

U.S. Department
of Transportation

United States
Coast Guard



Commander
Eighth Coast Guard District
Hale Boggs Federal Bldg.

501 Magazine Street
New Orleans, LA 70130-3396
Staff Symbol: (moa)
Phone: (504) 589-3042
FAX: (504) 589-4999

16721
D8 M Policy Ltr 02-2003
July 8, 2003

MEMORANDUM

From: D. F. Ryan II
CGD EIGHT (m)

A handwritten signature in black ink, appearing to read "D. F. Ryan II", written over a horizontal line.

To: Distribution

Subj: ENFORCEMENT GUIDANCE ON FRAUDULENT CREDENTIAL APPLICATION
CASES

Ref: (a) P091443Z JAN 03 COMDT (G-MO) "OCMI Guidance for Operation Drydock"
(b) The National Maritime Center's Intranet Site <http://cgweb.uscg.mil/g-m/nmc/mmd-tf/mmd/index.shtml>

1. PURPOSE. The purpose of this policy letter is to establish guidance to assist Eighth Coast Guard District Officers in Charge, Marine Inspections (OCMIs) regarding the enforcement of laws and regulations associated with fraudulent merchant mariner credential applications submitted to Regional Exam Centers (RECs). Operations "DRYDOCK" and "MARLIN SPIKE" were recently initiated by Commandant in an effort to identify merchant mariners who may present a risk to national security, or to marine safety based on their criminal record. These initiatives are outlined in references (a) and (b). This policy letter is not only applicable to OCMIs with RECs, but is applicable to all D8 OCMIs because Personnel Action cases are typically sent to the MSO nearest where the mariner lives. This policy letter further refines the Commandant guidance and is intended to establish consistent enforcement throughout the District.

2. BACKGROUND

- a. There are three aspects to fraudulent application cases: the potential for Regional Exam Center action (i.e. denial of application and assessment period imposed); the potential for administrative Personnel Action against the credential (i.e. revocation or letter of warning); and the potential for criminal prosecution against the applicant. Deciding when to impose one or all of the process choices is very complex and cannot be generalized. Because of the decision-making complexities, and the potential for inconsistent enforcement across the District, we have developed flow charts to help guide the OCMI through the decision-making process.
- b. Although D8(m) attempted to give specific guidance for every possible circumstance, some cases such as mariners with multiple minor convictions must be resolved on a case-by-case basis. Accordingly, OCMIs should use reasonable discretion where prompted in the enclosed decision flow charts, or when extenuating circumstances dictate; but this should be the exception.

Subj: ENFORCEMENT GUIDANCE ON FRAUDULENT CREDENTIAL APPLICATION CASES

c. This policy does not impose additional operational requirements beyond normal REC and S&R process resolutions; however, reasonable documentation requirements have been purposely included into the policy flow charts to ensure that case summaries and pertinent information are included in the mariner's paper file, MMLD or MISLE (i.e. Letter of Warning) for future reference.

d. Jurisdiction and authority to take action against a mariner's credential remain the same. Original credentials issued under fraudulent circumstances may be considered "void ab initio," see Commandant Decision on Appeal (CDOA) 2025. This has been the historical Coast Guard enforcement posture for original credentials; see Marine Safety Manual, Volume III, Chapter I. In contrast, the historical Coast Guard enforcement posture to resolve renewed credentials cases (involving original issue fraudulent applications) is through the administrative Suspension & Revocation process. Some in the Coast Guard believe that renewed credentials (*whose original issues were obtained under fraudulent means*) have not reached the legal threshold of "property interest," which would require the S&R process (also see MSM, Vol III, Ch 1). Accordingly, they believe that renewed credentials (*whose original issues were obtained under fraudulent means*) can also be "null and voided" by the issuing OCMI. Until Commandant resolves this issue via a written national policy, the Eighth District has decided to uphold the historical S&R enforcement posture. Accordingly, renewed-credential fraudulent application cases shall be resolved administratively through the S&R process.

e. In accordance with CDOA 2613, U.S.C.G. vs. Slack (and verified with G-MOA), the appropriate sanction for fraudulent application cases brought to an S&R hearing is revocation. It is not D8(m)'s intent to pursue revocation in each case involving a fraudulent credential application. Therefore, our flow charts are designed to resolve the most significant cases with revocation. For those cases, the OCMI should issue a "Misconduct" complaint for violation of 18 U.S.C. 1001. For less significant cases, the flow charts lead the OCMI to "Letter of Warning" resolutions.

3. ACTION.

a. Commanding Officers / OCMI are directed to follow the guidance outlined in enclosures (1) through (3) when processing fraudulent application cases.

