

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

GARY ELLSWORTH VAN AUKEN
Respondent

Docket Number 2018-0411
Enforcement Activity No. 5754326

AMENDED DECISION AND ORDER
Issued: April 02, 2020

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.
Suspension and Revocation National Center of Expertise
CWO Larry W. Goade
Sector Puget Sound
For the Coast Guard

GARY ELLSWORTH VAN AUKEN, Pro se
For the Respondent

I. BACKGROUND

The United States Coast Guard (Coast Guard) brought this administrative action under 46 U.S.C. § 46 USC 7703(1)(A) and its underlying regulations at 46 C.F.R. Part 5, seeking to revoke Respondent Gary Van Auken's Merchant Mariner Credential (MMC or Credential). On November 7, 2018, the Coast Guard filed a complaint against Respondent, alleging he violated 46 U.S.C. § 7703(1)(A), 46 C.F.R. § 5.33, and 33 C.F.R. § 95.045(b) by operating the towing vessel BLACK HAWK while intoxicated. Respondent filed a timely answer, admitting the jurisdictional allegations but denying certain factual allegations and requesting a formal hearing.

On February 21, 2019, the Coast Guard filed a separate Complaint against Respondent, alleging another instance of operating a vessel while intoxicated and temporarily suspending Respondent's MMC. Respondent waived the expedited procedures in the temporary suspension case, and the parties agreed to have both cases heard simultaneously.

Following completion of discovery, I held the hearing in this matter on May 14, 2019. Jennifer Mehaffey, Esq. represented the Coast Guard. Respondent represented himself, assisted by his wife, Shauna Van Auken. Following the hearing, I provided the transcript to both parties and gave them the opportunity to file post-hearing briefs containing proposed findings of fact, proposed conclusions of law, and argument supporting their positions. The Coast Guard filed a timely brief but Respondent did not. After the briefing deadline had passed, Respondent inquired of my staff if he could still submit proposed findings of fact and conclusions of law, and my staff informed him that he could file a motion explaining why he had not filed a timely submission and the Coast Guard would have the opportunity to respond, after which I would consider the issue. Respondent neither replied nor filed such a motion.

I have carefully reviewed the entire record in this case, including the testimony, exhibits, applicable statutes, regulations, and case law, and find the allegation **PROVED**. The Coast

Guard's proposed findings of fact and conclusions of law are generally accepted as supported by the evidence and, to the extent they are relevant, are incorporated in this Decision and Order.

II. FINDINGS OF FACT

1. Respondent is, and was at all times relevant to this proceeding, the holder of a Coast Guard-issued MMC. (Ex. CG-01).
2. On June 30, 2017, the Medical Director of the Coast Guard National Maritime Center issued Respondent a medical waiver for alcohol abuse, which would be invalidated by any incidents involving any type of substance abuse. (Ex. CG-10; Tr. at 21, 25, 36).
3. On May 1, 2018, Sause Brothers Ocean Towing Company employed Respondent as a master of an ocean-going tug. (Tr. at 40).
4. Sause Brothers has a zero-tolerance policy for alcohol on its vessels and in its offices. (Ex. CG-4; Tr. at 45).
5. The Souse Brothers tug BLACK HAWK (ON 515015) is a United States flagged towing vessel 112.1 feet in length. (Ex. CG-03).
6. On May 1, 2018, Respondent acted as the Master and operating the BLACK HAWK with a barge in tow. (Ex. CG-06; Ex. Resp.-B; Tr. at 40, 60).
7. On May 1, 2018, Brian Hatler, the Chief Engineer of the BLACK HAWK observed that Respondent was operating the vessel in an unsafe manner, was unresponsive to questions, and smelled of alcohol. (Tr. at 64-66).
8. The Chief Engineer called the Port Captain and told him that he suspected that the captain was seriously impaired by alcohol and drastic measures were required. (Tr. at 66).
9. The Port Captain directed the Chief Engineer and First Mate to relieve Respondent and move the BLACK HAWK to a safe anchorage with the assistance of other tugs.
10. Later that evening on May 1, 2018, Sean Daggert, the Sause Bros., Bay Area Port Captain (Port Captain) boarded the BLACK HAWK and observed Respondent was disheveled, slurring his speech and smelled of alcohol. . (Tr. at 79-80).
11. The Port Captain confronted Respondent, who admitted he had been drinking alcohol. (Ex. Resp.-B; Tr. at 80, 86).

