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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	ON APPEAL
	:	NO. 2727
MERCHANT MARINER CREDENTIAL	:	
Issued to: ROBERT RYAN BOUDREAUX	:	

APPEARANCES

For the Government:
CWO John Christie, USCG
Coast Guard Sector New Orleans
Ms. Lineka N. Quijano, Esq.
Ms. Jennifer A. Mehaffey, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent:
Mr. David Kish, Esq.

Administrative Law Judge:
Dean C. Metry

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

On October 18, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard issued findings and conclusions from the bench, finding the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Robert Ryan Boudreaux proved, and ordering the suspension of Respondent's credential for 90 days, with a further suspension of six months suspended on nine months probation.

That Coast Guard Complaint alleged misconduct in that Respondent served aboard a vessel under the authority of his credential from October 25 to November 13, 2017, in violation of an ALJ order suspending that credential.

Respondent appeals.

FACTS & PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued by the United States Coast Guard (MMC).

On October 18, 2016, the Coast Guard filed a Complaint against Respondent's MMC alleging that Respondent had committed an act of misconduct by failing to comply with his marine employer's drug and alcohol policy. *See Appeal Decision 2723 (BOUDREAUX I)* (2019) at 3, 2019 WL 8137712 at 2. That Complaint was assigned Coast Guard ALJ docket number 2016-0332.

The hearing in that matter was convened by ALJ Bruce T. Smith on July 11, 2017. At the conclusion of the hearing, the ALJ returned Respondent's MMC to his possession, with the understanding that this allowed Respondent to continue working under the authority of his credential, pending decision in his case. [Respondent Ex. 3 (CG-ALJ 2016-0332 Tr. Vol. II at 226-28).]

On or about July 15, 2017, Respondent signed articles of engagement with Keystone Marine, and shipped aboard the M/V SEAKAY SPIRIT as an AB. [Tr. Day III at 5.] The articles specified that Respondent's service on the SEAKAY SPIRIT would continue for 120 days, and that service was under the authority of his credential. For the relevant time, the SEAKAY SPIRIT was operating in the coastwise trade, generally between St. James, Louisiana and Houston, Texas. Generally, no single at-sea leg of the vessel's route was longer than 24 hours. [*Id.*]

On October 24, 2017, the ALJ issued a decision and order (D&O) in the 2016-0332 case. [CG Ex. 2.] The D&O found the allegation of misconduct proved, and ordered Respondent's credential suspended outright for 60 days, effective immediately.

At the time of the D&O's issue, Respondent was employed onboard the SEAKAY SPIRIT. Not later than October 29, 2017, Respondent received notice of the D&O and filed Notice of Appeal. [Tr. Day III at 5.] Respondent continued to serve on the SEAKAY SPIRIT for the period of October 25 to November 13, 2017. [*Id.* at 5-6.] Respondent signed off the vessel on November 13, as scheduled. [*Id.*]

On March 6, 2018, the Coast Guard filed a second Complaint against Respondent's Merchant Mariner Credential, alleging that Respondent had committed an act of misconduct by serving on the SEAKAY SPIRIT under the authority of his credential, for the period October 25 to November 13, 2017, in violation of the ALJ's suspension order. That Complaint was assigned Coast Guard ALJ docket number 2018-0071, and initiated the instant case.

The hearing in the matter was convened by ALJ Dean C. Metry on October 16, 2018. On October 18, at the conclusion of the hearing and by the parties' consent, the ALJ issued an oral ruling, finding the allegation of misconduct proved and suspending Respondent's credential for ninety days outright, to be followed by six months suspended on nine months probation. [Tr. Day III.] This decision was memorialized by an Order on October 18, 2018. Respondent appealed from that Order on November 12, 2018.

In light of Respondent's appeal and Request for Temporary MMC, on December 6, 2018, the ALJ issued an Order Modifying Bench Decision (Modification Order). That Order provided that, in lieu of granting Respondent a temporary credential under 46 CFR § 5.707, the Coast Guard would return Respondent's existing temporary credential (issued under § 5.707, following the earlier case, CG-ALJ 2016-0332) on December 18, 2018, sixty days after the sanction of ninety days suspension was imposed by Order of October 18. Pursuant to the Modification Order, the final thirty days of the ordered suspension would be "remitted," to be served by

Respondent only after "administrative exhaustion of all appeals of this decision." [Modification Order at 2.][1]

On December 30, 2019, I issued a decision upholding the sanction imposed in Respondent's prior case, CG-ALJ 2016-0332. *Appeal Decision 2723 (BOUDREAUX I)*, 2019 WL 8137712.