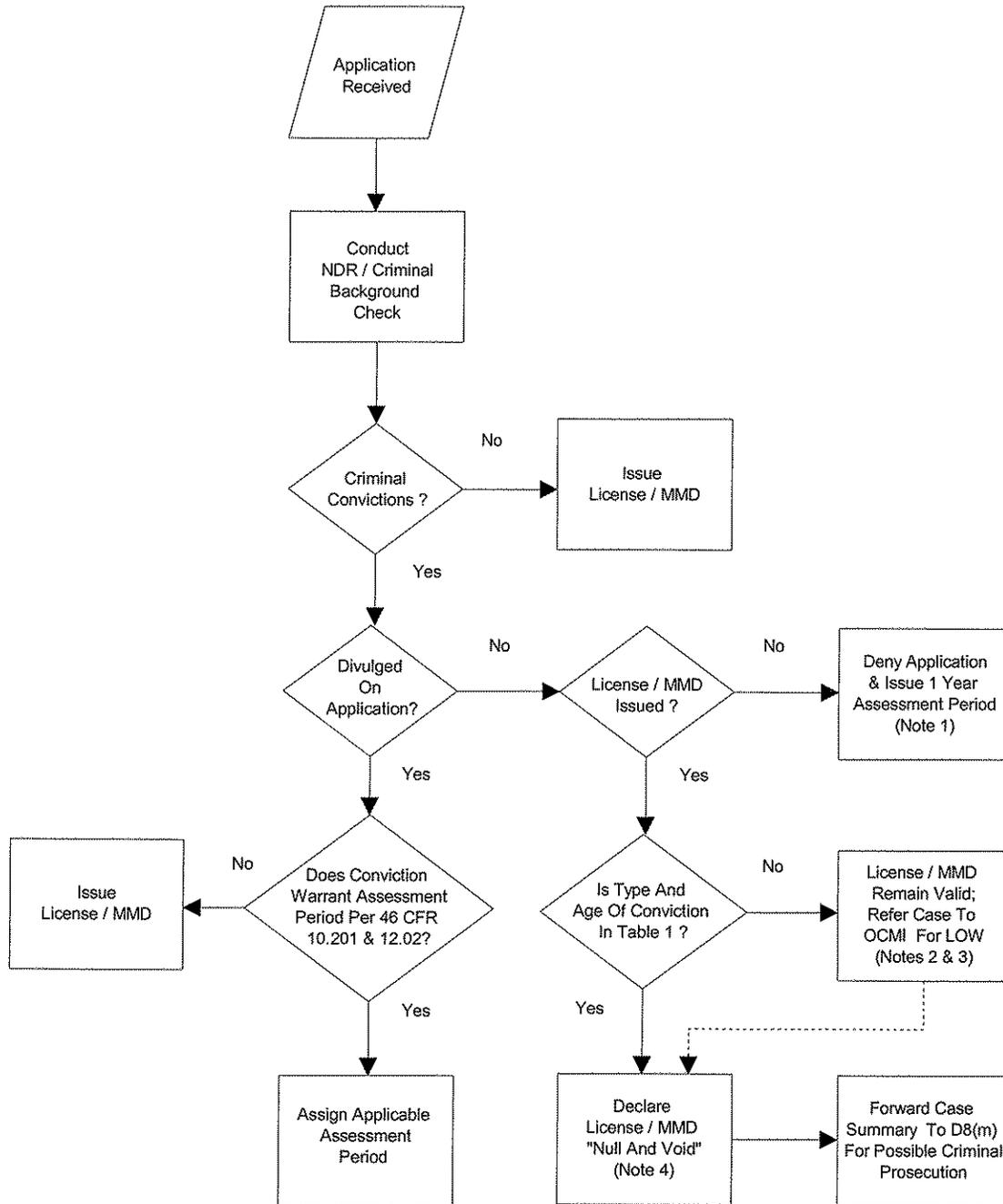
b. Special circumstances may warrant resolution beyond the prescribed guidance contained within the enclosures. In those cases, you should contact the Eighth District Marine Safety, Security and Environmental Protection Division (moa) staff for assistance.

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- Encl: (1) Scenario #1, Application for Original License / MMD
(2) Scenario #2, Application for Renewal of License / MMD
(3) Scenario #3, Traditional OPDRYDOCK case
(4) Table 1, List of Convictions for Potential S&R Action
(5) CDOA 2535, USCG vs. Sweeney
(6) CDOA 2613, USCG vs. Slack

Dist: All Eighth Coast Guard District MSOs, MSUs, and RECs

Scenario # 1 Application for Original License / MMD



Note 1: The OCMI retains the discretion to reduce or omit the 1 year assessment period, as appropriate, based on the number, severity and age of the conviction(s). At the time of re-application, the REC shall take the mariner's conviction history into consideration and decide whether an additional assessment period or denial (in accordance with 46 CFR 10.201 and 12.02) should be applied.

2: If mariner refuses the LOW, the OCMI shall declare credential(s) null and void.

