

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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UNITED STATES COAST GUARD
COMPLAINANT,

vs.

Merchant Mariner's Document
No. [REDACTED]

Issued to:
Jerome E. Slade
Respondent

Docket No. 00-0628
PA No. 00001471

Before: Archie R. Boggs
Administrative Law Judge

PRELIMINARY STATEMENT

This proceeding is brought pursuant to the authority contained in 5 USC 551-559; 46 USC Chapter 77; 46 CFR Part 5; and 33 CFR Part 20.

Jerome E. Slade was served with an original Complaint by a U.S. Coast Guard Investigating Officer on 21 September 2000, and with an amended Complaint on 22 December 2000. The Complaints allege statutory authority as 46 USC 7703 and regulatory authority as 46 CFR 5.33.

The factual allegations in the original Complaint dated 21 September 2000 read as follows:

"Factual allegations (1) - Violation of Law or Regulation

The Coast Guard alleges that on 11 September 1998 in the County of Alameda, California the Respondent:

1. Was convicted of driving while under the influence of alcohol.

Factual allegations (2) – Violation of Law or Regulation

The Coast Guard alleges that on 26 April 2000 at the United States Regional Examination Center, New Orleans, LA the Respondent:

1. Fraudulently certified that:
 - a. he had never been convicted by any court for an offense other than a minor traffic violation; and
 - b. he had never been convicted of operating a motor vehicle while under the influence of alcohol
2. Both of these assertions are true, since Respondent had been (convicted) by the Superior Court of Alameda County, California for refusal to test and driving under the influence of alcohol on 11 September 1998.

The factual allegations in the amended Complaint dated 22 December 2000 read as follows:

Factual allegations (1) – Conviction of NDRA Offense

The Coast Guard alleges that on 11 September 1998 in the County of Alameda, California the Respondent:

1. Was convicted of driving under the influence of alcohol on 11 September 1998.

Factual allegations (2) – Violation of Law or Regulation

The Coast Guard alleges that on 26 April 2000 at the United States Regional Examination Center, New Orleans, LA the Respondent:

1. Fraudulently certified that:
 - a. he had never been convicted by any court for an offense other than a minor traffic violation and
 - b. he had never been convicted of operating a motor vehicle while under the influence of alcohol
2. Both of these assertions are untrue, since Respondent had been convicted by the Superior Court of Alameda County, California.

The Respondent denied the allegations of the complaint. On October 24, 2000 he filed an unsigned answer with the Administrative Law Judge Docketing

Center, denying the jurisdictional and factual allegations. Mr. Slade was subsequently represented by professional counsel.

LT Selvin McLean and LCDR Andy Norris presented the case for the Coast Guard. Donglai Yang and Mike Wilty, attorneys at law, 5044 Lapalco Blvd., Marrero, LA, 70072, represented the Respondent.. The Respondent requested a hearing.

A hearing was held at the Marine Safety Office, 1615 Poydras Street, Room 737, New Orleans, LA on 10 and 16 January 2001.

Prior to the hearing the Respondent, through his counsel, filed a "Motion for Summary Decision." The motion "Moved this honorable office for a summary decision pursuant to 33 CFR 20.901. As more fully discussed below there is no genuine issue of material facts that on 11 September 1998 (the date of the conviction) Respondent was (not) acting under the authority of any license, document or merchant mariner's document. As such, jurisdiction over this matter is lacking. Therefore the Respondent is entitled to a Summary Dismissal as a matter of law."

It is true that the original Complaint dated 11 September 2000 alleged that Respondent acted under the authority of his document on 11 September 1998 "by serving as a QMED and engaging in official matters regarding (to) that document." However, in the amended Complaint, dated 22 December 2000, the Investigating Officer alleged that when he applied for a renewal of his merchant mariner's document on 26 April 2000 the Respondent acted under the authority of his document by "engaging in official matters regarding his document."