12. The Port Captain directed Respondent to undergo a reasonable cause chemical test for alcohol and administered the test to him at approximately 2315 hours. (Tr. at 80, 84-85).
13. The test showed a blood alcohol concentration level (BAC) of 0.13. (Ex. CG-02; Tr. at 80, 84-85).

III. DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* 46 U.S.C. § 7702(a).

A. Burden of Proof

Under the APA, the fact-finder must consider the “whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence” before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the “preponderance of the evidence” standard, meaning a party must prove that “a fact’s existence is more likely than not.” Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers’ Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993); see also Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Evidentiary rules under the APA are less strict than in jury trials, and only irrelevant, immaterial, or unduly repetitious evidence need be excluded. See 5 U.S.C. § 556(d); Gallagher v. Nat’l. Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. Nat’l. Transp. Safety Bd., 684 F.2d 683, 688 (10th Cir. 1982). Moreover, evidence “need not be authenticated with the precision demanded by the Federal Rules of Evidence” in order to be admissible in an administrative proceeding. Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007).

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. In a suspension or revocation hearing, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a).

B. Jurisdiction

Respondent admitted to all jurisdictional elements relating to the remaining allegations. However, the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established). Since this case involves a violation of marine safety law or regulation, in order to establish jurisdiction the Coast Guard must prove the alleged violation occurred while Respondent was “acting under the authority” of a Merchant Mariner Credential. *See* 46 U.S.C. § 7703. A vessel employee is considered to be acting under the authority of a credential or endorsement when they are required to hold it by either law or regulation, or by their employer as a condition of employment. 46 C.F.R. §5.57(a).

The record does not contain any testimonial or documentary evidence establishing that Respondent was required to hold an MMC or endorsement as a condition of his employment. However, as a towing vessel over 26 feet in length, the BLACK HAWK must “be under the direction and control of a person holding a MMC endorsed as master or mate (pilot) of towing vessels. . .” 46 C.F.R. 15.535(b); see also 46 C.F.R. 15.805(a)(5) (setting out the requirements for Masters of towing vessels at least 8 meters in length). Thus, it is clear Respondent was required by regulation to hold an MMC with a Master’s endorsement while in control of the BLACK HAWK, and jurisdiction is established.

C. Violation of Law or Regulation

The Coast Guard may seek to suspend or revoke a credential if the holder was acting under the authority of the MMC when he or she violated or failed to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters. 46 U.S.C. § 7703(1)(A) and 46 C.F.R. § 5.33. A mariner acts under the authority of an MMC when he or she is required to hold one by law or regulation; or by an employer as a condition for employment. 46 C.F.R. § 5.57(a). See Appeal Decision 2687 (HANSEN) (2010). Here, the Coast Guard charged Respondent with a violation of 33 C.F.R. §95.045(b), alleging he was acting under his authority while operating the towing vessel BLACK HAWK while under the influence of alcohol.

D. Narrative of Events

Respondent admitted to operating the BLACK HAWK while intoxicated. (Ex. R-B). The testimony and documentary evidence in the record corroborates this admission. Specifically, the credible testimony is as follows.

On May 1, 2018, Brian Hatler served as the Chief Engineer aboard the BLACK HAWK. (Tr. at 60). The tug received an assignment to pick up a barge around 1430 hours, but could not come alongside it because it was still boomed in at the dock facility. (Tr. at 61). The BLACK HAWK was able to pick up the barge around 1830 hours but while leaving the dock, its stern brushed against another vessel's bow. (Tr. at 62, 95). Mr. Hatler noted that the BLACK HAWK "made several out of character movements" as it towed the barge out of the channel, and came very close to a dock on two separate instances. (Tr. at 63-64). Mr. Wenski took the wheel and maneuvered until he felt too cold, then asked Respondent to take over while he changed into warmer clothes. (Tr. at 95).