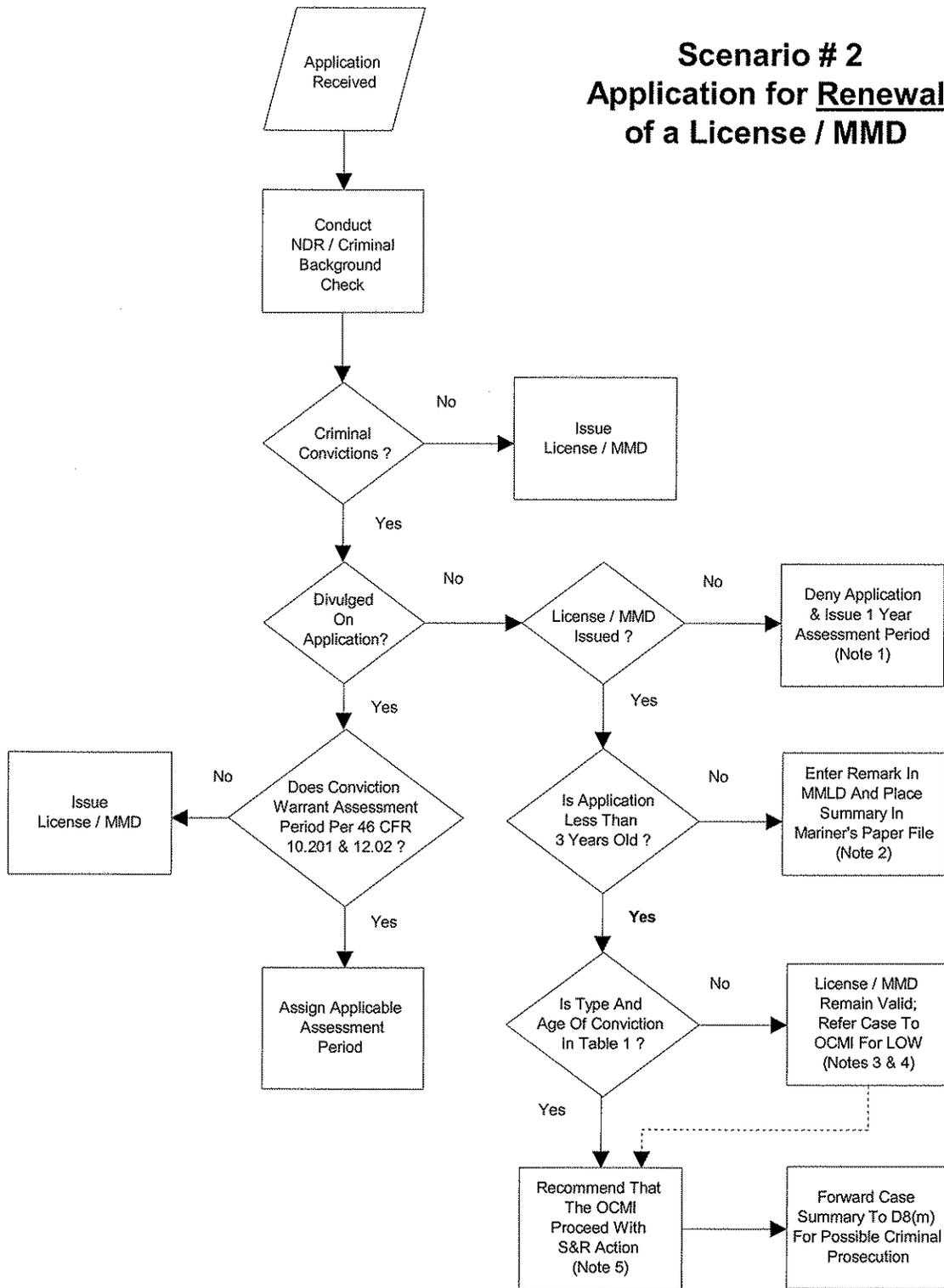
3: For cases with multiple minor convictions, the OCMI may, at their discretion, declare the credential(s) null and void where the number, severity and age of the convictions warrant. If this action is taken, the OCMI shall forward a case summary to D8(m) for possible criminal prosecution.

4: Mariner will be eligible to reapply one year after the voided credential is returned to the appropriate REC. At the time of re-application, the REC shall take the mariner's conviction history in to consideration and decide whether an additional assessment period or denial (in accordance with 46 CFR 10.201 and 12.02) should be applied.

(Rev: 6/03)

Enclosure (/)

Scenario # 2 Application for Renewal of a License / MMD



Note 1: The OCMI retains the discretion to reduce or omit the 1 year assessment period, as appropriate, based on the number, severity and age of the conviction(s). At the time of re-application, the REC shall take the mariner's conviction history in to consideration and decide whether an additional assessment period or denial (in accordance with 46 CFR 10.201 and 12.02) should be applied.

2: As per 46 CFR 5.55(a)(3), the application date is beyond the 3 year statute of limitations for misconduct relating to the fraudulent application offense. However, the case should be referred to the Investigations Department for potential S&R action regarding the conviction itself.

3: If mariner refuses the LOW, the OCMI will initiate S&R Action.

4: For cases with multiple minor convictions, the OCMI may, at their discretion, initiate S&R action where the number, severity and age of the convictions warrant. If this action is taken, the OCMI shall forward a case summary to D8(m) for possible criminal prosecution.

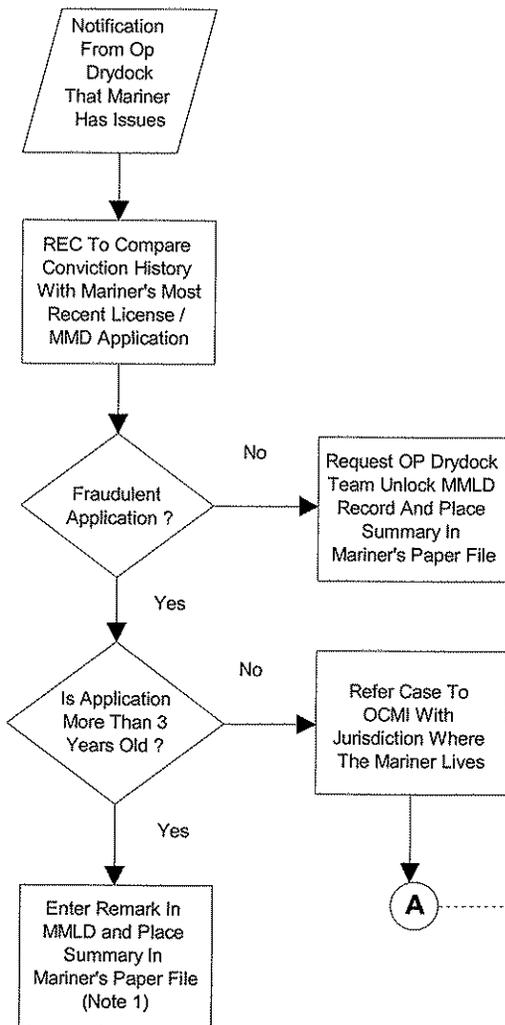
5: Issue a complaint for misconduct (fraudulent statement on credential application). As per CDOA 6213 (USCG vs. Slack), the only sanction for a fraudulent application case is revocation.