The Administrative Law Judge recognizes that Mr. Slade was not acting under authority of his document when he was convicted on 11 September 1998. However, when he applied for a renewal of his document on 26 April 2000 he was acting under authority of his document.

46 CFR 5.57(b) reads as follows:

"Acting under authority of license, certificate or document.

(b) A person is considered to be acting under the authority of the license, certificate or document while engaged in official matters regarding the license, certificate or document. This includes, but is not limited to, such acts as applying for renewal of a license, taking examinations for upgrading or endorsements, requesting duplicates of replacement licenses, certificates or documents, or when appearing at a hearing under this part."

Inasmuch as the Respondent was acting under authority of his document when he applied for a renewal of that document on 26 April 2000 the motion for a summary decision was denied.

In support of the Complaint the Investigating Officer introduced into evidence three (3) exhibits:

I.O. Exhibit No. 1 – a photo copy of Merchant Mariner's Document No. [REDACTED] which is issued to Mr. Slade.

I.O. Exhibit No. 2 – a record of a conviction in the Municipal Court for the Livermore Pleasanton Judicial District for the County of Alameda, State of California, concerning Jerome Earl Slade.

I.O. Exhibit No. 3 – an application for renewal of his merchant mariner's document, Coast Guard form 719B, which was executed by Mr. Slade on 26 April 2000.

Mr. Slade testified under oath in his own defense. He offered five (5) exhibits.

Respondent Exhibit A – an affidavit executed by the Respondent outlining his activities through September 1998, particularly 11 September 1998.

Respondent Exhibit B – an International Brotherhood of Electrical Workers official receipt which indicates the period during which Mr. Slade worked for that union.

Respondent Exhibit C – a copy of a decision in a matter entitled Cartwright vs. Board of Chiropractic Examiners, 129 Cal Rptr. 462 Cal 1976.

Respondent Exhibit D – a copy of decision in a matter entitled County of Los Angeles vs. Civil Service Commission, 46 Cal Rptr 2nd 256.

Respondent Exhibit E – an employment history report from the International Brotherhood of Electrical Workers outlining the Respondent's employment with that union from 1997 to 1999.

FINDINGS OF FACT

The Coast Guard's and the Respondent's Accepted Proposals are adopted as the Administrative Law Judge's Findings of Fact.

COAST GUARD'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

-ACCEPTED

1. On September 11, 1998, the respondent, Mr. Jerome E. Slade, was the holder of Coast Guard Merchant Mariner's Document number [REDACTED] [GOVT. 1].

ACCEPTED

2. On September 11, 1998, the respondent, pursuant to his plea of "no contest (*nolo contendere*)", was convicted of violating section M23152(A) of the California Vehicle Code by the Municipal Court for Livermore-Pleasanton Judicial District of the County of Alameda, State of California [Govt. 4].

ACCEPTED

3. Section M23152(A) of the California Vehicle Code proscribes driving an automobile while under the influence of alcohol.

ACCEPTED

4. The DUI Advisement of Rights, Waiver, and Plea Form that respondent himself signed after consulting with his attorney on September 11, 1998 states the following in item 28 under the heading of "Consequences of Plea of Guilty or No Contest":

28. I understand that a plea of no contest (*nolo contendere*) will have exactly the same effect in this case as a plea of guilty, but it cannot be used against me in a civil lawsuit

ACCEPTED

5. As a result of his court conviction, the respondent was sentenced to the following:
- Spend 9 days in jail;
 - Serve 36 months court probation;
 - Pay a \$1400 fine; and
 - Attend traffic school.

ACCEPTED

6. The court order completion date for the respondent's traffic school was April 14, 1999.

ACCEPTED

7. As of the date of the hearing, respondent had not completed the traffic school, and he had not paid the \$1400 fine levied against him.

ACCEPTED

8. As a result of this non-compliance with the court-imposed sentence, a bench warrant was issued by the Municipal Court of Livermore-Pleasanton Judicial District for the respondent's arrest on April 21, 1999.