Respondent's timely appeal of the ALJ decision in the second case, CG-ALJ 2018-0071, is now properly before me.

BASES OF APPEAL

Respondent asserts the following bases of appeal:

I. *The 2017 ALJ's D&O did not become effective until November 23 2017, so Respondent's sea service between October 25 and November 13 did not violate that order.*

II. *An ALJ's D&O is not a formal, duly established rule, so violation of such an order is not misconduct.*

III. *The 2017 D&O was in error and not final agency action, and the ALJ therefore erred in considering it part of Respondent's prior record, for purposes of assessing a proper sanction.*

OPINION

I.
The 2017 ALJ D&O did not become effective until November 23, 2017, so Respondent's sea service, between October 25 and November 13 did not violate that order.

Respondent bases this argument on 33 CFR § 20.1101(b)'s provision that, as to Coast Guard suspension and revocation proceedings, "Unless appealed [to the Commandant], an ALJ's decision becomes final action of the Coast Guard 30 days after the date of its issuance." [Respondent's Appellate Brief at 8.] Respondent argues that, under this regulation, the D&O of

[1] The terms of probation were also amended, providing for suspension of the credential for eight months, suspended on twelve months probation from October 18, 2018.

October 24, 2017, did not become effective and enforceable until thirty days had passed, and therefore Respondent's sea service between October 29 and November 13, 2017, did not violate the D&O.

This argument is based upon a misreading of 33 CFR § 20.1101. That section defines the "finality" of a Coast Guard ALJ order for the specific purpose of establishing when the agency action is judicially reviewable, under the Administrative Procedure Act (APA). *See, e.g., Dresser v. Ingolia*, 307 F. App'x 834, 839-40 (5th Cir. 2009) (examining 33 CFR § 20.1101 and holding that a Coast Guard ALJ decision is not "final agency action" while appeal to the Commandant is pending). Respondent has cited no authority to support his erroneous reading of § 20.1101. The immediate effectiveness of ALJ D&Os is supported by 46 CFR § 5.567(d)'s provision that, barring unusual circumstances, an ALJ's order of revocation or suspension normally states that the credential is to be surrendered "immediately."

The 2017 ALJ D&O, issued on October 24, 2017, directed "that Respondent Robert Ryan Boudreaux is hereby prohibited from serving aboard any vessel requiring a [MMC] for a period of SIXTY DAYS commencing upon the issuance of this Decision and Order." [CG Ex. 2 at 22.] In his bench ruling, the ALJ properly cited 46 CFR § 5.567: "This section sets forth [that] the effective date of the order is set by the terms of the order. In this case, Judge Smith in his Order indicated that the effect of his Order was immediate." [Tr. Day III at 7-8.] The ALJ below was correct: the disputed order was, by its own terms, and consistent with 46 CFR § 5.567, effective as of October 24, 2017, and Respondent's argument to the contrary is unavailing. *Cf. Administrator v. Goade*, NTSB Order No. EA-2636, 1987 WL 122196 at 2 (pilot's professed belief that he could continue to fly after surrendering his civil airman's certificate, because appeal of the certificate's suspension was pending, was erroneous, not creditable, and no defense to the charge of operating on a suspended certificate).

II.

An ALJ D&O is not a formal, duly established rule, so violation of such an order is not misconduct.

As already noted, the ALJ in this case found proved the allegation that Respondent served under authority of his credential in violation of an ALJ order suspending that credential.[2] On appeal, Respondent argues that the decision and order of a Coast Guard ALJ is not a "formal, duly established rule," and that therefore, even if Respondent did violate the 2017 D&O by sailing on the authority of his credential between October 25 and November 13, his conduct did not amount to misconduct. [Respondent's Appellate Brief at 9.]