Mr. Wenski went to Mr. Hatler and mentioned that something was not right with Respondent, and he was either having a mental issue or was intoxicated. (Tr. at 64, 96). The vessel made several unusual turns and the engines came out of gear, and the captain of another Sause Brothers vessel radioed Respondent that the BLACK HAWK was close to going aground. (Tr. at 64). Mr. Hatler went to Mr. Wenski's stateroom and told him they were risking a major disaster. Respondent came up behind Mr. Hatler, who smelled alcohol on Respondent's breath and asked him if he was drunk. Respondent replied, "I've had a hard day." (Tr. at 65). During this time, the wheelhouse was empty and nobody was in control of the vessel. (Tr. at 67).

Mr. Wenski, the first mate, returned to the controls and re-engaged the engines while Mr. Hatler called Jack Hill, the Senior Port Captain, and told him he suspected Respondent was seriously impaired by alcohol and insisted something needed to be done. (Tr. at 65-66). The Port Captain ordered Mr. Hatler to relay a message to Respondent and Mr. Wenski to get the vessel to a safe anchorage. (Tr. at 66). Although Mr. Wenski did not have experience maneuvering the vessel with a barge in tow and they were between a bridge and a dock with rocks ahead, he was able to bring the vessel to an anchorage. (Tr. at 98, 66). Mr. Hatler informed Respondent that Mr. Wenski was now in command of the vessel and Respondent was to go wait in his stateroom. (Tr. at 66).

Sean Daggett, another Sause Brothers port captain, took an assist boat to the BLACK HAWK around midnight and went to Respondent's stateroom to order him to take an alcohol test. (Tr. at 79, 82). He observed that Respondent had been sleeping, looked disheveled and had bloodshot eyes, moved slowly, and slurred his words. He could also smell alcohol in the air. (Tr. at 79-80). After Mr. Daggett administered the alcohol test, he asked if Respondent had been drinking and Respondent said yes, he had been, and it had been a hard day. (Tr. at 80). The alcohol test indicated a BAC of approximately 0.13 percent. (Ex. CG-02; Tr. at 80, 85).

Mr. Daggett also tried to administer a drug test, but Respondent was unable to give a urine sample so he drank some water. (Tr. at 81). While they waited, Respondent told Mr. Daggett about some issues he was having and his remorse about the situation. After Respondent gave the urine sample, Mr. Daggett left so Respondent could call his wife. (Id.) Sause Brothers then arranged Respondent's flight home and he departed the vessel around 1300 on May 2, 2018. (Tr. at 81).

E. Reasonable Cause Existed to Administer an Alcohol Test

Respondent does not dispute that Sause Brothers had reasonable cause to direct him to take a chemical test for alcohol. However, under Appeal Decision 2704 (FRANKS) (2014), the Coast Guard must prove that the test was properly ordered.

Coast Guard regulations prohibit merchant mariners from operating a vessel (other than a recreational vessel) or from acting as a crewmember when their blood alcohol concentration is 0.04 percent or higher or if "the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." 33 C.F.R. §§ 95.020(b) and (c). The regulations allow marine employers to "direct an individual operating a vessel to undergo a chemical test when reasonable cause exists," meaning when "[t]he individual is suspected of being in violation of the standards in §§95.020 or 95.025." 33 C.F.R. § 95.035.

A determination of reasonable cause should, if practicable, be based on observation by two persons. Id. The applicable standard is whether "[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." 33 CFR § 95.020(c).

Here, Respondent was operating the BLACK HAWK on May 1, 2018 when Mr. Hatler, Mr. Wenski, and Mr. Daggett all noted signs of intoxication based on his manner, speech, appearance, movements, and other behaviors. There was clearly good cause for administering a chemical test for alcohol.

