appeal of the underlying D&O, including the Appellant's request to amend his Appeal.

REQUEST TO AMEND

Appellant requests to amend his Appeal to add two additional arguments and include "newly discovered" evidence. One argument is a request to consider the

cumulative effect of the assigned errors, which I will do. The other argument and evidence relates to Appellant's appeal of the Chief ALJ's Order denying his petition to reopen which I address in Part XIV of this Decision.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of and acting under the above captioned license. On November 18, 1996, the Coast Guard Regional Examination Center in Baltimore, Maryland, received by mail, two applications signed and submitted by the Appellant. The applications consisted of (a) a cover letter dated November 2, 1996, signed by the Appellant, (b) an application for "Mate of any Gross Tons Inland/Unlimited First Class Pilot License" and (c) an application for "Master of 1600 Gross Tons Inland – Radar Endorsement." In both applications, in block 25, the Appellant indicated that letter(s) of sea service were attached. One of the sea service letters was ostensibly from the New York Sun Shipping Company ("Sun letter") dated November 2, 1996, the same date as the cover letter and the two applications. The Sun letter purports to be signed by "John W. Smith," and refers to sea time accumulated by the Appellant while working for the New York Sun Shipping Company. The Sun letter indicated that the Appellant had purportedly worked "478 8-hour underway days" for the company. The phone number on the Sun letter was listed to the Appellant. The sea service claimed in the Sun letter, combined with the sea service claimed in the other sea service letter issued by the Delaware River and Bay Authority, would have qualified the Appellant for the upgrade of his license to Master 1600. The cover letter that accompanied the two license applications referred to the precise amount of sea service time that had been declared in both sea service letters.

On March 11, 1997, the Chief of the Baltimore Regional Examination Center ("REC") faxed an inquiry to the New York Sun Shipping Company requesting verification of the Appellant's sea service time with that company. In a letter dated March 11, 1997, to the Baltimore REC, Captain Francis Barry of the New York Sun Shipping Company, wrote that the company had no record of the Appellant having ever worked on any Sun Company vessel. In a letter dated March 24, 1997, the Chief of the Baltimore REC notified the Appellant that his license application was being referred to the Investigations Department of Coast Guard Activities Baltimore. On May 8, 1997, the Appellant was charged with *Misconduct*. The hearing was held on June 19 – 20, 1997, in Baltimore, Maryland. At the hearing, the Appellant was represented by James J. Nolan, Jr., Esquire. On January 28, 1998, the ALJ issued his Decision and Order in which he found proved the charge of *Misconduct*.

BASES OF APPEAL

Appellant's 155-page pro se Appeal contains thirty "Appeal Items." Appeal Item #1 consists of fifty-nine (59) "Itemized Corrections on the Record." The arguments set forth in Appellant's Appeal are, at times, repetitive, difficult to distinguish, and include several instances where entire paragraphs are copied verbatim and repeated in multiple locations within the Appeal. For example, the following excerpt:

> In this case, Mr. Bennett was applying for an upgrade of his license. A fair reading of 46 C.F.R. 5.57 under the doctrine of ejusdem generis would probably bring within its ambit an application for an upgrade of a license. However, what is not fairly included in this definition is the specific misconduct charge by the Coast Guard, namely, allegedly sending the letter with the application. It is not the sending of a letter which constitutes acting under the authority of a license. Rather it is the actual "applying" or the "application" which is the gravamen of acting under the authority of a license. The specification that Mr. Bennett

> wrongly, knowingly and fraudulently submitted a signed letter to upgrade his license legally fails to allege a charge or specification sufficient to come within behavior prescribed [sic] by federal statutes and regulations. If Mr. Bennett had been charged with wrongfully, knowingly, and fraudulently submitting and signing an "application," then such a charge would arguably come within the provisions of Section 5.57.

appears, verbatim, in four different locations in the Appeal. See Appeal at 33, 41, 46, and 114. This type of reiteration occurs in several other locations in the Appeal. See e.g., Appeal at 39, 66, 102; Appeal at 32, 90, 103, 122; and Appeal at 100, 110. When acting on an appeal from an agency decision, the agency has all the powers which it would have in making the initial decision. 5 U.S.C. § 557(b). One of these powers includes the exclusion of irrelevant, immaterial, or unduly repetitious evidence. See 5 U.S.C.§ 556, 46 C.F.R. § 5.537 and Fed. R. Evid. 402 – 403. Understanding that Appellant has prepared this Appeal pro se, I have identified the following fifteen (15) material issues on appeal. All other issues raised by Appellant not enumerated below are immaterial, irrelevant or unduly repetitious and are hereby denied.