Respondent-U.S. Coast Guard Application

ACCEPTED

1. On April 26, 2000, the Respondent submitted a Coast Guard form 719B Application for license as Officer, Staff Officer, Operator, and Merchant Mariner's Document, for the renewal of his Merchant Mariners Document and for an original issue of a 3rd Engineer unlimited steam and diesel license to the Regional Exam Center, New Orleans [Govt. 5].

ACCEPTED

2. On page 2, section IV., of respondent's CG form 719B, the respondent answered "no" to the following question:

Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?(Conviction means found guilty by judgement or by a plea and includes cases of deferred adjudication (nolo contendere, adjudication withheld, etc.) or when the court required you to attend classes, make contribution of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of trial court finding. Expunged convictions must be reported unless the expungement was based upon a showing that the court's earlier conviction was in error.

ACCEPTED

3. This response by respondent was fraudulent, in that respondent had been convicted in California in 1998 for driving under the influence of alcohol.

ACCEPTED

4. On page 2, section IV of respondent's CG form 719B, the respondent also answered "no" to the following question:

Have you ever been convicted of a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on the highway or operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance?

ACCEPTED

4. This response by respondent was also fraudulent, in that respondent had been convicted in California in 1998 for driving under the influence of alcohol.

ACCEPTED

6. The respondent certified that the information on the application was true and correct by signing block 43, page 2 of CG-718B [Govt. 5].

ACCEPTED

7. Respondent had no reasonable or legitimate basis to believe that he had not been convicted of the offense of driving under the influence of alcohol in California in 1998.

CONCLUSIONS OF LAW

ACCEPTED

1. 46 U.S.C. 7703(3) permits the suspension or revocation of a merchant mariner's credential(s) if the mariner is convicted of an offense described in section 205(a)(3)(A) of the National Driver Register Act (NDRA) of 1982 (23 U.S.C. 401) within three years preceding the initiation of a suspension & revocation (S & R) proceeding.

ACCEPTED

2. One of the offenses listed in section 205(a)(3)(A) of the NDRA (and which is now codified at 49 U.S.C. 30304(a)(3)(A)) is driving under the influence of alcohol.

ACCEPTED

3. State court convictions are admissible at S & R hearings (see, e.g., CDOA 2462 (Armstead); CDOA 2497 (Guizzotti); CDOA 2435 (Baber); CDOA 2355 (Rhule); and CDOA 1446 (Gross)) and should be considered as "substantial evidence adverse to respondent." CDOA 2497 (Guizzotti).

ACCEPTED

4. The Coast Guard looks to state law to determine whether a mariner has actually been "convicted" in state court. CDOA 2435 (Baber).

ACCEPTED

5. The principal case cited by respondent, Cartwright v. Board of Chiropractic Examiners, 16 Cal.3d 762 (1976), makes it clear that a "no-contest" plea in California results in a conviction. See, e.g., page 773 ("[When the conviction is based on a *nolo contendere* plea . . ."); page 774 ("Since a conviction after a *nolo contendere* plea . . .").

ACCEPTED

6. The fact that respondent's "no contest" plea in California resulted in him immediately being placed on probation is conclusive evidence he was 'convicted' for all purposes under California law. Dickerson v. New Banner Institute, Inc., 103 S.Ct. 986, 992 (1983); CDOA 2435 (Baber).

ACCEPTED

7. California Code section 1016 Penal, subdivision 3, which is the statutory authorization for a plea of *nolo contendere*, states as follows:

The court shall ascertain whether the defendant fully understands that a plea of *nolo contendere* shall be considered the same as a plea of guilty and that, upon a plea of *nolo contendere*, **the court shall find the defendant guilty** (emphasis added).

ACCEPTED

8. California Code Penal section 667.7(b) defines a habitual offender as one whose guilt has been established by, *inter alia*, a plea of *nolo contendere*.

ACCEPTED

9. California Code Penal section 1025(b), relating to the use of a prior conviction in a criminal trial, makes it clear that a conviction obtained via a plea of *nolo contendere* may be used as evidence of a prior conviction in a subsequent criminal trial.