(Rev: 6/03)

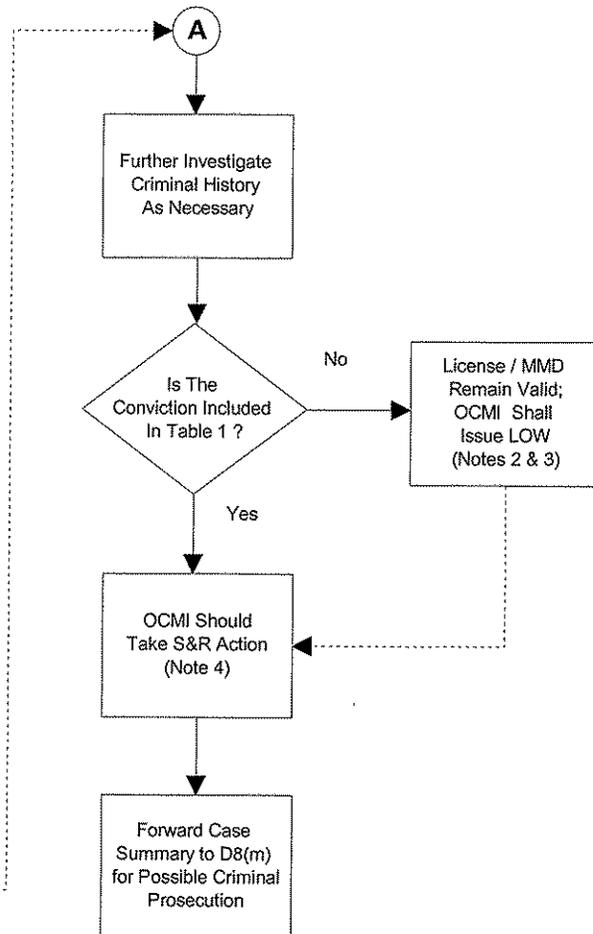
Enclosure (2)

Scenario # 3 Operation Drydock Case

REC Activity



IO Dept. Activity



- Note 1: As per 46 CFR 5.55(a)(3), the application date is beyond the 3 year statute of limitations for misconduct relating to the fraudulent application offense. However, the case should be referred to the investigations Department for potential S&R action regarding the conviction itself.
- 2: If mariner refuses the LOW, the OCMI will initiate S&R Action.
- 3: For cases with multiple minor convictions, the OCMI may, at their discretion, initiate S&R action where the number, severity and age of the convictions warrant. If this action is taken, the OCMI shall forward a case summary to D8(m) for possible criminal prosecution.
- 4: Issue a complaint for misconduct (fraudulent statement on credential application). As per CDOA 6213 (USCG vs. Slack), the only sanction for a fraudulent application case is revocation.

(Rev: 6/03)

Table 1
List of Convictions
for Potential S&R Action

Conviction Type	Maximum Age of Conviction
Murder, attempted murder, homicide and attempted homicide	20 Years
Terrorism (including acts of sabotage and espionage)	20 Years
Smuggling of aliens	20 Years
Manslaughter	10 Years
Misconduct resulting in loss of life or serious injury	10 Years
Aggravated assault (including assault with a deadly weapon)	10 Years
Sexual assault (including rape and child molestation)	10 Years
Perversion	10 Years
Drug trafficking (including sales, distribution and transfer)	10 Years
Criminal violation of environmental laws	10 Years
Destruction of property (Note2)	10 Years
Robbery (Note 2)	10 Years
Burglary (Note 2)	10 Years
Simple assault	5 Years
Larceny (Note2)	5 Years
Vehicular homicide	5 Years
Interference with government official's performance of official duties	5 years
Drug use or possession (Note 3)	3 Years
Driving under the influence	3 Years
Reckless driving and racing on highway	2 Years

Note 1: This table is derived from Title 46 CFR 5.59, 5.61, 10.201 and 12.02, and represents the maximum assessment periods found in Tables 10.201 and 12.02.

2: Cases involving these convictions do not need to be forwarded to D8(m) unless they involve Armed Robbery, Felony Arson, Felony Burglary, and Grand Larceny

3: S&R cases involving simple use or possession will likely be resolved in accordance with the guidelines set forth in CDOA 2535 (USCG vs. Sweeney).

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD
UNITED STATES OF AMERICA

UNITED STATES COAST GUARD : DECISION OF THE VICE COMMANDANT.
vs. : : ON APPEAL
MERCHANT MARINER'S DOCUMENT : NO. 2535
NO. (REDACTED) and :
LICENSE NO. 645588 :
Issued to: Michael J. SWEENEY :

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By an order dated 21 June 1991, an Administrative Law Judge of the United States Coast Guard at Alameda, California suspended Appellant's License and Merchant Mariner's Document outright for six months with six additional months suspension remitted on twelve months probation, upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 27 December 1990, Appellant wrongfully used marijuana as evidenced by a urine specimen collected on that date pursuant to a drug test program required by his employer, San Francisco Bar Pilot Association.

The hearing was held at Alameda, California on 31 January 1991 and on 12 and 13 March 1991. Appellant was represented by professional counsel. Appellant entered a response denying the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer introduced nine exhibits into evidence and introduced the testimony of three witnesses, two of whom testified telephonically pursuant to 46 C.F.R. 5.535(f). Appellant introduced eight exhibits into evidence and introduced the testimony of two witnesses. In addition, Appellant testified under oath in his own behalf.

The Administrative Law Judge's final order suspending all licenses and documents issued to Appellant was entered on 21 June 1991. Service of the Decision and Order was made on 28 June 1991. Subsequently, Appellant filed a notice of appeal on 2 July 1991, perfecting his appeal by filing an appellate brief on 1 August 1991. Accordingly, this appeal is properly before the Vice Commandant for review.

Appearance: John E. Droeger, Esq., World Trade Center, Suite 261, San Francisco, CA 94111.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned License and Document issued by the U. S. Coast Guard. Appellant's license authorizes him to serve as a master of inland steam or motor vessels of any gross tons; third mate, ocean steam or motor vessels of any gross tons; first class pilotage, San Francisco Bay from sea to and between the Dumbarton Bridge, Stockton, and Sacramento, including all tributaries therein; radar observer - unlimited.

Enclosure (5)

Appellant has been employed as a pilot for the San Francisco Bar Pilot Association (hereinafter "Association") for approximately six years and is commissioned by the State Board of Pilot Commissioners.

On 27 December 1990, Appellant appeared at St. Francis Memorial Hospital Laboratory, San Francisco, California to submit to a urinalysis, as required by the Association. The laboratory was designated as a collection site by the Association.

The urinalysis collection coordinator, Ms. Hamlin, had received three months orientation and had previously collected approximately 500 urine specimens for the program at the time of Appellant's test.

Ms. Hamlin provided Appellant with a specimen collection container, initiated the chain of custody form and documentation and instructed Appellant to enter a bathroom and provide a urine specimen. Appellant complied, producing the required urine specimen. Ms. Hamlin then affixed an identification label with a preprinted specimen identification number on the side of the container.

In Appellant's presence, Ms. Hamlin typed Appellant's initials "MJS" onto the tamper proof seal, placing the seal over the cap of the specimen container. The chain of custody form and other documentation were completed and verified by Appellant. Appellant acknowledged that the specimen container was sealed in his presence with a tamper proof seal and that the information provided on the Drug Testing Custody and Control Form and specimen container was correct. This acknowledgment was executed by Appellant signing his name to the donor certification on the Drug Testing Custody and Control Form.

Subsequently, the urine specimen was placed in a shipping box and given to a courier. The courier delivered the specimen to the Nichols Institute Substance Abuse Testing Lab (NISAT), a laboratory which is certified by the National Institute on Drug Abuse (NIDA), San Diego, California. Appellant's urine specimen tested positive for the presence of marijuana metabolite in both the screening and confirmation tests.

BASES OF APPEAL

Appellant asserts several bases of appeal from the decision of the Administrative Law Judge, however, because of the disposition of this case, these bases will not be discussed.

OPINION

The Administrative Law Judge has issued an order that fails to comply with a statutory mandate. An outright six month suspension was ordered with an additional six month suspension remitted on twelve months probation following a finding that Appellant had in fact used marijuana.

The controlling statute, 46 U.S.C. 7704(c), requires that a merchant mariner's license/document be revoked "[i]f it is shown that a holder has been a user of, or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured." (emphasis supplied). In the case herein, the record is void of any evidence of cure. However, the Administrative Law Judge supports his order of suspension with the following comment:

The Respondent having tested negatively consequent to his positive test and the medical review officer's opinion that the Respondent is "not

addicted" lead me to believe that an order of less than revocation would be appropriate. I considered the Investigating Officer's recommendation an appropriate one.
[Decision & Order 68-69]

The order issued by the Administrative Law Judge contravenes the operative law, 46 U.S.C. 7704, which mandates revocation unless cure is proven. Notwithstanding the fact that Appellant subsequently tested negative for drug use and the statement of the Medical Review Officer that Appellant is "not addicted" to drugs (Respondent Exhibit C), the record fails to support even a colorable argument that Appellant has been cured of his drug use.

It is a paramount and often cited tenet in suspension and revocation proceedings which involve drug use, that an Administrative Law Judge is without discretion to issue an order less than revocation unless the respondent has proven to the Administrative Law Judge's satisfaction that he is cured of drug use and/or addiction. Appeal Decisions 2476 (BLAKE) affd. sub nom Commandant v. Blake, NTSB Order No. EM-156 (1989); affd. sub nom Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991); Commandant Decision on Review #5 (CUFFIE); Appeal Decisions 2504 (GRACE); 2494 (PUGH); 2525 (ADAMS).

Administrative agencies and their procedures, are required to follow applicable statutory authorizations and may not exceed those limits promulgated in the statute. This stands to reason, since an agency's power can be no greater than that which is given to it by Congress. Lyng v. Payne, 476 U.S. 926 (1985); America West Airlines, Inc. v. National Mediation Board, 743 F. Supp. 693 (D. AZ 1990); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); United States v. Amdahl Corporation, 786 F.2d 387 (Fed. Cir. 1986).

Since the record is void of evidence satisfying the statutory requirements of 46 U.S.C. 7704(c), I cannot affirm the Administrative Law Judge's order of suspension in light of this agency's duty to enforce those laws enacted by Congress to promote safety of life and property at sea. In this regard, it is significant that Congress enacted 46 U.S.C. 7704 with the express purpose and intent of removing those individuals who possess or use dangerous drugs from service aboard United States Flag vessels. House Report No. 338, 98th Cong., 1st session 177 (1983).

It must be noted that this case is specifically distinguished from cases in which, as a matter of policy, orders of the Administrative Law Judge were not disturbed (to effect a more severe order) because those orders were considered inappropriate or too lenient. See, Appeal Decisions 570 (CASPER); 1502 (WILLIAMS); 2162 (ASHFORD); 2181 (BURKE). Contrary to the case herein considered, those cases did not involve a direct statutory requirement of proof to effect a particular order. It is also noted that my order, infra, will not necessarily result in a more severe sanction imposed by the Administrative Law Judge.

Furthermore, I specifically find the decision not to disturb the Administrative Law Judge's order of dismissal in Commandant Decision on Review No. 5 (CUFFIE), to be in error and is hereby expressly overruled for those reasons aforementioned. Additionally, I find that case not to be controlling since it was based on the predecessor statute to 46 U.S.C. 7704 (46 U.S.C. 239) rather than the current law.

My decision in this case does not emanate from any opinion regarding the leniency/severity of the Administrative Law Judge's order. On the contrary, it

derives from the failure of the order to meet the specific evidentiary requirements of 46 U.S.C. 7704(c). Unless and until 46 U.S.C. 7704 is amended, where drug use is found proved, an order less than revocation will not be permitted to stand on review absent proof of cure, clearly reflected in the record and satisfactory to the Administrative Law Judge.

II

Because the issue of cure is central to this case, a discussion of what should be considered as constituting cure is in order.

A sound, reasonable basis upon which to craft a viable definition of cure exists in 46 C.F.R. 5.901(d). Using that regulation as a foundation, I consider the following factors to satisfy the definition of cure in cases where drug use is an issue:

1. The respondent must have successfully completed a bonafide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).
2. The respondent must have successfully demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

In most cases which are docketed in a timely manner, at the time when the charge of drug use is found proved, sufficient time may not have elapsed to evidence cure under the above guidelines. To avoid such a potentially unfair result, the Administrative Law Judge could continue the hearing if the respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program. On the other hand, continuance would not be appropriate if it were based on the mere promise or assurance from the respondent that he will commence steps to effect a cure. In these latter situations, an order of revocation would be required.

The aforementioned guidelines and procedures should also be utilized regarding an issue of cure that arises pursuant to a charge of use or possession of drugs in 46 C.F.R. 5.59.

CONCLUSION

The order of suspension of the Administrative Law Judge contravenes the statutory requirements of 46 U.S.C. 7704(c) in that there is no evidence in the record that Appellant has been cured of drug use.

ORDER

The decision and order of the Administrative Law Judge dated 21 June 1991, is hereby REMANDED. The Administrative Law Judge is directed to REOPEN THE HEARING and permit Appellant to present evidence of cure or evidence of substantial involvement in the cure process to the satisfaction of the Administrative Law Judge. If such evidence is produced, the Administrative Law

Judge may issue an appropriate order or continuance pursuant to Opinion II, supra. If such evidence is not produced to his satisfaction, the Administrative Law Judge shall issue an order consonant with the provisions of 46 U.S.C. 7704.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 18th day of February, 1992.

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
	:	
vs.	:	COMMANDANT
	:	
	:	ON APPEAL
MERCHANT MARINER'S	:	
LICENSE NO. 638361	:	NO. 2613
	:	
	:	
<u>Issued to Jeffrey A. Slack</u>	:	

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By Decision and Order ("D&O") dated May 3, 1996, an Administrative Law Judge ("ALJ") of the United States Coast Guard at Houston, Texas, revoked Mr. Jeffrey A. Slack's ("Appellant") license based upon finding proved one specification of *misconduct* and one specification of *violation of law*. The specification for the charge of *misconduct* alleged that Appellant, while acting under the authority of the above captioned license, wrongfully made fraudulent statements on his Merchant Mariner's license renewal application. The specification for the charge of *violation of law* alleged that Appellant, while being the holder of the above captioned license, was convicted of an offense described in Section 205(a)(3)(A) of the National Driver Registration Act of 1982.

The hearing was held on February 27, 1996 in Toledo, Ohio. Appellant entered a response denying each charge and specification.

Enclosure (6)

The Coast Guard Investigating Officer introduced into evidence the testimony of three (3) witnesses and six (6) exhibits. In defense, Appellant entered into evidence his own testimony, the testimony of three (3) witnesses, and twelve (12) exhibits. The ALJ entered into evidence eight (8) procedural exhibits.

The ALJ issued a Decision and Order (“D&O”) on May 3, 1996. The ALJ found the *misconduct* charge and supporting specification proved and the *violation of law* charge and supporting specification proved. Upon a finding of proved, the ALJ revoked Appellant’s license.

The D&O was served on Appellant on May 6, 1996. Appellant, through his attorney, filed a timely notice of appeal on May 29, 1996. Appellant requested a transcript which was received on August 8, 1996. The appeal was perfected on October 7, 1996. Therefore, this appeal is properly before me.

APPEARANCE: Mr. Thomas A. Sobecki, 520 Madison Avenue, Suite 811, Toledo, Ohio 43604.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of and acting under the authority of the above captioned license. See hearing transcript (“TR”) at 36; D&O at 3-4; Investigating Officer’s Exhibits (“I.O. Ex.”) 1 and 2. Appellant’s license authorized him to serve as Master of Great Lakes or Inland Steam or Motor Vessels of not more than 25 gross tons and also contained a commercial assistance towing endorsement. See I.O. Ex. 1. Appellant has held a license since 1986. See I.O. Ex. 2.

Appellant signed and submitted a license renewal application in which he certified that the information contained on the form was correct. See TR at 38; I.O. Ex. 2. On

August 28, 1995, MSO Toledo's Regional Examination Center ("REC") received Appellant's license renewal application. See I.O. Ex 2.

On August 29, 1995, Mr. Bibee, a license evaluator for the REC, advised Appellant that his license renewal application was being returned as incomplete because he did not complete blocks #20, 21 and 22, which request information on prior criminal convictions other than minor traffic violations. See Respondent's Exhibit A; TR. 120. Before answering items 20, 21, and 22, Appellant contacted the Coast Guard Marine Safety Office in Toledo, Ohio to inquire as to what types of convictions needed to be included on the application. See TR. 123. Appellant testified that a lady with the Coast Guard whom he did not identify informed him that they were especially interested in information concerning Driving Under the Influence (DUI) convictions. Id.

On his resubmitted license renewal application, Appellant answered "yes" to question 20 which reads, "Have you ever been convicted by any court – including military court – for other than a minor traffic violation? (If 'YES', complete Item 22 Below.)." Appellant placed his initials in this block to certify that he answered the question. Item 22 reads: "Particulars of conviction/use or addiction (State place, date, and particulars)." Appellant listed a May 29, 1995 conviction for DUI in block 22. He listed no other convictions on his license renewal application.