1. The ALJ erred when he determined that there was sufficient evidence that the Appellant submitted the fraudulent sea service letter and the deceptive cover letter that accompanied his license application.
2. The ALJ erred when he determined that the deceptive cover letter and fraudulent sea service letter were received with Appellant's application.
3. The ALJ erred when he determined that the deceptive cover letter and fraudulent sea service letter were part of Appellant's Merchant Mariner's license application.
4. The ALJ erred when he determined that submitting the application (including the deceptive cover letter and fraudulent sea service letter) constituted an action under the authority of his license;
5. The ALJ erred when he determined the sea service requirements Appellant needed to upgrade his license from Master 500 gross ton to Master 1600 gross ton;

6. The ALJ erred when he found that the charge was sufficient where the specification contained the language “on or about November 6, 1997” and the application was dated November 2, 1997 and received by Activities Baltimore Regional Examination Center (“REC”) on November 18, 1997;
7. The ALJ erred when he found that the charge was sufficient where there was no risk to safety at sea;
8. The Coast Guard Investigating officer engaged in improper discovery.
9. The Coast Guard Investigating officer improperly taped the suspension and revocation hearing.
10. The ALJ caused undue delay in rendering his D&O.
11. The ALJ erred when he found that it was not improper for the Chief of the REC to backdate Appellant’s application to correspond with the date it was entered in the mail log as having been received.
12. The ALJ erred when he found that the Chief of the REC did not entrap the Appellant by approving a license application known to be based on a fraudulent sea service letter;
13. The ALJ erred when he found that the Coast Guard was not estopped from pursuing the revocation and suspension of Appellant’s license.
14. The ALJ erred when he denied Appellant’s petition to reopen.
15. The cumulative effect of the assigned errors denied the Appellant a fair and just determination of the matter.

OPINION

The ALJ is the arbiter of facts. As such, it was his duty to evaluate the testimony and evidence presented at the hearing. There is longstanding precedent in these suspension and revocation proceedings that the findings of fact of the ALJ are upheld unless they can be shown to be arbitrary and capricious or there is a showing that they are clearly erroneous. See Appeal Decisions 2557 (FRANCIS); 2452 (MORGRANDE); and 2332 (LORENZ).

I

The first basis of Appellant's appeal is that the ALJ erroneously found that the Appellant submitted the deceptive cover letter and fraudulent sea service letter. Although the interpretation of the testimony by the Appellant may differ from that of the ALJ, the ALJ's findings of fact will only be disturbed if the Appellant demonstrates that they are arbitrary and capricious or clearly erroneous. Arbitrary and capricious is defined thusly: "willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." Black's Law Dictionary 105 (6th ed. 1990). As a basis for appellate review, "a finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed." 5 Am. Jur. 2d *Appellate Review* § 672 (1997); Black's Law Dictionary 251 (6th ed. 1990). Therefore, the ALJ's determination will only be overturned if he acted arbitrarily and capriciously or was clearly erroneous in determining that the Appellant submitted the deceptive cover letter and fraudulent sea service letter.

The deceptive cover letter at issue, which Appellant claims was submitted by someone else, refers specifically to:

(a) the exact amount of time (67 days) included on Appellant's legitimate sea service letter from Cape May – Lewes Ferry;
(b) the exact amount of the Appellant's check ($145) for the fees;
(c) the exact date (April 8, 1996) of the Appellant's Master 500 and 1600 gross ton Inland exam;
(d) the exact number of Delaware river trips (42) the Appellant took;
(e) the exact date that Appellant obtained his first license (April 24, 1995);
(f) the exact number of days (478) contained on the fraudulent sea service letter; as well as
(g) the exact number of supervisory days (360) claimed on the fraudulent sea service letter.

This cover letter is also dated the same day as the Appellant's applications, his check and the fraudulent sea service letter. The deceptive cover letter refers specifically to both his applications for a Master 1600 ton upgrade and a First Class Unlimited Pilot license. This level of detail could reasonably lead the ALJ to believe that this cover letter was written and submitted by the Appellant. The ALJ's finding that Appellant submitted the deceptive cover letter was based on these facts presented at the hearing and, therefore, was neither arbitrary and capricious nor clearly erroneous.

