

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

---

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL F. DUARTE,

Respondent.

---

Docket Number CG S&R 03-0015  
CG Case No. 172707

**PRETRIAL CONFERENCE MEMORANDUM, MEMORANDUM ORDER  
FINDING JURISDICTION, AND CONSENT ORDER**

**Issued : May 7, 2003**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

On April 30, 2003 and May 2, 2003, counsel for the Coast Guard, together with Respondent's counsel, participated in telephonic pre-trial conference calls with the undersigned as per 20 CFR §501. The purpose of the conference calls was to identify and resolve potential evidentiary and legal issues and, depending on my rulings on a Motions to Dismiss, to discuss possible settlement of the above-captioned case which was set for trial May 6, 2003.

On April 29, 2003, Counsel for Respondent submitted a Motion to Dismiss citing lack of jurisdiction and relying on *Soriano v. United States*, 494 F.2d 681 (9<sup>th</sup> Cir. 1974) as authority. (Exhibit 21; note: The parties have copies of all exhibits alluded to herein. Copies of exhibits are also tabbed in the case file). Respondent asserts that he was acting in the capacity as a docking master, and, because there is no license for docking master and no license was required as a condition of employment for him to serve as docking master, the Coast Guard has no jurisdiction over his master of towing vessels license and document. In support of his Motion to Dismiss, Counsel for Respondent submitted separately a copy of Captain William E. Clifford's expert witness report. (Exhibit 22).

The first item discussed during the April 30<sup>th</sup> conference call was whether to admit relevant testimony found in the depositions of the two Russian witnesses who are unavailable. (Exhibit 23). Counsel for both parties agreed to stipulate where possible and argue at a subsequent conference call or at the hearing on the admissibility of deposition testimony in dispute. Respondent's Motion to Dismiss was discussed briefly but the undersigned gave counsel for the Coast Guard until Friday, May 2, 2003, to provide offers of proof and legal argument in response. It was also agreed that after briefs were filed and oral argument made during the conference call set for May 2, 2003, if the undersigned found that the Coast Guard has jurisdiction, then active settlement discussions would take place during the conference call.

In further support of his Motion to Dismiss, on May 1, 2003, Counsel for Respondent submitted copies of Judge Peter A. Fitzpatrick's decision and order in *United States Coast Guard v. Dean Bruch and James Ray McTigue*. (Exhibit 24).

On Friday morning, May 2, 2003, Counsel for the Coast Guard submitted his brief in response to the Motion to Dismiss. (Exhibit 25). Later that morning, Counsel for Respondent submitted a copy of Captain George H. Reid's expert witness report for additional consideration in his Motion to Dismiss. (Exhibit 26). At 2:00 p.m., the parties

and the undersigned engaged in another conference call to address specifically Respondent's Motion to Dismiss on the issue of whether the Coast Guard has jurisdiction in this case; that is, whether Respondent was acting under the authority of his Coast Guard license.

The undersigned has read all briefs submitted, all cited cases and reports, and has listened carefully to oral arguments. At the conclusion of oral arguments during the conference call, I announced my finding that Respondent was acting under the authority of his license(s) and that therefore the Coast Guard has jurisdiction. I found that Respondent was directing and controlling the tugs under his command and noted that 46 CFR § 15.410 requires towing vessels such as the vessels in the instant case, to be under the direction and control of a licensed person and that 46 CFR § 15.610 requires towing vessels of at least 26 feet to be under the direction and control of a licensed person. Therefore, Respondent was acting under the authority of his license(s) as required by law or regulation pursuant to 46 CFR § 5.57 (a)(1) and that there is no need to inquire whether Respondent's license was required as a condition of employment as a docking master under 46 CFR § 5.57 (a)(2) since the requirements of §5.57(a)(1) and (a)(2) are in the disjunctive. Therefore, there is Coast Guard jurisdiction.