Contrary to what he stated on his license renewal application, Appellant has an extensive list of prior convictions other than minor traffic violations. In 1984 and again in 1993, Appellant was convicted of reckless operation of a motor vehicle. See I.O. Ex 3. In 1986, Appellant was convicted after a plea of no contest to a charge of aggravated menacing. Id. In 1987, Appellant was found guilty of resisting arrest. See I.O. Ex. 5. In

1991, Appellant was convicted of Operating a Motor Vehicle while Intoxicated ("OMVI"). In 1995, Appellant was convicted of Driving While Intoxicated ("DWI").
See I.O. Ex. 4.

On November 13, 1995, Mr. Bibee wrote to the Appellant advising him that his application would be held pending the outcome of a hearing into the propriety of his license renewal application and advised that the hearing would be scheduled for December 13, 1995. See Respondent's Exhibit C. On November 17, 1995 the Appellant was formally served with the charges and specifications. The formal charges advised appellant that the hearing was scheduled for January 23, 1996. See Respondent Ex. E. On January 9, 1996, the ALJ changed the date, time and location of the hearing. The date was changed from January 23, 1996 to February 27, 1996. The time was changed from 1000 to 0900. The location was changed from the Federal Building in Toledo to the Toledo Municipal Court. See Respondent Ex. D.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the ALJ:

1. Appellant was denied a timely hearing.
2. The definition of misconduct is unconstitutionally vague.
3. The charge of misconduct and the supporting specification were not proved.
4. The ALJ did not fairly consider all options in imposing sanctions.

OPINION

I

Appellant's first argument is that he did not receive a timely hearing. Specifically, Appellant contends he was originally informed in a letter that his hearing would be held on December 13, 1995, but because the hearing was not held until February 27, 1996, it was not timely. 46 C.F.R. § 5.509 allows an ALJ to change the "time and place of opening the hearing" as long as it is "consistent with the rights of the respondent to a fair, impartial and timely hearing and the availability of the witnesses." The record indicates that the delay was due to logistical issues involved with using an out of state judge. See TR. 12-13. The Coast Guard also kept Appellant well informed of the changes through correspondence and phone calls. See TR. 10. Whether a hearing is held in a timely manner is decided based on a standard of reasonableness under the circumstances and whether the respondent is prejudiced by the alleged delay. In this case I am not convinced that the "delay" between initial notification that charges would be preferred and the hearing thereon was, in fact, a "delay". But, for purposes of this appeal I will assume that two and a half months is a "delay".

In U.S. v. Jackson, 504 F. 2d 337 (8th Cir. 1974), the court held that the due process clause of the Fifth Amendment of the U.S. Constitution requires a balancing of the reasonableness of a delay against any resultant prejudice. Appellant has not argued that he was prejudiced by the "delay". Nor has he made any showing that the "delay" was unreasonable. There is no indication that the "delay" had any affect on locating witnesses or their ability to testify. Nor is there any indication the "delay" substantially altered

Appellant's or any witnesses' ability to recall facts or events. See Appeal Decisions 2253 (KIELY); 2064 (WOOD). This contention is without merit.

II

Appellant's second argument is that the definition of misconduct in 46 C.F.R. § 5.27 is unconstitutionally vague.

Administrative proceedings do not present a proper forum for Constitutional challenges to duly enacted regulations. See generally: Public Utilities Comm. v. U. S., 355 U. S. 534 (1958); Engineers Public Service Co. v. S. E. C., 138 F.2d 936 (1943); Decisions on Appeal Nos. 2135(FOSSANI), 2049(OWEN) and 1382(LIBBY). "An agency charged with administration of an act of Congress lacks the authority to pass upon the constitutionality of that act, even were it so inclined. Thus the proper forum for such an objection lies before a court of record and not an administrative proceeding." See Appeal Decision 2202 (VAIL).

This is not the proper forum to determine the constitutionality of the definition of misconduct in 46 C.F.R. § 5.27. See Appeal Decision 1862 (GOLDEN), where I stated [I]f appellant wishes to complain about my [regulatory] definitions, he is free to do so. But this is not the forum in which he will obtain the relief he seeks." Such an issue needs to be addressed in a court of record.

III

Appellant's third argument is that it was error for the ALJ to have found proved the first charge and accompanying specification, and therefore, the charge should be dismissed for being insufficient. Appellant contends that the specification was inaccurate because it alleged that the misstatements on the license application, in this case

omissions, were in block 22 and not block 20, as the charge and supporting specification indicate. Alternatively, Appellant argues that even if the specification is found to be sufficient, he lacked fraudulent intent, and therefore, the incorrect filing did not constitute misconduct.

The specification supporting the charge of misconduct stated that Appellant “initialed block 20 of [his] license application stating that [he] had only one conviction.” Appellant did answer block 20 correctly by answering “yes” to the question: “Have you ever been convicted by any court – including military court – for other than a minor traffic violation? *If ‘yes,’ complete item 22, below [emphasis added].*” However, it is apparent that block 20 and block 22 go hand in hand. Block 22 is an extension of block 20 where the individual describes in detail a “yes” answer to block 20. It was block 22 that Appellant answered inaccurately but to claim that he was not charged with this is without merit. Findings that lead to the suspension or revocation of a license can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, (D.C. 1950); Appeal Decisions 2545 (JARDIN); 2422 (GIBBONS); 2416 (MOORE); 1792 (PHILLIPS); 2578 (CALLAHAN). When the record clearly indicates that the parties understand exactly what the issues are, the parties cannot afterward make a claim of surprise, lack of notice, or other due process shortcoming. See Appeal Decision 2545 (JARDIN); 2512 (OLIVO); Kuhn, supra.

