

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

UNITED STATES COAST GUARD
Complainant

VS

RONALD WAYNE LIVELY
Respondent.

Docket Number CG S&R 03-0338
CG Case No. PA 1788769

DECISION AND ORDER

Issued: March 3, 2004

Issued by: Edwin M. Bladen, Administrative Law Judge

Appearances:

For the Coast Guard

LCDR Diane Kalina
U.S. Coast Guard Marine Safety Office
510 L Street, Suite 100
Anchorage, AK 99577

For the Respondent

Randall E. Farleigh, Esq.
Attorney for Respondent
629 L Street, Suite 101
Anchorage, AK 99501

PRELIMINARY STATEMENT

The Coast Guard has alleged in a May 7, 2003 complaint that Respondent on December 30, 1997, August 17, 2001, January 31, 2002 and December 23, 2002 at Anchorage, Alaska, engaged in acts of Misconduct as defined in 46 CFR § 5.27 by

OPTIONAL FORM 99 (7-90) 3-3-04 # of pages ▶

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wrongfully making fraudulent statements when he answered "NO" to the question "Have you had a driver's license revoked or suspended for refusing to submit to an alcohol or drug test?" on his renewal Applications for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document. As a result this proceeding is brought under the authority of 46 CFR Part 5, 5 USC §§ 551-559, and 46 USC § 7703. The Coast Guard seeks to revoke Respondent's credentials.

Respondent on May 24, 2003 personally answered the complaint asserting as to each paragraph of the complaint he lacked sufficient knowledge, information or belief as to the truth of the allegations thus specifically denying each allegation. He also asserted an affirmative defense that there was a "court release filed in Seattle Coast Guard Office when applying for the original Merchant Mariner Document in August, 1978."

Respondent has demanded a hearing in this matter.

The Chief Administrative Law Judge then assigned this matter to this judge on May 30, 2003. A notice of hearing was issued setting a November 3, 2003 hearing date in Anchorage, Alaska.

On July 15, 2003 Respondent's professional counsel entered his appearance and supplemented Respondent's answer asserting another affirmative defense that the May 7, 2003 complaint's misconduct specification arising from statements allegedly made on December 30, 1997 were time barred because of 46 CFR § 5.55(a)(3) [service of the complaint for an act or offense not otherwise provided for, three years after commission of the act or offense alleged].

In apparent response to this limitations defense, the Coast Guard, on July 23, 2003, amended the complaint removing the December 30, 1997 allegation and substituted the following:

2. Respondent holds the following Coast Guard issued credential(s): License Number 992508 and MMD XXX-XX-XXXX.¹
3. Respondent acted under the authority of that license and MMD on 08/17/01, 01/31/02 and 12/23/02 by engaging in official matters regarding that license and MMD by applying for renewal and duplicate license and/or MMD.

FACTUAL ALLEGATIONS – MISCONDUCT

1. The Coast Guard Alleges that on 08/17/01, 01/13/02 and 12/23/02 at Marine Safety Office Anchorage, AK the Respondent:
 2. wrongfully made fraudulent statements when he answered “No” on his “Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner’s Document” to the question “Have you ever been convicted by any court . . . or forgo appeal of a trial court finding?” and his FBI record shows the following convictions that the respondent failed to inform the Coast Guard marine Safety Anchorage of: Dangerous drugs in 1970; Burglary in 1978; Carrying a concealed weapon/Possession of a firearm in 1981; Harassing communications in 1997; DWI in 2001.

The service of the amended complaint was acknowledged by Respondent’s attorney.

An amended Notice of Hearing was issued setting the hearing in Anchorage, AK for Wednesday, February 18, 2004.

Respondent has requested that testimony from certain witnesses be provided by telephone as allowed in 33 CFR § 20.707. That motion was granted at the outset of the hearing.

¹The MMD number is the same as a person’s social security number and is here redacted in the interest of avoiding an invasion of personal privacy.

On December 4, 2003, the Coast Guard again amended the Complaint to delete the references to the FBI records in paragraph 2 of the Factual Allegations – Misconduct. At the hearing this Judge determined that the hearing would proceed on the December 4, 2003 version since the Coast Guard had apparently abandoned a portion of the factual assertions.

A hearing on this complaint and answer was held and transcribed in Anchorage, Alaska on February 18, 2004 at the Marine Safety Office, 510 L Street, Suite 100, Anchorage, Alaska.

The parties were afforded the opportunity to file proposed findings of fact and conclusions of law as provided in 5 USC § 557(c)(1). The parties declined and elected instead to make an oral closing argument.

There have not been any ex parte communications with this judge by any party or anyone representing a party. See 5 USC § 557(d)(1) *et seq.*

At this Judge's request, only a transcript of the parties' closing arguments has been prepared. After a review of the record evidence and the closing arguments, this matter is now ripe for decision.