Following that announcement, the parties discussed settlement. In summary, the parties agreed on 30 days suspension outright. In addition, Respondent is to complete successfully the following courses at the Massachusetts Maritime Academy: 40 Hours of Advanced Shiphandling and a 4 Day Course in Bridge Response Management. There was also the recognition that enrollment and completion by September 30, 2003 of similar Coast Guard approved courses acceptable to the Officer in Charge, Marine Inspection, Boston would satisfy the settlement agreement. Following successful completion of the courses, there is probation period of 12 months. If a complaint is filed for a violation of any of the following sections of 46 CFR: § 5.27, § 5.29, § 5.31, § 5.33 or § 5.35 during that 12 month probation period, and an administrative law judge finds a violation, a

stipulated period of license suspension for a period of 3 months will take effect. The parties jointly moved for its approval and entry of a consent order. Finding that the settlement agreement substantially complies with the provisions of 33 CFR § 20.502, I approved the Settlement Agreement and entered my consent order orally.

**The following is my ruling on whether the Coast Guard has jurisdiction over Respondent's license.**

### **RELEVANT FACTS**

On June 8, 2000, Respondent Michael F. Duarte, licensed as Master of Towing Vessels, was serving as Docking Master aboard the T/V POSAVINA. According to interviews and depositions from the tugboat operators, he ordered the positioning, movements, and operations of the three tugboats assigned to undock the T/V POSAVINA. He also ordered one tugboat operator to depart his tug, leaving an unlicensed mariner at the helm. According to the tugboat operators, they were subject to his commands and each followed Respondent's commands as he directed and controlled their tugboats. In short, Respondent was in charge of the entire undocking operation.

### **ISSUE**

Whether a mariner holding a license as master of towing vessels, acting as a docking master, directing and controlling the movements of docking or undocking a vessel as well as its tugs, is operating under the authority of that license.

### **APPLICABLE LAW AND REGULATIONS**

The applicable law and regulations are found at 46 USC § 7703, and 46 CFR §§ 5.57, 15.410, and 15.610. Under 46 USC § 7703, “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder – (1) when **acting under the authority** [emphasis mine] of that license, certificate, or document ... has committed an act of incompetence, misconduct, or negligence.” 46 CFR § 5.57 provides, in pertinent part, that “[a] person employed in the service of a vessel is considered to be acting under the authority of a license ... when the holding of such license ... is: (1) [r]equired by law or regulation; or (2) [r]equired by an employer as a condition for employment.” 46 CFR § 15.410 requires every assistance towing vessel to be under the direction and control of a licensed individual authorized to engage in assistance towing under the provisions of 46 CFR § 10.482. 46 CFR § 610 requires towing vessels at least 26 feet in length to be “under the direction and control of a person licensed as master or mate (pilot) of towing vessels or as master or mate of vessels of greater than 200 gross registered tons....”

### **ARGUMENTS**

Respondent claims that he was not acting under the authority of his license for the following reasons: 1) that he was not acting as a Pilot but as a docking master for which there is no license; 2) that he was self-employed as such; and 3) that a license was not a condition of employment as a docking master. Respondent cites as authority, *Soriano v. United States*, 494 F.2<sup>nd</sup> 681 (9<sup>th</sup> Cir. 1974). (Exhibit 21, Memorandum in Support of Motion to Dismiss). Acknowledging the power of states to regulate pilots of foreign flag merchant vessels in state waters, the court in *Soriano* held that the Coast Guard does not

have jurisdiction over a mariner's federal pilot's license when the mariner was operating under his state pilot's license even though a federal pilot's license was a prerequisite to issuance of a state license. As stated in Commandant Decision on Appeal (*Dietze*, 2039), "... I do not consider it appropriate to apply the rule in *Soriano* outside the Ninth Circuit to cases not involving state pilots." For this reason and the fact that the Coast Guard is not relying on the "condition of employment" prong of 46 CFR § 5.57, discussed *infra*, I do not find *Soriano* controlling.

Respondent also cites as authority *United States Coast Guard v. Dean Bruch and James Ray McTigue*, a consolidated decision and order issued in 1989 in which Judge Peter A. Fitzpatrick held that the Coast Guard lacked jurisdiction over mariners who were serving as docking masters in the Port of Philadelphia. (Exhibit 23 in the case file). For the following reasons, *Bruch* and *McTigue* are not applicable in this case: In *Bruch* and *McTigue*, the Port of Philadelphia required docking masters aboard coastwise vessels hold First Class Pilot licenses with endorsements for the immediate waters involved. Since neither Bruch nor McTigue held First Class Pilot Licenses **with endorsements for waters in the Philadelphia area**, [emphasis mine] they were charged with misconduct. Judge Fitzpatrick found, in pertinent part, that "the application of 46 USC 8502 to docking masters on qualifying vessels is not self-evident and that the agency has not given notice of its interpretation of the statute to the maritime industry throughout the country. This is particularly important here since these mariners come from other states and were not familiar with the interpretation of the statute at Philadelphia." Aside from recognizing that the Commandant has held in *Stewart* (1983) that one who is directing and controlling tugs, even if aboard the assisted vessel, is acting under the authority of his uninspected towing vessel license, the *Bruch* and *McTigue* decision deals with the requirement for a First Class Pilot's license with an endorsement for local waters, which is not the case with Respondent Duarte. There is no evidence that the Port of Boston required docking masters or docking pilots to possess a Federal Pilot's License with an

endorsement for the waters where the T/V POSAVINA was undocking. Moreover, while *Bruch* and *McTigue* are instructive, scholarly, and arguably persuasive, they are not Commandant Decisions on Appeal that comprise the agency's policy rulings and statutory interpretations which are binding on its administrative law judges. They comprise final agency action only to the extent that the charges and specifications against respondents Bruch and McTigue were dismissed.

Respondent further states that the Coast Guard's reliance on Commandant Decisions on Appeal cases *Stewart* (2392) and *Rivera* (2126) is misplaced because in those cases, the Commandant found that a license was required as a condition of employment, and, that in the instant case, there was no such requirement.

Respondent submits testimony from the deposition of Captain George H. Reid of Harrison Reid and Associates, Marine Consultants. In that testimony, Captain Reid opines, among other things, that Respondent "was a part of the vessel's management, he was aware of the deficiencies that we've mentioned in this process." In response to a question whether he as any difficulty with any of his (Duarte's) actions as a docking pilot, Captain Reid replied, [h]e didn't have any actions as a docking pilot." Captain Reid had opined that since one of the tugs was under the command of an unlicensed person, that person was not competent and that the damage and subsequent spill were caused by the grossly negligent operation of the tug. In short, Captain Reid opined that Respondent was not the cause of the damage and spill but that the damage and spill were caused by the gross negligence of a certain tugboat operator. To the extent that Captain Reid's testimony is offered to minimize Respondent's actions as docking master, his opinion is in direct conflict with the testimony of the on scene tugboat operators who have personal and direct knowledge of Respondent's actions. Therefore, I give less weight to the opinion of Captain Reid.

Respondent also offered the expert report of Captain William E. Clifford. In summary, Captain Clifford opined that all of Captain Duarte actions were consistent with

good maritime practice. Without addressing the issue of whether to accept Captain Clifford's opinion on the standard of care pertaining to Respondent's actions as docking master, his report clearly acknowledges that Captain Duarte was active in directing and controlling the movement of the tugs involved in undocking the T/V POSAVINA. That may be explained by the fact that Captain Clifford reviewed the written interviews of Respondent and the operators of the tugs in question. Therefore, I give great weight to Captain Clifford's opinion only to the extent that it recognizes how actively Respondent was in directing and controlling the tugs involved in undocking the T/V POSAVINA. His opinion on the standard of care is not relevant on the issue of jurisdiction.

Counsel for the Coast Guard's Response Brief states, in summary fashion, that the Respondent's actions as docking master satisfies the "direction and control" requirements of 46 CFR §§ 15.410 and 15.610 as well as the applicable case law regarding operation of Coast Guard regulated towing vessels by directing and controlling the activities of the uninspected towing vessels during the undocking of the T/V POSVINA. I agree. Counsel's brief contained several excerpts from the tugboat operators' depositions in which they testified that the operation was under the control of Respondent. Thus, Respondent was acting under the authority of his license resulting in Coast Guard jurisdiction. I find Coast Guard Counsel's brief to be an excellent, persuasive discussion of the relevant law and regulation concerning jurisdiction over docking masters and give it great weight in this ruling.

During the May 2, 2003 conference call, Counsel for Respondent argued that the tugs must be actually controlled by Respondent; that Respondent was an independent contractor; that it's a due process issue; and that Captain Reid's opinion that Respondent was not in control should be given consideration. For the reasons set forth above, Respondent was in control of the undocking operation that included directing and controlling the movements and operation of the tugboats. See excerpts of depositions attached to Counsel for the Coast Guard's Brief in Response to Motion to Dismiss.

Moreover, Respondent even directed that the operator of one tug depart that vessel, leaving that vessel under the control of an unlicensed operator. In the absence of other regulatory requirements, it would be inconsistent with the legislative and regulatory intent to allow a licensed operator to direct and control the operation of uninspected towing vessels to escape Coast Guard jurisdiction over that license merely because the direction and control was exercised outside of the tugboats' pilothouses.

The issue of whether Respondent was an independent contractor is not applicable in this case because my decision is not based upon finding that a license is a condition of employment but on the basis that a license is required by law or regulation secondary to exercising direction and control over the towing vessels. Further, employer-employee, master-servant, or agency relationships are not dispositive on whether Respondent exercised direction and control over the three tugboats. The facts show that he did, in fact, exercise direction and control.

It's not a due process issue as set forth in *Bruch/McTigue* wherein there was no general notice that docking masters were required to have Pilot's licenses with endorsements for local waters. The Coast Guard is not asserting that Respondent must have a Pilot's license.

On Captain Reid's deposition testimony that Respondent "didn't have any actions as a docking pilot" I give that opinion less weight for the reasons set forth above.

Counsel for the Coast Guard argued that the *Bruch/McTigue* cases deal with the issue of local custom that is not in issue here, and that the Coast Guard is seeking jurisdiction over Respondent's license as master of towing vessels, not as a Pilot. As stated above, *Bruch/McTigue* recognized that the Commandant has held that one who is directing and controlling tugs, even if aboard the assisted vessel, is acting under the authority of his uninspected towing vessel license. Counsel urged the undersigned not to give much weight to Captain Reid's deposition. For the reasons set forth above, Captain Reid's opinion is assigned less weight. Counsel for the Coast Guard asserted that

Commandant Decisions on Appeal *Stewart* (2393) and *Rivera* (2126), NTSB Decision EM-77 are directly applicable to the facts in this case. Counsel also argued that *Soriano* is not applicable. For the reasons set for above, I agree. Finally, Counsel for the Coast Guard reiterated that the Coast Guard is not claiming that there is a docking master's license nor it is going after Respondent's Pilot's license. Again, for the reasons set for above, I agree. In rebuttal, Counsel for Respondent argued that like the *Bruch/McTigue* cases, this is a violation of due process. For the reasons set for above, I disagree. There is no local requirement for a Pilot's license with a local endorsement for which Respondent had no notice.

### **RULING**

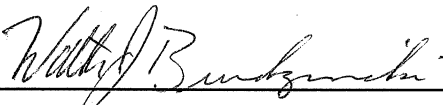
By directing and controlling the operation of the tugboats in undocking the T/V POSAVINA, Respondent was acting under the authority of his master of towing vessels license. "One who directs and controls the operation of a towing vessel must be licensed by the Coast Guard." *Stewart* (2393). In *Stewart*, appellant directed the activities of the two tugs in undocking a foreign flag vessel from the pier. The Commandant held that "[a] docking master is in command of the entire towing operation. His license is subject to suspension or revocation for negligence during the docking maneuvers." *Stewart* (2393). Like Captain Stewart, Respondent was in charge of the entire operation. Therefore, the Coast Guard has jurisdiction.

## **SETTLEMENT AGREEMENT**

On May 6, 2003 the parties submitted a their written Motion for Approval of a Settlement Agreement and Entry of Consent Order under 33 CFR 20.502. (Exhibit 27). I have reviewed the terms of the Settlement Agreement and find that it is fair and reasonable and in substantial compliance with the requirements of 33 CFR § 20.502. the parties agree that the Settlement Agreement constitutes full and complete settlement of all issues in this matter.

## **ORDER**

Upon consideration of the record, it is hereby **ORDERED** that the Settlement Agreement is **APPROVED** in full and incorporated herein by reference. This Consent Order shall constitute full, final, and complete adjudication of this proceeding.

  
\_\_\_\_\_  
WALTER J. BRUDZINSKI  
Administrative Law Judge

Dated: May 7, 2003  
New York, NY

Copy:  
CCDG1(dl) Attn: LT C.F. Coutu  
ALJ Docketing Center  
Megan Allison, Esquire (ALJDC)  
Nicole Lichenstein, Esquire (Comdt G-CJ)  
William Burke O'Leary, Esquire

SHORT TITLE OF CASE  U.S. Coast Guard v. Michael F. Duarte	DOCKET NUMBER 03-0015 COAST GUARD CASE NUMBER 1727707
--	--

### Settlement Agreement

1. In light of the Respondent's cooperative attitude and good faith efforts, the Coast Guard and the Respondent agree to the mitigated penalty of 30 days outright suspension to begin no later than 1 June 2003. Respondent agrees to deposit his Merchant Mariner Credentials with MSO Boston for the period of suspension. Suspension does not begin until MSO Boston receives said credentials. Failure to do so will be considered a breach of this settlement agreement.

As conditions to the Settlement:

2. The Respondent agrees to attend the Massachusetts Maritime Academy's 40-hour Advanced Shiphhandling course, or a similar Coast Guard approved course acceptable to the Officer in Charge, Marine Inspection, Boston, no later than 30 September 03.
3. The Respondent agrees to attend the Massachusetts Maritime Academy's 4-Day Bridge Resource Management Course, or a similar Coast Guard approved course acceptable to the Officer in Charge, Marine Inspection, Boston, no later than 30 September 03.
4. The Respondent will provide the Coast Guard proof of enrollment (prior to commencement of the course) and proof of satisfactory completion of said courses identified in paragraphs 2 and 3.
5. The parties stipulate that this table set forth the appropriate orders in this matter:

If the Respondent...	then the Respondent's License will be...
Fails to provide the Coast Guard with proof of enrollment and completion of each of the above described courses,	Suspended outright for three months with three months suspension held on 24 months probation.
Successfully completes these conditions to the satisfaction of the U.S. Coast Guard,	Suspended outright for 30 days with an additional three months suspension held on 12 months probation with the probationary period to begin on the date of Administrative Law Judge's Consent Order.

6. Any incident within the probationary period that results in a Coast Guard Complaint filed against the Respondent that subsequently results in an ALJ finding in violation of 46 CFR 5.27, 5.29, 5.31, 5.33 or 5.35 will violate this settlement agreement and automatically invoke three months of outright suspension held by this Settlement Agreement.

7. The Respondent agrees to inform the Investigations Department at Marine Safety Office Boston, by written correspondence, of any changes of address and/or telephone number occurring prior to the end of the probationary period.

8. Nothing in this Settlement Agreement and Consent Order shall relieve Respondent of the duty to comply with all applicable provisions of any Federal, State, or local laws or statutes.