Clearly, Appellant knew what issues were to be litigated. Appellant knew that he was being charged with fraudulently applying for a license renewal because he did not disclose all of his convictions on that form. That the specification indicated block 20 instead of block 22, while slightly inaccurate, is not grounds for dismissal of the

specification and reversal of the decision. If anything, it was a harmless error. In this instance, there was no prejudice to Appellant. Appellant had notice of the charge, was able to put forward a defense, and fully litigated the issue.

In the alternative, Appellant asserts that even if the specification is found to be sufficient, Appellant lacked fraudulent intent; therefore, the incorrect filing did not constitute misconduct. Appellant cites Rechany v. Roland, 235 F. Supp. 79 (S.D.N.Y. 1964) for the proposition that “an error of judgement, no matter how serious, which is not accompanied by fraudulent intent, does not constitute misconduct.” (See Appellant’s Brief page 4). The same argument was unsuccessful in Appeal Decision 2433.

(BARNABY). In BARNABY, I stated:

Appellant contends that misconduct was not proven because his failure to reveal the fact of his conviction at the time of his license renewal application was not wrongful. . . . He argues that poor judgment is not wrongful, citing Recahnny [sic] v. Roland, 235 F Supp. 79 (S.D.N.Y. 1964). Recahnny [sic], however, is inapposite to the facts here. The issue in that case was whether Plaintiff’s conduct - using a passkey to open a passenger’s stateroom - was wrongful. The court distinguished between wrongful conduct and errors in judgment. Here, Appellant was not charged with not fully informing himself, but rather with misrepresentation. His answer on the application concerning his prior conviction . . . was clearly false and in violation of pertinent statutes and regulations. His conduct was wrongful and does not fall within the ambit of a mere error of judgment.”

Appeal Decision 2433 (BARNABY) (citations omitted). Appellant’s actions clearly amounted to wrongful conduct as enunciated in the quoted passage from Appeal Decision 2433 (BARNABY). Appellant admitted that he contacted the Coast Guard to inquire as to what information was required in block 22 of the application. He knew the Coast Guard wanted information regarding DUI’s because, by Appellant’s own admission, the

Coast Guard told him so. See TR. 123. Notwithstanding this information, Appellant decided not to record his 1991 DUI conviction on his application because he “didn’t think it was relevant being that long ago.” See TR. 123. The record reflects that appellant had reportable convictions in 1984, 1986, 1987, 1991, 1993 and 1995. On his license applications he reported only the 1987 and the 1995 convictions. He admitted omitting the others (including one involving a DUI), notwithstanding that he knew the license renewal form sought information regarding convictions from all courts. TR. 139-141. This wrongful conduct clearly exceeds a “mere error of judgment.”

Appellant also contends that the word “conviction” was used on block 22, and therefore, Appellant was reasonable in thinking that he only had to report his most recent conviction because the word “conviction” on block 22 is singular, and not plural. This argument is completely without merit. There is nothing on the application which would indicate that the applicant only had to report his most recent conviction. In addition, as stated earlier, Appellant knew the form contemplated information from all *courts*. *He admitted* that he was informed by the Coast Guard to include DUI *convictions* [emphasis added]. See TR. 123, 139. Appellant’s admissions at the hearing show he knew of the requirement that he include prior convictions and not just his most recent conviction on the license renewal application. Thus, by his own testimony, Appellant refutes this contention.

IV

Appellant’s fourth argument is that the ALJ did not consider all options when he determined that a revocation order was required after finding the charges proved.

Appellant contends that this is contrary to 46 U.S.C. §§ 7701 and 7703 because under these statutes revocation or suspension is not mandatory.

46 U.S.C. § 7701(b) states that “[I]licenses . . . may be suspended or revoked for acts described in section 7703 of this title.” 46 U.S.C. § 7703 goes on to state that “[a] license . . . may be suspended or revoked if the holder – (1)(B) has committed an act of incompetence, misconduct, or negligence.” The ALJ did not ignore these sections of the Code when he made his decision. Precedents dictate that the ALJ had only one option to follow when determining the appropriate disposition in this case. The ALJ followed those precedents correctly by revoking Appellant’s license. I have previously stated that where fraud in the procurement of a license is proved in a suspension and revocation proceeding, revocation is the *only* appropriate sanction. See Appeal Decisions 2570 (HARRIS); 2346 (WILLIAMS); 2205 (ROBLES); 2569 (TAYLOR). Appellant was found to have fraudulently procured a renewal of his license:

It was proved at the hearing that on his original license application in August 8, 1986, Appellant stated that he did not have any convictions. Clearly, from the record developed at the hearing, this was false. Furthermore, Appellant’s 1990 license renewal application listed only his 1987 conviction of BWI and conviction for resisting arrest. See I.O. Exhibit 2. Appellant’s false statements on his original license application and his 1990 renewal application do not prove false statements on his 1995 license renewal application. However, once false statements in his 1995 license renewal application were proved, they are relevant to determining the appropriate disposition. I reiterate the rule that proof in a suspension and revocation proceeding of a single specification and charge of fraud in the procurement of a license is enough to require that license to be revoked.

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Where, as here, there were multiple instances of fraudulent procurement shown, this rule has even more application.

For all the foregoing reasons, the ALJ was correct when he revoked Appellant's license.

CONCLUSION

After reviewing the entire record and considering all of Appellant's arguments I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the ALJ. The hearing Appellant received was fair and in accordance with the requirements of the applicable regulations.

ORDER

The order of the Administrative Law Judge dated May 3, 1996 is AFFIRMED.

//S//

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

Signed at Washington, D.C., this 23, of December, 1999.