

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

UNITED STATES COAST GUARD

Complainant

vs.

CLAYTON S. LORE,

Respondent.

Docket Number CG S&R 02-0402
CG Case No. 1611457

DECISION AND ORDER

Issued: August 12, 2003

Issued by: JOSEPH N. INGOLIA, Chief Administrative Law Judge

APPEARANCES

FOR THE COAST GUARD

LCDR Mark Hammond
LTJG Scott Baranowski
U.S. Coast Guard Activities Baltimore
2401 Hawkins Road
Baltimore, Maryland, 21226

FOR THE RESPONDENT

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative proceeding¹ seeking to revoke the Coast Guard issued License, Number 867246, issued to Clayton S. Lore (Respondent). This administrative action was brought pursuant to the legal authority contained in 46 USC Chapter 77, § 7703 (1)(B) and (2), the Administrative Procedure Act, 5 USC §§ 551-59; the Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard, 33 CFR Part 20, and Marine Investigation Regulations - Personnel Action, 46 CFR Part 5.

On June 20, 2002, the Coast Guard filed a Complaint against the Respondent alleging two (2) Factual Allegations. The first Factual Allegation charged the Respondent under the statutory authority of 46 USC 7703 (1)(B) with Misconduct alleging that the Respondent:

wrongfully falsified his (renewal) application for a merchant mariner's license by certifying (in Section VI) that he had not been convicted by any court for an offense other than a minor traffic violation after having plead (sic) guilty to second degree assault in Maryland District Court on January 9th of that same year.

The second Factual Allegation charged the Respondent under the statutory authority of 46 USC 7703(2) with conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document. The Coast Guard alleges that:

- (1) the Respondent was arrested on 6/14/98, 5/12/99, and 10/6/99 for second degree assault,
- (2) that he pled guilty to the 6/14/98 arrest in which he violated the terms of probation and served ninety (90) days in jail, and
- (3) was "convicted of second degree assault in conjunction with each

¹ This proceeding was commenced when the Coast Guard was formerly in the Department Of Transportation. Pursuant to the savings provisions under HR 5005, the Coast Guard's authority remains unchanged with respect to its transition to the Department of Homeland Security.

of the 5/12/99 and 10/6/99 arrests and sentenced to two concurrent sentences of 3 years in jail (all but 6 months suspended) with an additional 2 years probation.”

The Respondent did not file an Answer to the Coast Guard’s Complaint until January 24, 2003. In his Answer, the Respondent admitted to all Jurisdictional Allegations and denied all Factual Allegations stating, “he intends to contest all factual allegations set forth in the Complaint.” On January 28, 2003, this matter was assigned to the undersigned Chief Judge. On January 31, 2003, a Scheduling Order was issued setting the hearing for May 6, 2003 at the U.S. Coast Guard Courtroom, U.S. Customs House, 40 S. Gay Street, Baltimore, Maryland 21202.

On May 6, 2003, the hearing convened, as scheduled, with the Coast Guard represented by LCDR Mark Hammond and LTJG Scott Baranowski. The Respondent was present and represented by his Attorney, Mr. Julian J. Izydore, Esq. At the beginning of the hearing the Respondent presented his Merchant Mariner’s License and was advised of his legal rights, including notice that this hearing was an administrative proceeding directed only against his Coast Guard issued Merchant Mariner’s License and was neither a criminal action involving imprisonment, nor a civil action involving fines.

Prior to opening statements, the Investigating Officer (IO) made a Motion to amend the Complaint for the Misconduct allegation requesting to change the January 9, 1999 date to January 7, 1999. The Respondent did not object and the Motion was GRANTED. The hearing proceeded with the Investigating Officer calling one witness and introducing four (4) exhibits. All of the exhibits were admitted into evidence noting the Respondent’s objections to the admission of Coast Guard Exhibits 2, 3 and 4 arguing that certain statements constituted hearsay and double-hearsay. The Respondent’s objections

were overruled given that hearsay evidence is admissible in Coast Guard Suspension and Revocation proceedings (33 CFR 20.803) and that proper due weight would be given to the exhibits with respect to the case and record taken as a whole. The Respondent testified on his own behalf and did not introduce any exhibits into evidence. A list of witnesses and exhibits is provided in Attachment A.

At the conclusion of the hearing, the record clearly demonstrated that the Coast Guard had met its burden of proof. The preponderance of reliable and credible evidence supported its charges in the Complaint. The record demonstrated that on April 9, 1999, the Respondent falsified his Merchant Mariner's License renewal application and that the Respondent had previously been criminally convicted by the District Court of St. Mary's County, Maryland for Second Degree Assault. Based on the record, the Respondent's Merchant Mariner's License, Number 867246 was REVOKED and deposited with the Coast Guard. The Respondent was given instructions that he could petition to reopen his case under 33 CFR 20.904 but in no circumstances in less than a one (1) year period of time.

Following the conclusion of the hearing, the parties were afforded an opportunity to file Post Hearing Briefs due no later than the close of business on May 23, 2003. The Coast Guard² filed a Post-Hearing Brief. The Respondent did not file a Post-Hearing Brief. The transcript for this matter was ordered and received by the ALJ Docketing Center on June 5, 2003.

On June 17, 2003, a Post-Hearing Telephone conference was convened with the Investigating Officer, LTJG Scott Baranowski and Mr. Shawn Moran, an attorney from

² The Coast Guard's Post Hearing Brief did not contain any enumerated proposed findings of fact or conclusions of law.

the Law Office of Dorsey and Associates, representing the Respondent. The purpose of the Post-Hearing Telephone conference was to allow the parties an opportunity to comment on whether or not the Coast Guard's Complaint was timely filed with respect to the time limitations under 46 CFR 5.55.

The parties were provided a ten (10) day period of time to file additional briefs. On June 30, 2003, the Coast Guard filed its Second Post Hearing Brief and argued that the Misconduct allegation was not time barred under 46 CFR 5.55 due to the fact that the Respondent's ninety (90) day period of incarceration extending the applicable time limitation. The Respondent did not file a post hearing brief on this issue.

II. FINDINGS OF FACT

1. The Respondent, Clayton Slade Lore, is the holder of a United States Coast Guard issued License, Number 867246 issued on April 19, 2002 as "Master of Steam or Motor Vessels of not more than 50 gross tons upon inland waters, excepting waters subject to international regulations for preventing collisions at Sea, 1972." Res Merchant Mariner's License.³
2. The Respondent testified that he has been a fishing boat Captain since 1985, approximately eighteen (18) years. TR 52.
3. On January 7, 1999, the Respondent pled "GUILTY" to the charge of ASSAULT – SEC DEGREE (Second Degree Assault) in the District Court of Maryland for Saint Mary's County. The Respondent was sentenced to ninety (90) days, with ninety (90) days suspended and unsupervised probation for 18 months. The Respondent was directed to pay criminal and court costs in the amount of fifty-

³ The following abbreviations are used in this Decision and Order: RES for Respondent, CG for Coast Guard, EX for Exhibit, FF for Findings of Fact, TR for Transcript.

five (55) dollars. The Respondent was given instructions as a condition of his probation to: “obey all laws”, “pay court costs”, and “complete anger management program at Walden Center.” CG Ex 2, TR 53.

4. On April 8, 1999, the Respondent applied for renewal of his Merchant Mariner’s License (Application for License as Officer, Staff Officer, Operator and Merchant Mariner’s Document - CG Form 719B). On his renewal application, the Respondent initialed the block that corresponds to a “NO” response 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 judgment or by plea and includes cases of deferred adjudication (nolo contendere, adjudication withheld, etc.) or where 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 a 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. (If yes, attach statement).

CG Ex 1.

5. The Respondent admitted that he answered “NO” to the above question but testified that he doesn’t know why he did so. CG EX 1, TR 53-54.
6. On June 1, 1999, the State of Maryland filed a Motion to Violate Probation against the Respondent stating that “on May 12, 1999 the [Respondent] was again arrested and charged with Assault in the 2nd degree (case number 5Q12843).” CG EX 2.
7. On July 15, 1999, the District Court of Maryland for Saint Mary’s County found the Respondent in violation of the terms of his probation. The District Court

revoked the Respondent's January 7, 1999 probational sentence and imposed the original sentence incarcerating the Respondent for a period of ninety (90) days.

CG EX 2.

8. The Respondent's ninety (90) day period of incarceration occurred within the three (3) year time period for filing of the Coast Guard's Complaint staying the applicable period of time under 46 CFR 5.55. CG EX 2, CG Complaint.
9. On October 6, 1999, the Respondent was again arrested by the State of Maryland for ASSAULT – 2ND DEGREE. CG EX 4.
10. On November 22, 1999, the Respondent pled GUILTY to the charges of ASSAULT – 2ND DEGREE in connection with the May 12, 1999 and October 6, 1999 arrests and was sentenced to concurrent sentences of “3 years DOC suspended to Six months SMCDC with work release commencing 10-6-99. Upon release, the defendant is placed on 2 Years Supervised Probation with special conditions.” “Court costs in the amount of \$125.00 are to be paid within 30 days.” CG Ex 3, 4.
11. The Respondent's criminal convictions for Second Degree Assault is classified by the Coast Guard as a “simple assault” under 46 CFR Part 10, Subpart B, table 201(h). TR 16. The assessment time period for a simple assault is one to five years. TR 17, Table 10.201(h).
12. Mr. John Cassidy, Chief of the Records Examination Center in Baltimore, Maryland provided credible testimony that had the Respondent been truthful on his Merchant Mariner's License renewal application, the Respondent would not have been issued his renewal license on the date of his application and that further

information and investigation would have been required in order to make a proper determination of whether or not the Respondent would have ever been issued a renewal license. TR 19, 24, 25, 33-36, 40.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 USC 7703 (1)(B), 7703 (2), 46 CFR Parts 5 and 10; and 33 CFR Part 20.
2. At all relevant times, the Respondent was the holder of his U.S. Coast Guard License (No. 867246) and was acting under the authority of that license when he filled out and filed his April 8, 1999 Merchant Mariner License renewal application. 46 CFR 5.57.
3. On April 8, 1999, the Respondent committed MISCONDUCT in violation of 46 USC § 7703 (1)(B) by falsifying his Merchant Mariner's License renewal application by certifying under oath that he had never been convicted by a court for an offense other than a minor traffic violation after having pled guilty to the criminal charge of "ASSAULT – 2ND DEGREE" in the District Court of Maryland for Saint Mary's County on January 7, 1999.
4. The Coast Guard's Complaint, filed on May 1, 2002 is not time barred within the time limitations of 46 CFR 5.55 with respect to the Allegation of Misconduct due to the fact that the Respondent served ninety (90) days of incarceration within the time period to file the Coast Guard's Complaint. 46 CFR 5.55 (b).
5. On November 22, 1999, the Respondent was convicted of an offense in violation of 46 USC 7703 (2) by pleading guilty to two (2) charges of ASSAULT – 2ND

DEGREE in the District Court of Maryland for Saint Mary's County.

CG EX 3, 4.

6. The Respondent committed MISCONDUCT by falsifying his renewal license application in violation of 46 USC 7703 (1)(B).
7. The Respondent violated 46 USC 7703 (2) because he was convicted of Second Degree Assault.

IV. DISCUSSION

The Coast Guard's Complaint is predicated on two (2) allegations, one, that the Respondent's falsification of his license renewal application was Misconduct and two, that the Respondent's criminal convictions would have prevented the renewal of his license had he truthfully answered the pertinent question on his renewal application form. The allegations are discussed below, in turn.

Misconduct

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 USC 7701. A mariner's License, Certificate of Registry or Merchant Mariner's Document is subject to suspension or revocation if it has been shown that the license holder, when acting under the authority of that license, commits an act of Misconduct. 46 USC 7703(1)(B). Here, there is no question that when the Respondent applied for the renewal of his Merchant Mariner's License on April 8, 1999, he was acting under the authority of that License. The pertinent regulation so provides. See 46 CFR 5.57(b) which states:

A person is considered to be acting under the authority of the license, certificate or document while engaging 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

The crux of the issue relating to the charge of Misconduct is whether or not the Respondent's actions fall within the regulatory definition of Misconduct. It is defined at 46 CFR 5.27. The regulation reads:

Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

In this case I have found as fact that on April 8, 1999 the Respondent applied for the renewal of his Merchant Mariner's License (FF 4), that he responded "NO" to a question asking whether or not he had been convicted by any court for an offense other than a minor traffic violation (FF 4,5), and that he actually had been convicted of the charge of Second Degree Assault in the District Court of St. Mary's County, Maryland on January 7, 1999, only three months before he answered "NO" (FF 2,3). Further, the Respondent certified under oath that the information on his application for renewal was true and correct, including his "NO" answer (FF 4). The Respondent knew or should have known that his "NO" answer was false. Indeed, he so testified (TR 53). His statement that "I guess I wasn't thinking about it" is both self-serving and not credible. TR 54.

Given the above, there is no question but that the Coast Guard has sustained its burden of proof by placing a preponderance of the evidence in the record. Under the holding in APPEAL DECISION 2610 (BENNETT), the Respondent was required to submit true and accurate information and when he did not do so the Coast Guard, on the basis of his misrepresentation issued him a renewal License. In providing the

false "NO" response on his application, he was guilty of Misconduct which was complete at the time he submitted the false information. Id. See also APPEAL DECISION 2456 (BURKE), APPEAL DECISION 2223 (HEWETT). So here, on the record made in the case it is held that the allegation in the Complaint that the Respondent was guilty of Misconduct is found PROVED.

Conviction of an Offense so as to Prevent Renewal

The pertinent law at 46 USC 7703(2) provides that a Merchant Mariner's License may be suspended or revoked if the holder:

is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document.

The Coast Guard contends that the Respondent's criminal convictions for Second Degree Assault would prevent the issuance or renewal of his Merchant Mariner's License. The undersigned agrees with that contention. Again, the facts are uncontroverted. On January 7, 1999, the Respondent was found guilty in Maryland of Second Degree Assault and was placed on probation with specific conditions (FF 3). He later violated his probation with the result that he served ninety (90) days in jail for the January 7, 1999 conviction. (FF 7). In November, 1999 the Respondent was found guilty of two (2) other violations of Second Degree Assault. (CG EX 3,4).

It is unquestionable that had the Respondent not falsified his renewal application, the Coast Guard would have considered his criminal record in determining whether or not he should have been issued a renewal license. This is especially true when one considers that his first criminal conviction (January 7, 1999) for Second Degree Assault occurred within three (3) months of the filing of his renewal application.

In considering the Respondent's criminal record under the minimum (1 - 5 year) assessment period (46 CFR 10.201(h)(4)), the Respondent would have been required to "provide evidence of suitability for service" Factors used by the Coast Guard for this consideration include: "Character references from persons who can attest to the applicant's sobriety, reliability, and suitability for employment in the merchant marine including parole or probation officers", "Steady employment", or "Successful completion of all conditions of parole or probation." Id at 10.201(j)(3)-(5).

Given the above it is clear that the truth or omission of information by applicants for Coast Guard licenses and documents is essential to the Coast Guard's ability to discharge its mission of protecting life and property at sea. APPEAL DECISION 2569 (TAYLOR), APPEAL DECISION 2346 (WILLIAMS), and APPEAL DECISION 2570 (HARRIS) where the Commandant succinctly stated:

In the interest of promoting safety at sea, the Coast Guard is required by law to assess the qualifications of license applicants. A mariner's wrongful withholding of the information necessary to assess a mariner's professional and physical qualifications poses a serious threat to maritime safety. (citations omitted)

Finally, in deciding this case one must give consideration to the Commandant's APPEAL DECISION 2613 (SLACK) where he held:

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. ... [P]roof 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. (citations omitted).

Here, the Respondent offered no real reason for his failure to truthfully answer questions involving important aspects of his application and the record supports the

view that the statements made as well as the omission of important factual information data were intentional and fraudulent so that the holding in SLACK, applies. I so hold that

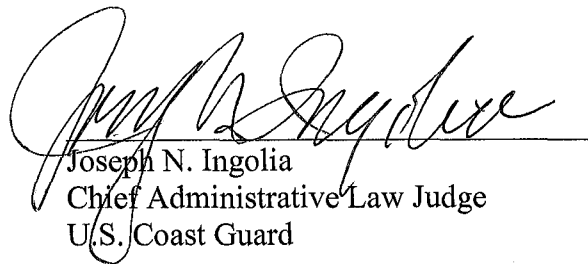
V. SANCTION

The Respondent committed Misconduct in violation of 46 USC 7703(1)(B) by wrongfully falsifying information on his Merchant Mariner's License renewal application. The Respondent violated 46 USC 7703(2) by being found criminally convicted by a competent court for Second Degree Assault. THEREFORE,

VI. ORDER

IT IS HEREBY ORDERED, that United States Coast Guard License No. 867246 and all certificates or documents issued by the Coast Guard to CLAYTON S. LORE are **REVOKED**, effective on the date of the hearing, May 6, 2003.

The parties are **FURTHER ADVISED** that service of this decision will serve as notice of the parties' rights for appeal. The rules and procedures governing administrative appeals are set forth in 33 CFR Subpart J. Refer to Attachment B.


Joseph N. Ingolia
Chief Administrative Law Judge
U.S. Coast Guard

Done and dated this 12th of August, 2003 at
Baltimore, Maryland