II

Appellant's second basis for appeal is that the ALJ erred in finding that the deceptive cover letter and fraudulent sea service letter were submitted contemporaneously with the Appellant's application. The ALJ's finding is reviewed on a clearly erroneous standard. Among other things, the ALJ relied on the log sheets and testimony of Ms. Lynn Patterson, supervisor of legal documents at REC, Activities Baltimore, to find that the application received on November 18, 1996 included the deceptive cover letter (I.O. ex. 1) and the two sea service letters (including the fraudulent sea service letter). See TR at 320; D&O at 19. The deceptive cover letter and fraudulent sea service letter were in the Appellant's application file and the only log entries for items received for Appellant's file were his application (with attachments) and a drug screen form received on February 11, 1997. See TR at 316, 319, and 320. I believe based on these facts, that there was sufficient evidence to support the ALJ's finding and, therefore, his decision was not clearly erroneous.

III

Appellant submits that the deceptive cover letter and the fraudulent sea service letter are not part of the application. Appellant contends that the application is limited to the Coast Guard form that he filled out and submitted. I disagree. An attachment to an application is properly considered part of the application. See e.g. Appeal Decision 2569 (TAYLOR) (where Applicant lied on an "information sheet" attached to his application). Appellant argued at the hearing and in his Appeal that any claims of sea service time in a cover letter would not be relied upon by the Coast Guard. While it is true that a bare claim of sea service time in a cover letter would be insufficient proof of that time, the Coast Guard relies on such information for direction in fulfilling the applicant's request and obtaining proper proof of the applicant's qualifications. In this case, the Coast Guard used the deceptive cover letter for guidance when processing the Appellant's request for a license upgrade. See TR at 319.

Clearly, the fraudulent sea service letter was part of the application as the application could not be processed without letters of sea service and the application referred specifically to the attached sea service letters. Sea service letters are a necessary and material part of the application, which prove satisfaction of Coast Guard requirements for a license upgrade. Cover letters and sea service letters assist the Coast Guard in evaluating the applicant's qualifications and, as such, are part of the application. Therefore, the ALJ properly considered the deceptive cover letter and fraudulent sea service letter as part of the Appellant's application.

IV

The Appellant contends that submitting an application for an upgrade to a license does not constitute action under the authority of his license. The regulation is clearly to the contrary. "A person is considered to be acting under the authority of the license . . . while engaged in official matters regarding the license . . . [t]his includes, but is not limited to, such acts as applying for renewal of a license, taking examinations for upgrading or endorsements, requesting duplicate or replacement licenses . . .". 46 C.F.R. § 5.57. This provision has been interpreted to include that application for a license upgrade constitutes acting under the authority of the underlying license. See Appeal Decision 2433 (BARNABY). Therefore, I find that the ALJ correctly determined that the Appellant was acting under the authority of his Master 500 license when he submitted his application for a license upgrade to Master 1600.

Appellant also claims that submitting an application is not "human behavior which violates some formal, duly established rule." See 46 C.F.R. § 5.27. I disagree. The ALJ correctly cited 18 U.S.C. § 1001 which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than 5 years, or both.

The Appellant's misconduct charge was clearly based upon this statute which is an appropriate source of a "formal, duly established rule." See 46 C.F.R. § 5.27.

V

Appellant claims that the ALJ erred when he determined the sea service requirements needed by Appellant to upgrade his license to 1600 gross tons. I agree in

part. Appellant claims that only 90 days of recent sea time was required to upgrade his license based on 46 C.F.R. § 10.422 (b)(2). Appellant is clearly in error as 46 C.F.R. § 10.422 applies only to licenses of up to 200 tons as evidenced by its heading: "Tonnage limitations and qualifying requirements for licenses as master or mate of vessels of **not more than 200 gross tons**." (Emphasis added). To obtain the Master 1600 Gross Ton Inland license for which Appellant applied, the Coast Guard requires *three years* total service including one year as a supervisor as set out in 46 C.F.R. § 10.442. The ALJ incorrectly found that four years of total service were required. See Finding of Fact 12. This error is inconsequential, however, because the Appellant was still unqualified for the 1600 Gross Ton license without the time claimed in the fraudulent sea service letter. The fraudulent sea service letter stated that the Appellant had "worked 360 8-hour underway days as a Boatswain Supervisor in a supervisory position" which would exactly satisfy the supervisory time requirement set out in 46 C.F.R. § 10.442(a).[1] The supervisor of legal documents at REC Baltimore, Ms. Lynn Patterson, testified that the Appellant "wouldn't have been qualified without [the fraudulent sea service] letter." See TR at 356. Thus, the ALJ's finding that the Appellant did not have the qualifying sea service time without the fraudulent sea service letter was correct.