F. Respondent Operated a Vessel While Under the Influence of Alcohol

Respondent did not challenge the validity of the test results. Nevertheless, it is the “ALJ’s responsibility to determine whether the evidence presented, including evidence involving the administration of the chemical test and the qualification of the technician, was sufficient to show that Respondent was ‘under the influence of alcohol.’” Appeal Decision 2659 (DUNCAN) (2006); see also Appeal Decision 2692 (CHRISTIAN) (2011). Acceptable evidence of being under the influence of alcohol or a dangerous drug includes but is not limited to either (a) personal observation of the mariner’s manner, disposition, speech, muscular movement, general appearance, or behavior; or (b) a chemical test. 33 C.F.R. § 95.030. A “chemical test” is defined as “a test which analyzes an individual’s breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use.” 33 C.F.R. § 95.010.

Kathryn Senz-Rose, the Director of Risk Management and Human Resources at Sause Brothers, testified that the company performs post-accident, reasonable suspicion, and random alcohol testing on its employees. (Tr. at 45; Ex. CG-04). Respondent was trained on the policy during his new hire orientation, and Sause Brothers has not made any significant changes to the policy since then. (Tr. at 46-48; Ex. CG-05 and CG-06). Ms. Senz-Rose described the type of alcohol test Sause Brothers uses, which is easy to administer and to maintain on the vessels. (Tr. at 50-52).

Mr. Daggett testified that there are instructions on the back of the package containing the alcohol test, and he read them before providing a mouth swab to Respondent. (Tr. at 83). He

instructed Respondent to keep the swab in his mouth for at least sixty seconds, per the instructions, and used a stopwatch to time the test. (Id. at 84.) After the time was up, he placed it directly into the circular end of a gauge and watched the color change as the test measured Respondents BAC. (Id.) He then took a picture to send to Ms. Senz-Rose and placed the test in a ziplock bag. (Tr. at 85; Ex. CG-02). Ms. Senz-Rose later sent a letter to the Coast Guard about Respondent's positive alcohol test. (Tr. at 41-42; Ex. CG-02).

The testimony shows the test was properly administered, and nothing in the record gives me any reason to doubt the veracity of the alcohol test results. Respondent's BAC was approximately 0.13 percent on May 1, 2018, significantly higher than the 0.04 percent level which the regulations establish as intoxication. See 33 C.F.R. § 95.020(b). This is sufficient to establish that he was acting under his authority by serving as Master of the BLACK HAWK while under the influence of alcohol. I therefore find the charge **PROVED**.

IV. SANCTION

Having found the allegation proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). While this case was heard simultaneously with Docket 2019-0060, the two cases were not consolidated. Thus, I have considered the appropriate sanction based solely on the facts and circumstances of this case. Moreover, I may not consider the incident giving rise to Docket 2019-0060 as prior record under 46 C.F.R. 5.569(b)(2), as the Decision and Order in that case is not yet final agency action.

What constitutes an appropriate sanction depends on the type and circumstances of the offense. 46 C.F.R. § 5.569. For some offenses, primarily drug-related, revocation is the only appropriate sanction. 46 C.F.R. 5.59. However, revocation may be sought for other types of offenses if the Investigating Officer believes "the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to

serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline.” 46 C.F.R. 5.61.

Although the Coast Guard decided to seek revocation of Respondent’s MMC, “[t]he selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.” 46 C.F.R. § 5.569(a). The Commandant has also recognized that ALJs have “wide discretion to formulate an order adequate to deter the [mariner’s] repetition of the violations [the mariner] was found to have committed.” Appeal Decision 2475 (BOURDO) (1988). Accordingly, I am not bound by the Coast Guard’s recommendations.

Except where a particular sanction is mandated, an ALJ may consider the following factors in determining an appropriate order: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b). These rules include a Table entitled “Suggested Range of an Appropriate Order,” stating Table 5.569 “is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits.” 46 C.F.R. § 5.569(d).

In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ,” who is not bound by the scale of average orders. Appeal Decision 2628 (VILAS) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). “In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review.” Appeal Decision 2628 (VILAS) (citing Appeal Decision 1937 (BISHOP)). The only recommended sanction

ranges for alcohol-related violations of law involve refusal to take a chemical test for drugs or alcohol. 46 C.F.R. § 5.569 (Table). Here, Respondent did not refuse to test but rather violated 33 C.F.R. § 95.045(b) by operating the towing vessel BLACK HAWK while intoxicated. Thus, the appropriate sanction for this type of offense appears to be entirely within my discretion.