A charge of misconduct must be based on the accused's violation of "some formal, duly established rule." 46 CFR § 5.27. The regulations provide a non-exhaustive list of sources for such rules: "statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." *Id.*

The ALJ below made a considered evaluation of Respondent's argument that an ALJ D&O is not a duly established rule, and rejected it. The ALJ reasoned that, because 46 CFR § 5.19(b) delegates the Commandant's suspension and revocation authority to Coast Guard ALJs, Respondent's argument that ALJ orders are not formal, duly established rules under § 5.27 would equally exclude from that category formal orders of the Commandant—a patently absurd result that is in no way compelled by the plain language of the regulations. [Tr. Day III at 7.]

The ALJ's conclusion—that ALJ suspension orders are formal, duly established rules, violation of which may give rise to a misconduct allegation—is supported by relevant precedent. An ALJ order of February 5, 1990, found a negligence charge proved, and suspended respondent mariner Taylor's license for two months, effective immediately. *See Appeal Decision 2524 (TAYLOR)*, 1991 WL 11007456, *aff'd*, NTSB Order No. EM-174, 1993 WL 402785. That order was served on Taylor on February 8. On February 10, 1990, Taylor assumed command of an uninspected towing vessel, and operated that vessel for twelve days during the period of outright

[2] The prior ALJ order read: "IT IS FURTHER ORDERED, that Respondent Robert Ryan Boudreaux is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Credential issued by the U.S. Coast Guard for a period of SIXTY DAYS commencing upon the issuance of this Decision and Order." [CG Ex. 2.]

suspension, in violation of the ALJ order. The Coast Guard filed a new complaint, alleging misconduct against Taylor, as supported by twelve specifications of violation of the February 5 suspension order, one specification for each day he served as Master. *TAYLOR* at 1, 1991 WL 11007456 at 1. This misconduct charge was found proved, a finding upheld on appeal to the Commandant and the National Transportation Safety Board (NTSB).

Here, the ALJ was correct to conclude that the October 24, 2017 D&O was a "formal, duly established rule," the violation of which constitutes misconduct. This conclusion was supported by relevant statute, regulation, and precedent, and I fully affirm and endorse it. "These proceedings serve no useful or remedial purpose if the orders issued by the Administrative Law Judge are not strictly enforced and obeyed." *TAYLOR* at 9, 1991 WL 11007456 at 7. The suspension and revocation authority, vested in the Coast Guard by 46 U.S.C. Chapter 77, and delegated to the ALJ by 33 CFR § 5.19(b), is meaningless if not enforced, and the means pursued by the Coast Guard here (a second complaint against Respondent's credential) are an appropriate means of enforcement.

The ALJ found, and I affirm, that the 2017 D&O was a formal, duly established rule, the violation of which gives rise to a misconduct charge. Such a situation could be viewed in another way: because Respondent's license was suspended[3] by the Order of October 24, 2017, his service from that day until November 13, 2017, without a valid credential, in a capacity that required him to be the holder of a valid MMC with AB rating, violated 46 U.S.C. § 8701(b).[4] *Cf. Appeal Decision 2481 (CROWLEY)*, 1989 WL 1126138 (upholding ALJ's suspension order for violation of § 8701(b) where the respondent filled a credentialed deckhand billet while his MMC was suspended). From either viewpoint, Respondent's conduct clearly constituted misconduct.

[3] The order was effective immediately, and was enforceable when Respondent had notice of it, which was not later than October 29. 2017.

[4] On vessels of more than 100 gross tons, including the SEAKAY SPIRIT, "an individual may not serve[] on board . . . if the individual does not have a merchant mariner's document issued to the individual under section 7302 of this title. . . . [T]he document must authorize service in the capacity for which the holder of the document is engaged or employed." Violation of that statute may incur a civil penalty of $500. § 8701(d). *See also* 46 CFR § 15.401.

III.

The 2017 D&O was in error and not final agency action, and the ALJ therefore erred in considering it part of Respondent's prior record, for purposes of assessing a proper sanction.