VI

Appellant claims that the specification is insufficient because it alleges the misconduct occurred on or about November 6, 1997 and the evidence presented at the hearing indicated that the application was dated November 2, 1997 and was received by the REC on November 18, 1997. Pleadings in these administrative hearings are notice

[1] 46 C.F.R. § 10.103 defines "year" as 360 days for purposes of complying with service requirements. In

pleadings and are considered sufficient if they provide adequate notice of the conduct to allow a Respondent to prepare a defense. See Appeal Decision 2478 (DUPRE). "It is firmly established that there can be no subsequent challenge or appeal of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." See Appeal Decision 2504 (GRACE), citing Appeal Decision 1776 (REAGAN); Affirmed sub nom. Commandant v. Reagan, NTSB Order No. EM-9; Appeal Decision 1792 (PHILLIPS); Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950). Thus, the specification in this case is sufficient as it placed the Appellant on notice of the conduct that formed the basis of the charge and the issues were thoroughly litigated.

VII

Appellant claims that the charge and specification of wrongfully submitting a letter claiming unearned sea service time is insufficient because it does not pose a threat to safety at sea. Appellant cites the language contained under the definition of *Violation of law or regulation,* 46 C.F.R. §5.33, which provides: "[w]here the proceeding is based exclusively on that part of title 46 U.S.C. § 7703, which provides as a basis for suspension or revocation a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the *charge* shall be *violation of law or violation of regulation*." Appellant, however, was charged with *Misconduct,* not *Violation of law or regulation.*[2] 46 C.F.R. § 5.27 defines *misconduct* "[a]s human

the same section, a "day" is defined as eight hours of watchstanding.

[2] I have previously made it clear that submitting false information to the Coast Guard in support of a license application is a threat to maritime safety. "The truth of information provided by applicants for licenses and documents is essential to the Coast Guard's ability to discharge its mission of protecting life and property at sea." See Appeal Decision 2569 (TAYLOR). Additionally, I have held that "fraud in the procurement of any license, certificate, or document is a clear threat to the safety of life or property." Id.

behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. **It is an act which is forbidden or a failure to do that which is required.**" (Emphasis added). In submitting a license application to the Coast Guard, Appellant was required to submit true and accurate information. See Section VII of I.O. exhibit 2. This, he did not do. Therefore, I find that the charge of misconduct was applicable to Appellant's case.

VIII

Appellant claims the investigating officer misused his subpoena powers by issuing subpoenas after serving charges. Appellant argues that only the ALJ may issue subpoenas after the charges have been served. Appellant contends that if the Investigating officer wants to subpoena a record or an individual after charges are served, he must make a motion to the ALJ under 46 C.F.R. § 5.301(c).[3]

In this case, the investigating officer subpoenaed the Appellant's school records and documents kept by Captain Wighlcke, Appellant's former employer. The Coast Guard did not introduce these records at the hearing. Therefore, I find it unnecessary to reach the merits of this argument.

Appellant also objects to an interview of Captain Wighlcke, Appellant's former employer, held by LT Jendrossek, Chief, Investigations Division, Activities Baltimore. Appellant contends that the interview failed to meet the requirements of 46 CFR § 5.553.

Because the Coast Guard relies on the information provided by the applicant to discern the applicant's qualifications and suitability to hold the requested document or license, safety at sea is threatened when that information is incorrect.

[3] 46 C.F.R. § 5.301(c) states "After charges have been served upon the respondent the Administrative Law Judge may, either on the Administrative Law Judge's own motion or the motion of the investigating officer

Appellant refers to this conversation as a deposition; however, there was no transcript of the discussion, nor was it sworn testimony. The Coast Guard did not introduce the contents of the discussions. Appellant inappropriately cites to Appeal Decisions 2115 (CHRISTEN) and 2170 (FELDMAN) which deal with sworn deposition transcripts that were introduced at the hearing by the Coast Guard. That is not the case here. The requirements for deposition testimony contained in 46 C.F.R. § 5.553 do not apply to the conversation between LT Jendrossek and Captain Wighlcke.

In fact, the Appellant called LT Jendrossek as a witness and information obtained by LT Jendrossek from Captain Wighlcke that was beneficial to the Appellant was introduced on direct examination. The information that was obtained from LT Jendrossek's interview with Captain Wighlcke indicated that the Appellant had not claimed the false sea time in his application for employment with Captain Wighlcke. Therefore, even assuming, *arguendo*, that the conversation was improper, there was no prejudice to the Appellant.