ACCEPTED

10. California Code Business and Professional (B & P) section 7.5 states that a conviction within the meaning of the code means a plea of guilty or a conviction following a plea of *nolo contendere*.

ACCEPTED

11. Numerous professional licenses may be suspended or revoked in California after a conviction obtained by, *inter alia*, a *nolo contendere* plea. For example, the license of a real estate broker (California Code B & P section 10177); clinical lab technician (California Code B & P section 1320); dentist (California Code B & P section 1628.5); physician and surgeon (California Code B & P section 10177); speech pathologist (California Code B & P section 2533); dispensing optician (California Code B & P section 2553.6); barber (California Code B & P section 6571.6); seller or trainer of guide dogs for the blind (California Code B & P section 7211.2); and landscape architect (California Code B & P section 5676), can all be suspended or revoked following a conviction obtained by, *inter alia*, a *nolo contendere* plea. Interestingly enough, in response to the Cartwright case relied upon by respondent, the California legislature specifically amended the California statutes to allow for the suspension or revocation of a chiropractor's license. Stats. 1978, ch. 307, section 3, p.640. The effect of this and other legislative action "has substantially narrowed the practical impact of Cartwright." County of Los Angeles v. Civil Service Commission, 39 Cal.App.4th 620, 628 (1995).

ACCEPTED

12. A mariner does not have to be acting under the authority of his Coast Guard-issued credentials when he is convicted of a NDRA offense that is actionable pursuant to 46 U.S.C. 7703(3).

ACCEPTED

13. Respondent was acting under the authority of his Coast Guard-issued credential(s) when he made the fraudulent certifications on his application for renewal of his MMD. 46 CFR 5.57(b).

RESPONDENT'S
PROPOSED FINDING OF FACT

ACCEPTED

1. On September 11, 1998, before the Municipal Court, County of Alameda, State of

California, the Respondent plead "no contest" to his DUI (Driving Under Influence) charges in accordance with California state law.

ACCEPTED

2. Before that court, there was no adjudication of the Respondent's actual guilt by the jury, nor did the Respondent plead guilty to the DUI charges.

ACCEPTED

3. The Municipal court judge accepted the "no contest" plea.

NOT ACCEPTED

4. On specific advice from his attorney in California, Mr. Slade was led to understand that he was not being convicted of a crime, but rather was simply not contesting the charge due to the extreme burden in time, travel, and additional attorneys fees because he lived in Nevada. Under these facts and circumstances, Mr. Slade was technically mistaken and committed an error of judgment - - however, he did not commit fraud.

NOT ACCEPTED

5. On April 26, 2000, when he applied for the renewal of license at Coast Guard, the Respondent had reason to believe that he was not convicted of DUI.

NOT ACCEPTED

6. California state law controls the admissibility of the California court record in this proceeding.

ACCEPTED

7. The government does not dispute that the Respondent has thirty years of sea time without any disciplinary action against him. The record of the Respondent lacks any disciplinary ruling against him.

CONCLUSION(S) OF LAW

NOT ACCEPTED

(1) The court record from California state court should be excluded from evidence according to California law.

NOT ACCEPTED

(2) It is well established among the Commandant's decisions that the question of whether a proceeding in state court constitutes a conviction for purposes of the federal statute is determined by the effect of that proceeding under the state law, in the instant case, under California law. See Commandant decision on Appeal 2355 (Rhule License No. 153515). Therefore, the effect of the plea of no contest in the instant case should be interpreted under California law

NOT ACCEPTED

(3) Both statutory laws and judicial decision's of California mandate that a criminal court ruling based on a plea of "no contest" should not be admissible in this administrative proceedings. See California Penal Code Article 1016 and *Cartwright v. Board of Chiropractor Examiners*, 16 Cal. 3d 762, 129 Cal. Rptr. 462, 548 P. 2d 1134 (Cal. 1976) (*Cartwright*) and *County of Los Angeles v. Civil Service Com.*, 46 Cal. Rptr. 2d 256 (Cal. App. 4th 1995).

ACCEPTED, BUT THIS IS NOT A "CIVIL SUIT"

(4) California Penal Code Article 1016, in its pertinent part, states that:

Permissible pleas; effect of plea of *nolo contendere*; presumption of sanity:

There are six kinds of an indictment or an information, or to a complaint charging a misdemeanor or infraction"

nolo contendere, subject to the approval of the court . . . In cases other than those punishable as felonies, the plea and any admission required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which criminal prosecution is based. (Emphasis added).

ACCEPTED, BUT THIS ADMINISTRATIVE
PROCEEDING IS NOT LIKE A CIVIL SUIT

(5) By its clear language, the Penal Code Article 1016 states that a *nolo contendere* plea may not be used against the defendant as an admission in a civil suit, like this administrative proceeding, when the charge is a misdemeanor.

NOT ACCEPTED AS TO THIS PROCEEDING

(6) Under California law, the statutory bar on the use of a *nolo contendere* plea in a civil action is extended to administrative actions. See *County of Los Angeles v. Civil Service Com.*, 46 Cal. Rptr. 2d 256 (Cal. App. 4th 1995) (citing *Cartwright*, supra, at 772).

NOT ACCEPTED

(7) Since Driving Under Influence in California law is a misdemeanor, the plea and the judgment arising out of that plea may not be used against the Respondent as an admission in this administrative proceeding.

ACCEPTED, THIS IS NOT A "CIVIL PROCEEDING"

(8) The Respondent was instructed by the California court that the plea of "no contest" should not be used against him in a subsequent civil proceeding.

ACCEPTED

(9) The California Supreme Court held in *Cartwright v. Board of Chiropractor Examiners*, 16 Cal. 3d 762, 129 Cal. Rptr. 462, 548 P. 2d 1134 (Cal. 1976) that the conviction after nolo contendere should not be admitted due to the weakness in the available proof of guilt. That decision was also followed and reaffirmed by a recent case *County of Los Angeles v. Civil Service Com.*, 46 Cal. Rptr. 2d 256 (Cal. App. 4th 1995).

ACCEPTED

(10) (The) fraud means an intentional perversion of truth for the purpose of inducing another in reliance upon to part with some valuable thing belonging to him or surrender a legal right. See Black's Law Dictionary.

NOT ACCEPTED

(11) The Coast Guard officer fails to prove the "intentional element" of this charge.

NOT ACCEPTED

(12) On April 26, 2001 the Respondent reasonably believed that he was not convicted in a general sense. This belief was reinforced by the attorney representing Mr. Slade in the California DUI proceeding. A conviction, in a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. See Black Law Dictionary, Page 333.

NOT ACCEPTED

(13) It is merely an error of judgment for Mr. Slade to believe that he was never convicted by the California state court. This error of judgment does not rise to the level of fraud. See *Rechany v. Roland*, 235 F. Supp. 79 (S. D. N. Y. 1964)

OPINION

In his defense, through counsel, the Respondent contended: (1) he was misled by his

lawyer in California when he entered the nola contendere plea to the DUI charge and (2) the no defense (nola contendere) plea should not be recognized in this proceeding as a matter of law and therefore the Complaint should be dismissed.

The Respondent contended that he did not understand the "Latin" words -- nolo contendere -- and he was duped by his lawyer to enter that plea. The Investigating Officer Exhibit No. 2 contains a document entitled "Municipal Court of California, County of Alameda, DUI Advisement of Rights, Waiver and Plea Form." The instructions are "Fill out this form if you wish to plead guilty or no-contest to the charges against you. Initial the box for each applicable item ONLY if you understand it. If you have any questions about your case, the possible sentence, or the information on this form, ask your attorney or the Judge."