Respondent's offense was extremely serious. He endangered the vessel and crew when he operated the vessel under the influence of alcohol. The BLACK HAWK is a large vessel, 112.1 feet in length and 194 gross tons (434 gross tons ITC). At the time Respondent operated the vessel, it also had a barge under tow. There is credible evidence the vessel was adrift for a time, and at risk of striking a bridge or pier, or grounding on rocks. There is also credible evidence that the vessel briefly allided with another vessel while under Respondent's direction and control. Respondent also left the bridge unmanned when he went below deck, in contravention of the requirement that the vessel always be under the direction and control of an appropriately credentialed master or mate. 46 C.F.R. 15.535(b). These are all significant aggravating factors.

A further aggravating factor involves the status of Respondent's medical certificate, a necessary part of the MMC. When a mariner has a medical condition that could possibly pose a risk of sudden impairment or incapacitation, but obtains evidence from their treating physician that the condition is stable and they are not a high safety risk to themselves or others, they may obtain a medical waiver from the Medical Evaluation Division (MED) at the National Maritime Center. (Tr. at 18; see also 46 C.F.R. 10.303). A waiver request is submitted along with the medical certificate application, Coast Guard Form 719-K. (Id.) If the MED grants a waiver, it issues a letter detailing the waiver conditions and instructing the mariner to let the MED know if their condition changes so the staff can review the waiver and determine whether it is still valid. (Id.)

The MED issued Respondent a waiver for alcohol abuse on June 30, 2017, which was valid for five years. (Ex. CG-10; Tr. at 20). As there is a high risk of recidivism with alcohol

abuse, the MED required him to update any changes to his condition and stated the waiver would be invalidated with any future instance involving any type of substance abuse. (Tr. at 23). Respondent failed to inform the MED that he had any further issues with alcohol abuse. (Id. at 24). The MED only became aware of the alcohol abuse incidents giving rise to both this proceeding and Docket 2019-0060 because of the investigations and complaints in these cases. (Id. at 25).

The Division Director of the MED testified that, due to the incidents underlying both this case and Docket 2019-0060, Respondent's medical waiver is no longer valid. (Tr. at 24). Since I have found the allegation here proved, Respondent no longer holds a medical waiver and consequently cannot operate under the authority of his MMC.

Respondent did not present any evidence that he has sought or received treatment for alcohol abuse since the May 1, 2018 incident. While he submitted letters from both his treating physician and a licensed clinical psychologist, both dating from April 2019, neither addressed Respondent's issues with alcohol. Rather, Dr. Sean Sapunar stated he has never documented any alcohol issues during the four years he has treated Respondent and attributed Respondent's symptoms in January 2019 to abrupt withdrawal from testosterone and the psychologist did not mention alcohol at all. The only Substance Abuse Professional evaluation in the record dates from June 2017, just prior to issuance of the medical waiver. (Ex. R-A, R-C, R-E). These letters are not sufficient to establish that Respondent may safely return to work as a mariner and is unlikely to suffer relapse. Moreover, Respondent is currently unable to operate a vessel under the authority of his MMC because he does not possess a valid medical waiver.

The Commandant has upheld a sanction of revocation for operating a vessel while under the influence of alcohol. See Appeal Decision 2406 (ZOFCHAK) (1985) (“[The respondent's] actions resulted from the abuse of alcohol. It is common knowledge that alcohol abuse often takes the form of a disease and results in repeated episodes of intoxication. This being the case, it

was entirely proper for the Administrative Law Judge to find that it would be unsafe to allow Appellant to operate under authority of a Coast Guard issued operator's license until such time as it could be established that his drinking would pose no future danger to himself or his potential passengers.”). Under the circumstances of this case, where Respondent has not undergone treatment for his alcohol abuse and acted in a manner that posed serious risks to marine safety, I find the sanction of **REVOCATION** appropriate.



George J. Jordan
US Coast Guard Administrative Law Judge

Date: