

NTSB Order No.
EM-62

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 29th day of July 1977.

OWEN W. SILER, Commandant, United States Coast Guard

v.

THOMAS FRANCIS O'CALLAGHAN. Appellant

Docket ME-58

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming revocation of a radar observer endorsement on his vessel master's license (No. 441480) and suspension of the license itself for 6 months.¹ The Commandant also sustained a finding of misconduct by appellant in procuring the renewal of his radar observer endorsement.

Appellant had appealed to the Commandant (Appeal No. 2062) from the initial decision of Administrative Law Judge Albert S. Frevola, rendered after a full evidentiary hearing.² Throughout these proceedings, appellant has been represented by counsel.

The law judge found that on August 3, 1973, appellant wrongfully and knowingly obtained a renewal of his radar endorsement by presenting a false document at the Coast Guard Marine Inspection Office in Baltimore, which attested to his satisfactory completion of a radar course at the Maritime Institute of Technology and Graduate Studies. Although the law judge found various factors mitigating the offense, he nevertheless concluded that "the proper order requires the revocation of the Radar Observers's endorsement ... and an outright suspension of the license itself." (I.D. 57).

¹The Commandant acted pursuant to 46 U.S.C. 239(g). An appeal to this Board from his decision is authorized by 49 U.S.C. 1903(a)(9)(B).

²Copies of the decisions of the Commandant and the law judge are attached.

In his brief on appeal, appellant contends that (1) the Coast Guard lacks jurisdiction in this case; and that (2) the findings concerning the offense are erroneous. Counsel for the Commandant has not submitted a reply brief.³

Upon consideration of appellant's brief and the entire record, the Board concludes that the charge of misconduct was established by reliable, probative, and substantial evidence. The findings of the law judge, as modified herein, are adopted as our own. Moreover, we agree that the sanction is warranted.

The Coast Guard's jurisdiction is challenged because 49 U.S.C. 239(d) indicates that a licensed officer must have committed the misconduct "while acting under authority of his license...." Appellant was not entitled to the endorsement unless he was the holder of a valid license. The endorsement was an added qualification of the license itself. Consequently, there can be no question that appellant's actions were within the contemplated scope of the statute. We therefore reject his first contention.

Appellant's second contention requires consideration of the elements of scienter in his presentation of the false document to the Coast Guard. The elements to be proved in this case were: (1) that the document tendered was a material factor in obtaining a renewal of the radar endorsement; (2) that the document was in fact false; and (3) that appellant actually knew of its falsity.⁴

Appellant received the certificate in a sealed envelope, together with certain study material, from the dean of the Maritime Institute. The certificate attested that appellant had satisfactorily completed the Coast Guard approved "radar safety and navigation course." Previously, appellant had requested the dean to provide him with practice materials so that he would be able to fulfill the requirements for renewing his license and radar endorsement. (Tr. 436). Although appellant did not request the certificate, he testified that the dean said "... Captain, if

³Appellant's further request, in a supplemental brief, that we order production of the entire record in Appeal No. 2074, decided by the Commandant on September 20, 1976, is hereby denied. The decision will be considered, however, as any other precedent.

⁴See Hart v. McLucas, 535 F. 2d 516 (9th Cir. 1976), a case where an aircraft flight instructor was charged with making false entries in the logbooks of several of his students, in violation of federal aviation regulations.

anybody knows radar, you doIf anyone rates this certificate, you certainly do," when he handed him the sealed envelope (Tr. 440). They did not otherwise discuss the contents of the envelope, and it remained sealed until appellant presented it at the Coast Guard's marine inspection office.

Assuming that the certificate truly represented appellant's completion of the radar safety and navigation course, he was automatically entitled to renewal of his radar endorsement. Coast Guard regulations provide that a master who produces a radar observer certificate, dated within the previous 12 months, from a radar training course at an approved school, need not take a written examination which would otherwise be required.⁵ Hence, the certificate was clearly a material factor in obtaining the renewal.

Appellant admitted that he did not attend the course that graduated on January 26, 1973, as indicated by the certificate. He also stipulated that he was not a member of any class which graduated at any time from the Maritime Institute radar observer course. (Exhibit 13). Therefore, the falsity of the certificate is equally well established.

The third element of proof concerns appellant's knowledge of the fact that he was making a false presentation. He claims that he reasonably believed that the Coast Guard would accept his various other accomplishments in maritime education in lieu of the school certificate. We may well concede, as did the law judge, that appellant was candid and honest in expressing this belief. Nevertheless, he cannot be exonerated because of his subjective reasons for believing that he was qualified, which he did not communicate to the Coast Guard. Appellant's reasoning is frequently found in criminal cases involving fraud. It has been held, for example, that:

"One cannot be held to guilty knowledge of falsity of his statements simply because a reasonable man under the same or similar circumstances would have known of the falsity of such statements."⁶

⁵46 CFR 10.02-9(e)(5). See 35 Federal Register 19905, December 30, 1970. The Maritime Institute's course was approved by letter at that time (Exhibit 10). As of November 25, 1974, the Institute has been listed as an approved school in 46 CFR 10.30-5(f)(9). 39 FR 34544.

⁶Elbel v. United States, 364 F. 2d 127 (10th Cir. 1966). See also, Babson v. United States, 330 F. 2d 662 (5th Cir. 1964); and United States v. Benjamin, 328 F. 2d 854 (2nd Cir. 1964).

We must, however, differentiate between criminal and civil standards of proof. Since this case is civil in nature, the first question becomes whether it was reasonable for appellant to expect the Coast Guard to accept his background as a sufficient qualification for the renewal of his radar endorsement. Even if this should be true, the question remains as to why he did not explain those circumstances to the inspection officer and leave the determination to him. That course of action would be the appropriate one, even if we were to assume that appellant's belief was reasonable. Since none of these factual circumstances were made known to the Coast Guard, we find appellant was chargeable with knowing misrepresentation of the facts in presenting the certificate. We, therefore, conclude that all the elements of scienter were established.

The offense involved was concerned solely with appellant's endorsement and the revocation of this endorsement is therefore appropriate. In a subsequent decision the Commandant reached a contrary conclusion, exonerating an applicant for renewal of a radar endorsement who presented false documentation to the Coast Guard.⁷ Although we agree with appellant that the case are indistinguishable, we are not persuaded that the subsequent case was correctly decided by the Commandant.

In assessing sanction, we conclude that revocation of appellant's radar endorsement, for submitting false documentation on his application for renewal thereof, is a sufficient deterrent. Without the radar observer's endorsement, appellant's use of his license would be severely restricted.⁸ He would have to wait at least 1 year before being eligible to reapply for the endorsement⁹

⁷Commandant's decision on Appeal No. 2074 (Lowen), issued September 20, 1976. See footnote 3, supra.

⁸46 CFR 157.20-32 provided, in pertinent part, as follows:
"§157.20-32 Radar observers.

Every radar equipped vessel of 300 gross tons and over...shall have in its required complement of deck officers, including the master, only those who have qualified as 'radar observers'..."

⁹46 CFR 5.13-1(b) provides as follows:
"§5.13-1 Time limitations.

* * * * *

(b) Any person whose license, certificate or document has been revoked or surrendered for one or more offenses which are not specifically described in §§5.03-3 and 5.03-5 may after one year apply by letter and the application form requesting the

and, assuming that his application would be granted, he still must qualify for the endorsement in accordance with the applicable regulatory standards.¹⁰ The factors in mitigation which were considered included appellant's candor in this proceeding, his past contributions at the radar school, and the fact that his offense was not critical in terms of the safety of life and property at sea. The fact that his offense brought discredit to the school was the main factor considered in aggravation. (I.D. 56). Taken together, these factors do not provide a satisfactory rationale for applying the additional sanction to appellant's license.¹¹

In addition, the precedent considered by the law judge was a case in which the Commandant reduced the sanction applied against a licensed officer for committing a similar offense, indicating that a probationary suspension was a sufficient "remedial measure to discourage [the officer] from indulging in such practices in the future" (I.D. 57).¹² As noted above, we find the same remedial effect is served here by revocation of appellant's endorsement. His offense is solely related to a failure to qualify for that endorsement. Although he was acting under the authority of his license, we do not believe the sanction should be extended beyond the scope of the offense involved. The suspension of his license is therefore vacated.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted in part and denied in part;
2. The order of the Commandant revoking appellant's radar observer endorsement be and it hereby is affirmed;
3. The order of the Commandant suspending appellant's

issuance of a new license, certificate or document."

¹⁰It is not clear whether, in this situation, appellant would be required to qualify as a new applicant for the endorsement under 46 CFR 10.02-5, or would be eligible for renewal pursuant to 46 CFR 10.02-9.

¹¹The Commandant's rationale is confined to a comment that appellant's license was not renewable under "the regulations in effect at the time" without the endorsement (C.D.15). Since those regulations are not cited, we cannot assess their present effect on the sanction.

¹²Citing Commandant's decision No. 832 (Fisher).

master's license for 6 months be and it hereby is vacated and set aside; and

4. Except as modified herein, the order of the Commandant be and it hereby is affirmed.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board concurred in the above opinion and order.