IX

Appellant claims that the Coast Guard Investigating Officer improperly taped the suspension and revocation hearing. I am not aware of, and Appellant does not indicate, any regulation that prevents either party from recording the proceedings. This is within the discretion of the ALJ and Respondents have, on occasion, availed themselves of this opportunity. See e.g. Appeal Decision 2328 (MINTZ). Further, Appellant did not raise any objection to the recording at the hearing. It is a well established rule that in order to preserve an issue on appeal, there must have been a valid motion or objection made at the

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or the respondent, issue subpoenas for the attendance and the giving of testimony by witnesses or for the

hearing. See 46 C.F.R. § 5.701(b)(1); Appeal Decision 2458 (GERMAN); Appeal Decision 2376 (FRANK); Appeal Decision 2400 (WIDMAN). Failure to object at the hearing waives the issue on appeal. GERMAN, *supra*; Appeal Decision 2384 (WILLIAMS). I find, therefore, that Appellant has waived any error now claimed.

X

The Appellant claims that the ALJ caused undue delay in reaching a decision on his case. The hearing was held on June 19 and 20, 1997. On June 23, 1997, the ALJ issued an order calling for briefs from both sides by July 7, 1997. Appellant submitted a brief on July 7, 1997. The Coast Guard filed a response to Appellant's brief dated July 14, 1997. Appellant made a motion to strike the Coast Guard's response on July 16, 1997, which was later granted by the ALJ. See D&O at 3. On August 22, 1997, the ALJ identified a difficulty in evaluating the Appellant's proposed findings of fact and conclusions of law. The Appellant's brief referred to motions submitted prior to the hearing that were in narrative form and did not specifically and concisely set forth citations to the record or identify evidence from the record to support the proposed findings of fact and conclusions of law. Thereafter, on September 5, 1997, with the aid of counsel, Appellant submitted a 36-page memorandum containing 64 proposed findings of fact and 20 proposed conclusions of law.

On September 24, 1997, Appellant made a motion to allow him to use his license which the ALJ then granted on September 30, 1997. From September 30, 1997, until the ALJ issued his D&O on January 28, 1998, Appellant had full use of his Master 500 Gross Ton license. On October 23, 1997, the ALJ held a teleconference call at which time he

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production of books, papers, documents or any other relevant evidence."

informed the parties that he had found the specification proved and requested the parties come to an agreement as to sanctions. The parties held settlement negotiations until November 19, 1997 at which time they informed the ALJ that they had reached an impasse. On January 28, 1998, the Administrative Law Judge issued his D&O in this case.

While it is true that seven months elapsed between the hearing and the final written decision, those seven months were appropriately used to hear arguments and get information from the parties necessary to the resolution of this case. It is important to note that the Appellant was without the use of his license for only three months of that seven month period. Neither 46 U.S.C. § 7702 nor 5 U.S.C. § 555 prescribes a time limit in which a decision is to be issued. Given the complexity of issues raised and the circumstances of this case, I find that the Appellant's case was concluded within a reasonable time and that there was no undue delay on the part of the ALJ.

XI

Appellant contends that the ALJ erred when he determined that there was nothing improper about the backdating of the Appellant's application. Sometime in February 1997, Mr. Cassady, Chief of the Baltimore REC, placed a date stamp on the Appellant's application and wrote the date November 18, 1996 to correspond with the date the mail log indicated the application package was received. See TR at 120. While this practice is not optimal, there are no regulations prohibiting it. The date was placed on the document to correspond to a proper record entry in the mail log and was for reference when determining the date the application was received. See TR at 129, 130.

Contrary to Appellant's claim that "the office had a workable date-stamp for that purpose," there was no testimony introduced that the date stamp normally used for stamping incoming applications was working that day and, in fact, there was testimony that it may have been broken. See TR at 122, 359. Regardless of whether the date stamping procedure was proper, the ALJ did not rely on the date stamps in his decision. He stated, "these letters are reliable evidence with or without a date receipt stamp…. there is ample evidence in the record that the applications themselves were actually received on that date, as is clear from the log sheets, which incidentally were entries independently made in long hand by readily identifiable people." See D&O at 16. Thus, any error in the date stamping procedure was harmless.