Respondent contends that the ALJ's consideration of the 2017 D&O in determining the proper order for the second case was reversible error, in that the D&O was on appeal, and therefore not a final agency order and not appropriate for consideration as part of his prior record under 46 CFR § 5.569. [Respondent Appellate Brief at 12.] Respondent further asserts that reliance on the findings of the D&O was in error because those findings were themselves erroneous. [*Id.*]

In these suspension and revocation proceedings, the selection of an appropriate order is within the discretion of the presiding ALJ, subject to appeal and review. 46 CFR § 5.569(a). For offenses that do not carry a mandatory sanction of revocation the ALJ shall, in determining the proper order, consider remedial actions taken by the respondent, the prior record of the respondent, and other evidence in mitigation and aggravation. 46 CFR § 5.569(b).

33 CFR § 20.1315(a) identifies the elements of a "prior record," including "[f]inal agency action by the Coast Guard on any S&R [suspension and revocation] proceeding in which a sanction or consent order was entered." § 20.1315(a)(2). As discussed *supra*, unless appealed to the Commandant, a Coast Guard ALJ decision becomes final agency action thirty days after its issuance. 33 CFR § 20.1101(b)(1). A Commandant Decision on Appeal is final agency action as of the date of issuance. 33 CFR § 20.1101(b)(2). An ALJ decision pending appeal to the Commandant is not final agency action. Therefore, a decision pending appeal is not properly part of a mariner's prior record for consideration when determining a proper order in a subsequent suspension and revocation proceeding, under § 5.569(b)(2).

Here, the ALJ issued his bench ruling on October 18, 2018, while Respondent's appeal of the D&O in case CG-ALJ 2016-0332 was pending. The ALJ considered the D&O as part of Respondent's prior record in determining a proper sanction, and specifically cited "Respondent's earlier charge . . . for willfully disobeying a master's order." [Tr. Day III at 10.] The ALJ considered this prior charge, in combination with the present charge for disobedience to an

ALJ's order, as indicative of an underlying disdain for legal authority on Respondent's part, relevant to assigning a proper order. [*Id.* at 10-11.] However, the finding that Respondent had violated a Master's order was invalidated by *Appeal Decision 2723 (BOUDREAUX I)* at 15, 21, 2019 WL 8137712 at 10, 15, although my decision otherwise sustained the act of misconduct by failing to comply with the marine employer's drug and alcohol policy.

Considering the D&O as part of Respondent's prior record, as of October 18, 2018, was error, because the D&O was not final agency action, and did not fall into any of the categories of prior disciplinary records forming a mariner's "prior record," as enumerated at 33 CFR § 20.1315(a).[5]

To be clear, the ALJ was correct to consider the 2017 D&O in his consideration of the merits of the Government's present allegations against Respondent. The basis of this misconduct case is Respondent's violation of the suspension order contained in the 2017 D&O, and there was no error in the ALJ's admission of that D&O as a Government exhibit, nor in his interpretation and application of the Order in his findings of fact and conclusions of law. [*See* Tr. Vol. III at 1-9.]

Given ALJ error in determining the sanction, a proper sanction may be determined *de novo* on appeal, on the administrative record. *See* 5 U.S.C. § 557(b); *Appeal Decisions 2717 (CHESBROUGH)* at 14, 2017 WL 6941489 at 9-10; *1813 (JEWELL)* at 5, 1970 WL 117059. The remainder of this opinion will determine a proper sanction, pursuant to 46 CFR § 5.569, *de novo*. *See Appeal Decision 2575 (WILLIAMS)* at 12, 1996 WL 33408496, and cases cited therein.

[5] The Government contends that the ALJ's consideration of the 2017 D&O was appropriate, because an ALJ D&O pending appeal should be considered part of an individual's prior record under the definition of "safe and suitable person" at 46 CFR § 10.107. [CG Appellate Brief at 14.] This argument is unavailing. § 10.107 provides definitions for use in 46 CFR Subchapter B. The "safe and suitable person" definition cited by the Government is particularly directed at 46 CFR §§ 10.211 and 10.213, regulating the evaluation of criminal and driving records for credential *applicants*. On the other hand, 33 CFR § 20.1315 is a specific rule of evidence for suspension and revocation proceedings, directly applicable to the circumstances at hand. While the definitions at § 10.107 may be relevant on occasion in proceedings under 33 CFR Part 20, they do not preempt the specific rules of evidence for these proceedings.

Notwithstanding *de novo* consideration, it is appropriate to consider the factors in mitigation and aggravation (excluding prior record) discussed by the ALJ. *Appeal Decision 2717 (CHESBROUGH)* at 14, 2017 WL 6941489 at 9-10.

As to mitigation, the ALJ found that Respondent's application for a temporary credential subsequent to disembarking the SEAKAY SPIRIT, could be considered a mitigating remedial action, in that it recognized the validity of the prior ALJ suspension order. [Tr. Day III at 10.] Respondent's receipt of that temporary credential was also a mitigating factor, in that it demonstrated that Respondent's continued service did not represent an imminent threat to safety at sea. [*Id.* at 11.] Respondent's long service and demonstrated professionalism and competence as an able-bodied seaman were additional mitigating factors. [*Id.*] In aggravation, the ALJ considered Respondent's "testimony and demeanor . . . indicat[ing] . . . a certain disdainfulness of rules, regulations, or decisions issued or ordered by others [, u]nder the mistaken belief that these orders are not in compliance with the Respondent's own understanding of what he believes the proper procedures are." [*Id.*]

In these suspension and revocation proceedings, the selection of an appropriate order is discretionary, for all offenses that do not carry a mandatory sanction of revocation. 46 CFR § 5.569 provides guidance for the selection of a proper sanction, and includes a list of suggested ranges for various offenses, at Table § 5.569. Orders within the suggested ranges will not be considered excessive, but "[m]itigating or aggravating factors may make an order greater or less than the given range appropriate." 46 CFR § 5.569(d). Violation of an ALJ's order is not a listed offense in Table § 5.569.

Operating under the authority of a suspended credential, in violation of an ALJ suspension order, is a serious act of misconduct.

> These proceedings serve no useful or remedial purpose if the orders issued by the Administrative Law Judge are not strictly enforced and obeyed.
> * * *
> The Administrative Law Judge understandably has a justified concern that his [suspension] order was flagrantly disregarded and could be disregarded again. Appellant has demonstrated no respect for the previous order issued and there is no reason to believe that he would not similarly disregard subsequent suspension orders.

Appeal Decision 2524 (*TAYLOR*) at 9, 1991 WL 11007456 at 7, *aff'd*, *Commandant v. Taylor*, NTSB Order No. EM-174, 1993 WL 402785. *TAYLOR* upheld an order of revocation for operating under the authority of a suspended credential.[6]

As noted, there is no suggested order range for violation of an ALJ's order, nor for operating on the authority of a suspended credential. However, the table supports the general propriety of a three-month suspension order for such a misconduct offense—there is no listed category of misconduct violation for which a sanction of three months suspension would be considered excessive.

Considering all of the foregoing, and in light of the remedial aim of this proceeding, a sanction of 90 days suspension, with additional probation, for misconduct by operating in violation of a suspension order is appropriate.

Upon *de novo* consideration I find that a 90-day suspension plus probation is appropriate for the allegation found proved. Therefore there is no need to alter the currently-effective Order of October 26, 2018, as modified by the Order of December 6, 2018. Respondent remains subject to an Order of 90 days outright suspension, of which 30 days suspension is deferred until administrative exhaustion of Respondent's appeals, and eight months further suspension suspended on one year of probation.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The Order imposed by the ALJ, suspending Respondent's Merchant Mariner Credential for 90 days, as modified by the Order of December 6, 2018, is AFFIRMED.

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[6] Affirming the Coast Guard appellate decision in *TAYLOR*, the NTSB observed: "While the issue may be novel in the Coast Guard context, the Board had decided numerous aviation enforcement cases in which operation during the period of an airman certificate suspension was alleged. When such a charge has been upheld, the sanction traditionally has been revocation." *Commandant v. Taylor*, NTSB Order No. EM-174 at 6 n. 10, 1993 WL 402785 at 2 (citing *Administrator v. Dunn*, NTSB Order No. EA-2576, 1987 WL 122114 at 2). *See also Administrator v. Goade*, NTSB Order No. EA-2636, 1987 WL 122196 at 4 ("Intentionally operating during a suspension is perhaps the ultimate defiance of regulatory authority.").

ORDER

The ALJ's Decision and Order dated October 26, 2018, as modified by the Order of December 6, 2018, is AFFIRMED.

ADM, USCG
VICE COMMANDANT

Signed at Washington, D.C., this 28 day of APRIL, 2020.