Thirty-three items are listed. Among the items which Mr. Slade indicates that he understood by inserting his initials -- JES -- are the following:

9 -- Right to a Jury Trial -- I understand that I have the right to a speedy, public jury trial. At the trial, I would be presumed innocent and I could not be convicted unless 12 impartial jurors were convinced of my guilt beyond a reasonable doubt.

10 -- I give up my right to a jury trial.

11 -- Right to Confront Witnesses -- I understand that I have the right to confront and cross-examine all witnesses testifying against me.

12 -- I give up my right to confront and cross-examine witnesses.

13 -- Right Against Self-Incrimination -- I understand that I have the right to remain silent and not incriminate myself, and the right to testify in my own behalf. I understand that by pleading guilty or no contest, I am incriminating myself.

14 -- I give up my right to remain silent and to not incriminate myself.

15 -- Right to Produce Evidence -- I understand that I have the right to present evidence and to have the Court issue subpoenas to bring into court all

witnesses and evidence favorable to me at no cost to me.

16 – I give up my right to produce evidence and witnesses in my own behalf.

28 – I understand that a plea of no contest (nola contendere) will have exactly the same effect in this case as a plea of guilty, but it cannot be used against me in a civil lawsuit.

The Respondent speaks and understands the English language and he appears to be fairly well educated.

His contentions that he did not understand the no contest" (nola contendere) plea and his lawyer somehow tricked him into that plea are not accepted.

With regard to the Respondent's contention that the California DUI conviction is not admissible in this proceeding the Commandant of the Coast Guard has consistently ruled that State Court decisions are admissible as evidence in proceedings before Administrative Law Judges.

The Complaint is proved.

The Coast Guard proposed an order of six (6) months outright suspension. It is felt that due to the nature of his conviction - abuse of the use of alcohol – there should be a period of probation after the return of the Respondent's merchant mariner's document..

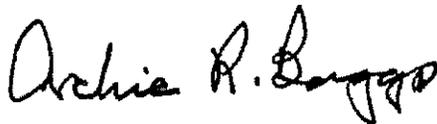
ORDER

That your merchant mariner's document No. N [REDACTED] and all other valid documents, licenses or certificates of service issued to you by the United States Coast Guard, or any predecessor authority, now held by you, be and the same, are hereby suspended OUTRIGHT, effective immediately on the service upon you of this Order. The said Outright suspension shall remain in effect for three (3) months.

Your said merchant mariner's document is further suspended for six (6) months, which additional suspension shall not be effective provided no charge under 46 USC 7701-7705 or any other navigation or vessel inspection law, is proved against you for acts committed during the foregoing period of outright suspension or for acts committed within eighteen (18) months from the date of termination of the said foregoing outright suspension.

If this probation is violated, the Order for which probation was granted shall become effective with respect to all documents here involved, and also any document acquired during the period of probation, at such time as designated by any U.S. Administrative Law Judge finding the violation, and may be added to or form a part of any other Order that is entered by such Judge.

You are directed to immediately deposit your document with the U.S. Coast Guard Marine Safety Office, 1615 Poydras Street, New Orleans, LA.



ARCHIE R. BOGGS
ADMINISTRATIVE LAW JUDGE

Dated: 15 May 2001
New Orleans, Louisiana

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

LT Selvin McLean
Marine Safety Office New Orleans
1615 Poydras Street, Room 736
New Orleans, LA 70112-2711
(FAX#) 504-589-4236

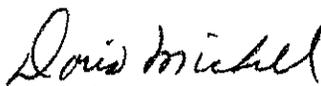
I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by First Class Mail:

Donglai Yang
Falcon Law Firm
5044 Lapalco Boulevard
Marrero, LA 70072

Jerome E. Slade


I hereby certify that I have this day forwarded the attached document by Federal express to the following person:

ALJ Docketing Center
United States Coast Guard
40 South Gay Street
Baltimore, MD 21202-4022


Doris Michel
Legal Assistant

Dated 15 May 2001
New Orleans, Louisiana