XII

Appellant claims that Mr. Cassady entrapped the Appellant by approving his license despite knowing that the sea service letter was false. First, it is questionable whether the defense of entrapment applies to administrative hearings. See Appeal Decision 2490 (PALMER). However, even assuming, *arguendo*, that entrapment could be a defense in an administrative proceeding, Appellant misunderstands the nature of the defense. The defense of entrapment forbids "the inducement of one by a government agent to commit an offense." See Appeal Decision 2490 (PALMER) citing United States v. Russell, 411 U.S. 423 (1973). In this case, Appellant submitted the false documents prior to the approval of his Master 1600 Gross Ton license. Appellant submitted these documents of his own free will and his misconduct was complete at the time he submitted the false documents. See Appeal Decisions 2456 (BURKE); 2223 (HEWITT). It was not necessary for the REC chief to approve the license for the misconduct to be complete or

for charges to be brought. There was no inducement by the government and, therefore, Appellant's entrapment argument is without merit.

XIII

The Appellant contends that the Coast Guard should be estopped from pursuing the charge against him because the Master 1600 Gross Ton license was issued solely for the purpose of seeking revocation of Appellant's Master 500 Gross Ton license, which Appellant believes was a "personal objective" of Mr. Cassady's. See Appeal at 125. Appellant argues that if the Coast Guard had investigated the authenticity of the deceptive cover letter and the fraudulent sea service letter before issuing the Master 1600 Gross Ton license, the fraud would have been discovered and the matter would have been resolved short of serving charges and conducting a hearing. Appellant claims the Coast Guard did not use a just, speedy and economical means of obtaining a result as required by

33 C.F.R. § 5.51.

Issuing the Master 1600 Gross Ton license, while imprudent, does not prevent the Coast Guard from conducting an inquiry into the fraudulent procurement of said license and taking appropriate action if misconduct is found. To so hold would prevent the Coast Guard from acting on evidence of fraudulent application that is discovered after a license has been issued. Even if the Coast Guard had discovered the fraudulent sea service letter and did not approve the Master 1600 Gross Ton license, suspension and revocation proceedings for submitting a fraudulent application would still have been appropriate against Appellant's Master 500 Gross Ton license. Therefore, the Coast Guard is not

estopped from proceeding against the Appellant because the Master 1600 Gross Ton license was approved.

XIV

Appellant contends that the ALJ erred in denying his petition to reopen because he had newly discovered evidence, not discoverable through due diligence, that would affect the outcome of his hearing. In his first claim of newly discovered evidence, Appellant alleges that the government's expert witness on handwriting, Ms. Joan DiMartino, and another government witness, the REC Chief, Mr. Cassady, had a conversation concerning one of the government's exhibits in violation of the ALJ's sequestration order. Appellant contends that in the course of this conversation, the testimony of the expert witness was tampered with, influenced, and tainted. Appellant claims that the existence of this conversation constitutes newly discovered evidence and that the ALJ erred in not granting the petition to reopen because the evidence is newly discovered, was not available through due diligence, and would affect the ultimate finding of the ALJ.

Appellant further alleges that he has newly discovered evidence that his rights to due process, privacy, and his right to a "just determination of the matters" in the suspension and revocation hearing were violated in that information concerning his unpublished home telephone number was obtained without a subpoena. As new evidence, Appellant offers correspondence from Bell Atlantic stating that Bell Atlantic has no record of any subpoenas for his home telephone account and that Bell Atlantic would not have released Appellant's telephone records without a subpoena. From this, Appellant concludes that information concerning his telephone service was improperly

acquired. Appellant claims that the ALJ erred in not granting the petition to reopen because this evidence was newly discovered, was not available through due diligence, and would affect the ultimate finding of the ALJ.

A petition to reopen a hearing may be granted on the basis of newly discovered evidence. See 46 C.F.R. § 5.601. The petition must include a statement setting forth a description of the newly discovered evidence and a statement as to whether or not this additional information was known to the petitioner at the time of the hearing and reasons why the petitioner, with due diligence, could not have discovered such new evidence prior to the completion of the hearing. See 46 C.F.R. § 5.603. Furthermore, the petition should be granted only when the newly discovered evidence would likely result in an outcome favorable to Appellant. See Appeal Decisions 2357 (GEESE); 1978 (DAVIS); 1634 (RIVERA).

The standard of review for an appeal of a denial of a petition to reopen is abuse of discretion. See Appeal Decisions 953 (MACKINNON); 2538 (SMALLWOOD).

> 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).

Neither appeal basis claims that an error of law occurred. Therefore, based on the abuse of discretion standard cited above, Appellant must show that the ALJ's findings are without evidentiary support.

