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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. MERCHANT MARINER LICENSE & MERCHANT MARINER DOCUMENT Issued to: JACK ANTHONY JORY	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2725

APPEARANCES

For the Government:
Mr. Robert Foster
LT Beth Gregorich, USCG
United States Coast Guard Sector Mobile, Alabama

For the Respondent:
Jack Anthony Jory, *pro se*

Administrative Law Judge: Bruce Tucker Smith

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5 and 33 CFR Part 20.

On December 5, 2008, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O) revoking the Merchant Mariner credentials of Respondent Jack Anthony Jory upon finding that Respondent posed a security risk and a threat to the safety of a marine vessel, a basis for suspension or revocation of a credential under 46 U.S.C. § 7703(5). The factual allegation supporting the Coast Guard's Complaint alleged that on

November 3, 2008, Respondent threatened the life of the Master of the M/V SEA FOX (O.N. 551454).

Respondent appealed the D&O. Respondent's appeal was rejected and the D&O was affirmed via Commandant Decision on Appeal dated December 22, 2010 (*Appeal Decision 2691 (JORY)*, 2010 WL 5790335).

On June 30, 2015, Respondent mailed a "Petition to Reopen," which was received at the Docketing Center on July 9, 2015. On July 16, 2015, the ALJ issued an Order Denying Respondent's Motion to Reopen. On July 28, 2015, Respondent filed a Motion to Reconsider. The ALJ denied this request via an Order dated July 31, 2015.

Respondent now appeals the denial of his petition to reopen.

In brief, Respondent, while serving aboard M/V SEA FOX on November 3, 2008, told the Master of M/V SEA FOX, "I will kill you." In events leading up to the statement, Respondent lunged at the Master while trying to grab a paper out of the Master's hand and struck the Master's hand, knocking a pen to the floor. In his findings, the ALJ characterized that action as an assault. On appeal, Respondent contended that no assault occurred, and also that it was improper to find an assault since he was not charged with assault. The appeal decision rejected both contentions. Respondent also contended that the ALJ erred in failing to grant a subpoena for a witness. The appeal decision noted that subpoenas were issued upon Respondent's request before the hearing, but the request for the subpoena at issue on appeal had been made more than a month after the record was closed and the D&O was issued. Accordingly, the contention concerning the subpoena, too, was rejected.[1]

Respondent now asserts that the ALJ abused his discretion in declining to reopen the matter. The ALJ properly considered reopening under 33 C.F.R. § 20.904(c), which allows reopening if the ALJ "believes that any change in fact or law, or that the public interest, warrants reopening it."

[1] Several other asserted errors were also rejected.

Respondent presented to the ALJ the 2012 deposition testimony of a witness to the assault, who testified that he saw Respondent lunging for the paper but did not see him knock a pen out of the Master's hand. The ALJ found this not to warrant reopening the matter. Respondent raises the issue on this appeal, where it is rejected for the same reason; the new evidence is not a material factual change, and the ALJ's conclusion was no abuse of discretion.

Respondent also contended that *Elonis v. United States*, 575 U.S. 723 (2015), constituted a change in the law, warranting reopening. The ALJ rejected this contention, noting that *Elonis* involved a criminal matter wherein proof of the actor's criminal intent was required. He quoted the earlier appeal decision in this case, pointing out that in these proceedings, an assault may occur "whether or not the actor actually intends to inflict or is capable of inflicting harm." *Appeal Decision 2691 (JORY)* at 7, 2010 WL 5790335 at 4. As *Elonis* did not change this rule of law, the ALJ found *Elonis* did not warrant reopening.

Respondent continues to argue *Elonis* on this appeal. *Elonis* involved the criminal offense of transmitting threats in interstate commerce, on social media. The Supreme Court held in *Elonis* that the jury instruction requiring only a negligent state of mind for conviction was erroneous, under the Court's statute-specific analysis. To the extent that Respondent is claiming *Elonis* affected the allegation that Respondent threatened the life of the Master, as distinct from the ALJ's determination that it did not affect the ancillary finding of assault, there are two fundamental reasons why *Elonis* likely does not affect the situation of Respondent's case. First, the Supreme Court emphasized the difference between the criminal case they were considering and civil liability. Here, we are considering a matter of administrative law, which is more akin to civil liability than to criminal law. Second, if *Elonis* represents a change in the applicable law, I see no reason to apply the change to a matter that was final four years before the *Elonis* decision. Further and more specifically, Respondent was not simply accused of making a threat. Rather, he was charged with posing a security risk and threat to the safety of a vessel. Reopening is not warranted on account of a change in law.

Respondent raises one other legal objection to the case against him. He asserts that in view of the ALJ's finding of fact that he assaulted the Master, any proceeding other than a criminal judicial proceeding on a charge under 46 U.S.C. § 11501(6) is improper, citing 46 CFR § 5.69 and 46 U.S.C. § 6301(5). There is no basis for the notion that a criminal court is the exclusive forum for handling every criminal act. In many cases, both criminal and administrative proceedings might be appropriate. Certainly, if an assault is committed by a merchant mariner while serving under authority of a credential, the matter may well justify proceedings against the credential, as innumerable Commandant's Decisions on Appeal demonstrate, e.g. *Appeal Decisions 2561 (CARTER)*, 1995 WL 17010111 (assault on Master); *2314 (CREWS)*, 1983 WL 483007 (assault by touching, among other offenses); *2193 (WATSON)*, 1980 WL 338483 (assault and battery with dangerous weapon). The fact that an assault occurred in the course of the events that were relevant to the Coast Guard's complaint in this case by no means bars the Coast Guard from conducting, to conclusion, suspension and revocation proceedings under 46 U.S.C. § 7703. Such proceedings were in fact conducted to conclusion several years ago in this case. Respondent's attempt to continue to litigate his case will not be further entertained.

CONCLUSION

The ALJ did not abuse his discretion in declining to reopen Respondent's case. Respondent has not provided good cause to reopen the matter.

ORDER

The ALJ's Order dated July 16, 2015, is **AFFIRMED.**

ADM, USCG

Signed at Washington, D.C. this 8 day of MARCH, 2020.