A

Appellant's first claim of newly discovered evidence revolves around a conversation between two of the government's witnesses that occurred after the ALJ had sequestered all witnesses from the hearing room. Appellant claims that he first became aware of the conversation between Ms. DiMartino and Mr. Cassady during a dinner conversation with his wife some eight months after the hearing and approximately one and one half months after the ALJ issued his D&O.

Appellant contends, as he did in his petition to reopen the hearing, that the conversation between Ms. DiMartino and Mr. Cassady constituted witness coercion and tampering by Mr. Cassady. The Order stated that this contention is unsupported by Mrs. Bennett's affidavit or any other evidence. See Order at 5. To refute that finding, Appellant asserts that Mrs. Bennett did not include details of Ms. DiMartino's and Mr.Cassady's conversation in her affidavit because she was keeping that testimony for the hearing after it was reopened. See Brief at 3.

Any further testimony from Mrs. Bennett concerning the content of the conversation between Mr. Cassady and Ms. DiMartino is immaterial. To prevail on his motion to reopen, the Appellant must show that, given the new evidence, he would be likely to prevail in a rehearing. The ALJ concluded that, even without the expert handwriting testimony of Ms. DiMartino, there was a wealth of other evidence supporting the finding that the charge and specification against Mr. Bennett was proved and that the Coast Guard met its burden of proof. See Order at 5. I agree.

Before granting a petition to reopen a hearing, the ALJ must determine whether the evidence will likely result in a decision favorable to the Appellant. See Appeal

Decision 2537 (GEESE). In asserting that the newly discovered evidence regarding Ms. DiMartino's and Mr. Cassady's conversation would result in a favorable outcome, Appellant characterizes Ms. DiMartino's testimony as "the only substantial evidence that the Coast Guard presented at the hearing" and the "crux" of the ALJ's decision. See Brief at 5. Without any evidence that Ms. DiMartino's testimony was in fact influenced or changed by the alleged conversation, Appellant concludes that Ms. DiMartino's testimony is no longer credible. Therefore, Appellant claims that without her testimony, the Coast Guard failed to meet the standard of proof required to support a finding of proved. See Brief at 7. Appellant further contends that in light of this newly discovered evidence, a reasonable person could not arrive at a finding of proved. I disagree.

In his Order, the ALJ unambiguously stated that this evidence would not have changed his decision. See Order at 5. In reaching this conclusion, the ALJ held that the expert witness' testimony was not the crux of his finding. See Order at 5. He stated that the record contained "a wealth of other evidence" supporting the finding of proved. See Order at 5. I agree.

As I set out in Parts I and II of this opinion, there is ample evidence on the record, independent of the testimony of Ms. DiMartino, to support the ALJ's finding that the Appellant submitted the fraudulent sea service letter as part of his application. There were seven items of specificity that, despite Appellant's protestations to the contrary, were not sufficiently likely to be known to others as to allow someone else to have written the letter. Furthermore, there was significant evidence which led the ALJ to determine that the Appellant's testimony was "either inaccurate, untruthful, or both." See D&O at 19. For instance, there are no log entries that would support Appellant's

claim that someone else submitted the deceptive cover letter and fraudulent sea service letter at a different time than that of his application. See TR at 316; I.O. ex. 13. Second, the Coast Guard never received the cover letter that Appellant claims he sent with his application. See TR at 538. Third, the cover letter that Appellant alleges he sent lists two telephone numbers even though Appellant's applications list "no phone." See Respondent's exhibit 17; I.O. ex. 2, 3. Finally, the ALJ found that without the fraudulent sea service letter, Appellant's application would not have qualified for the upgrade he was requesting. See Finding of Fact 27.

The D&O from the suspension and revocation hearing, issued prior to Appellant's petition to reopen, contains three pages detailing the facts and evidence in support of the conclusion that the deceptive cover letter was signed and sent by Appellant. Only after this detailed discussion of the evidence connecting the deceptive cover letter to the Appellant, is there any mention of the handwriting expert's testimony. See D&O at 18-20. Additionally, in response to a proposed conclusion of law from Appellant questioning the sufficiency of the expert witness's testimony, the D&O from the suspension and revocation hearing states, "The Coast Guard has met its burden of proof, even without Ms. DiMartino's expert testimony." See D&O at 19.

Therefore, even assuming, *arguendo*, that everything Appellant claims did occur and that the evidence is newly discovered, the new evidence would not have resulted in an outcome favorable to Appellant. The ALJ found substantial and reliable evidence in support of the conclusion that Appellant signed and sent the deceptive cover letter, even without considering the handwriting expert's testimony. The ALJ's decision is reasonable, supported by the evidence, and not an abuse of discretion.

B

Appellant's second claim of newly discovered evidence revolves around his allegation that his rights to due process, privacy, and his right to a "just determination of the matters" in the administrative hearing were violated in that information concerning his unlisted home telephone service was obtained without a subpoena. Appellant argues that he has newly discovered evidence in support of these alleged violations of his due process and privacy rights. The evidence Appellant offers consists of correspondence from Bell Atlantic stating that Bell Atlantic has no record of any subpoenas for his telephone account and that Bell Atlantic's policy is not to release unlisted telephone records without a subpoena. From this, Appellant concludes that information concerning his telephone service was improperly acquired. Appellant claims that the ALJ erred in not granting the petition to reopen because this evidence is newly discovered, was not available through due diligence, and would affect the finding of the ALJ.

To prevail on his motion to reopen, Appellant must show that he has new evidence that was not discoverable with due diligence. Appellant asserts that the correspondence from Bell Atlantic was not discoverable with due diligence because Mr. Cassady testified that he received the telephone information through directory assistance. Appellant claims that this "directly mislead [sic] the Respondent's Counsel and interferred [sic] in the Respondent's exercise of due diligence." See Brief at 9.

Appellant misunderstands the concept of due diligence. Due diligence is, "[s]uch a measure of prudence, activity, or assiduity as is properly to be expected from, and ordinarily is exercised by a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative

facts of the special case." BLACK'S LAW DICTIONARY 457 (6th ed. 1990). In this case, Appellant was represented by counsel and the issues were vigorously litigated. At the time of the hearing, the Appellant knew the method by which Mr. Cassady claims he obtained Appellant's unlisted telephone numbers. See TR at 87, 88. Presumably, Appellant knew that he had an unlisted telephone number and the protections associated with it. Accordingly, the new evidence in question - information from Bell Atlantic – could have been obtained at the time of the hearing. If Appellant believed that Mr. Cassady obtained his telephone numbers in violation of his privacy rights, then he should have questioned it then, not months later. Appellant and his attorney failed to use due diligence by not pursuing this issue at the time of the hearing.

Even assuming, *arguendo*, that this is new evidence which could not have been discovered through due diligence, Appellant has not shown that it would result in a decision favorable to the Appellant. The ALJ explicitly stated that this evidence "has no bearing on the final determination of this matter." See Order at 11. I agree. As discussed above, the ALJ had sufficient evidence, independent of the testimony regarding telephone records, to find that the Coast Guard met its burden of proof. Therefore, there was no abuse of discretion on the part of the ALJ.

The ALJ correctly denied the Appellant's petition to reopen the hearing because the evidence Appellant presented would not have favorably affected the outcome of the hearing. The abuse of discretion standard to be applied here is not whether someone could have come to different conclusions, but whether the findings are without evidentiary support. Appellant does not show that the findings are without evidentiary

support, therefore, the ALJ did not abuse his discretion in denying the petition to reopen the hearing.

XV

Finally, Appellant claims that the cumulative effect of the assigned errors deprived him of a fair and just trial. While Appellant has listed a multitude of perceived errors, I have found that most are simply disagreements between the Appellant's perception of the facts and the ALJ's determination of those facts. The cumulative effect of errors is grounds for reversal only when the combined effect of multiple, harmless errors are sufficient to prejudice the Appellant. In this case, the only harmless errors are those discussed in arguments V and XI regarding sea service requirements and the backdating of Appellant's application respectively. These two harmless errors, even when combined, do not amount to significant prejudice against the Appellant. Viewed as a whole, the assigned errors are not sufficient to warrant disturbing the ALJ's D&O.

CONCLUSION

I. Having thoroughly reviewed the record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings, conclusions, or order of the ALJ. The hearing was conducted in accordance with the requirements of applicable law and regulations.

II. Further, I find that the ALJ correctly denied the Appellant's petition to reopen the hearing because even had the new evidence been presented, it would not have resulted in an outcome favorable to the Appellant.

ORDER

The D&O of the Chief ALJ dated January 28, 1998 is AFFIRMED. The order of the Chief ALJ dated May 22, 1998, denying Appellant's petition to reopen the suspension and revocation hearing is AFFIRMED.

J. C. CARD
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 4, day of August, 1999.