FINDINGS OF FACT

1. Respondent was originally issued license Number 783119 through the Anchorage, Alaska Regional Examination Center on March 31, 1997 as a Master of Uninspected Fishing Industry Vessels of not more than 1600 and 100 Gross Registered Tons (Domestic) Upon Near Coastal Waters, and also as a mate for Steam or Motor Vessels of not More than 200 Gross Registered Tons (Domestic),

and not more than 500 Gross Tons (ITC) upon Near Coastal Waters. Respondent is also authorized to engage in Commercial Assistance Towing.²

2. The original Application for License in March, 1997 is lost and no copy is available to determine the answers to any of the questions contained thereon.
3. Respondent made application for renewal of his Master's license and Merchant Mariner's Document on August 17, 2001. In the application he answered "NO" by marking an "X" and his initials in the box accompanying the question reading in relevant part: "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?"³
4. Respondent did answer "YES" on the renewal Application of August 17, 2001 to the question "Have you had a driver's license revoked or suspended for refusing to submit to an alcohol or drug test?" and included a written statement disclosing a conviction for Driving While Intoxicated [DWI] in April, 1998.⁴
5. Respondent made application for renewal of his Master's license, Merchant Mariner's Document and Seafarer's Training Certification & Watchkeeping [STCW Certificate] on January 31, 2002 and answered "NO" by marking a line in the "NO" box accompanying the question reading in relevant part: "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?"⁵
6. Respondent made application for an original Merchant Mariner's Document, and a Tankerman endorsement on December 23, 2002 and answered "NO" by

² Coast Guard Exhibits 1

³ Coast Guard Exhibit 1

⁴ Coast Guard Exhibit 1

⁵ Coast Guard Exhibit 2

marking an "X" in the "NO" box accompanying the question reading in relevant part: "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?"⁶

- 7. Respondent did answer "YES" by marking an "X" in the "YES" box accompanying the question " Have you had a driver's license revoked or suspended for refusing to submit to an alcohol or drug test?" on the renewal Application of December 23, 2002.⁷
- 8. Each application for renewal, original MMD or for an endorsement to the MMD contained a certification and oath which was signed by Respondent.⁸
- 9. Respondent was convicted by a plea of Guilty in the District Court of the State of Oregon August 21, 1981 of the offense of Unlawful Possession of a Weapon.⁹
- 10. Respondent's sentence for his conviction of Unlawful Possession of a Weapon was suspended and probation ordered by the District Judge, Lane County District Court, State of Oregon on August 20, 1981.¹⁰
- 11. Respondent was convicted by a plea of Guilty in the Circuit Court of the State of Oregon on February 5, 2001 of the offense of Driving While Intoxicated [DWI].¹¹
- 12. Respondent was convicted by a plea of No Contest in the District Court for the State of Alaska on January 26, 1998 of the offense of Harassment.¹²
- 13. Respondent was convicted by a plea of Guilty in the Circuit Court for the State of Oregon on August 23, 1971 of the offense of Possession of a Dangerous Drug.¹³

⁶ Coast Guard Exhibit 3
⁷ Coast Guard Exhibit 3
⁸ Coast Guard Exhibits 1, 2, 3
⁹ Coast Guard Exhibit 6
¹⁰ Respondent's Exhibit D
¹¹ Coast Guard Exhibit 4
¹² Coast Guard Exhibit 5

14. A charge of distribution of a dangerous drug against Respondent was dismissed by the Circuit Judge for County of Curry, State of Oregon.¹⁴
15. Respondent's has a good reputation among his peers and vessel crew regarding his attention to duties and skill in mastering a vessel.
16. Respondent has not exhibited to his peers or crew any use of alcohol or drugs.
17. Respondent has assisted the Coast Guard in several search and rescues of mariners.
18. Respondent is an admitted alcoholic.
19. Respondent has attended and completed a Chemical Dependency Treatment program.¹⁵
20. Respondent continues to take an occasional drink of alcoholic beverages.
21. Respondent answered NO to the question "Have you ever been convicted by any court - including military court - for an offense other than a minor traffic violation" because he relied upon his Master's license instructor's advise, that since all his convictions were beyond the statute of limitations they need not be disclosed.
22. Respondent believed that only convictions for other than minor traffic offenses need be disclosed all of which occurred after the date of the last renewal of his license or MMD.

¹³ Coast Guard Exhibit 7

¹⁴ Respondent's Exhibit B

¹⁵ Respondent's Exhibit E

ULTIMATE FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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1. Jurisdiction is established in this matter because Respondent was acting under the authority of his license and Merchant Mariner Document by making application for renewal of these credentials in August 17, 2001, January 31, 2002 and December 23, 2002. See 46 CFR § 5.57(b)

2. Respondent was convicted by several state courts of various criminal offenses other than minor traffic violations on August 23, 1971, August 20, 1981, January 26, 1998, and February 5, 2001.

3. The elements of Fraud for the purposes of a fraudulent procured application requires a person to *knowingly make a false representation or statement* in connection with an application to the Coast Guard for a license or MMD. See, Appeal Decision 809 (MARQUES) (1955)

4. The Respondent's answer of "NO" to the question "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?" on his August 17, 2001, January 31, 2002 and December 23, 2002 renewal applications were made with the knowledge of his convictions for offenses other than minor traffic violations.

5. The complaint of the Coast Guard that Respondent wrongfully made fraudulent statements in his renewal applications is proven.

6. Respondent's reliance upon an instructor's advice that he did not have to disclose any conviction beyond the applicable statute of limitations was in essence a claim of mistake of law since Respondent knew the facts of his previous convictions, but had a mistaken belief as to the legal consequences of those facts. See *Hambro Automotive Corp v. United States*, 603 F.2d 850, 854 (Customs & Patent Appeals, 1979) quoting 58 C.J.S. *Mistake* p. 832)

7. The defense of mistake of law was uncorroborated by any witness or document. Nevertheless, Respondent's reliance on that advice was unreasonable, misplaced and not credible, and therefore, rejected!

8. At the closing of the record, as provided by 46 CFR 5.521(b) a *prima facie* case was established together with the admission by Respondent he is an alcoholic which had contributed to his previous criminal history, and his further admission he had and continues to consume alcoholic beverages from time to time. All of this demonstrated to me that Respondent's service on a vessel with crew would constitute a definite danger to public health, interest or safety at sea. Thus, his license was not returned to him during the pendency of the written Decision and Order.

DISCUSSION

An "Application For License As Officer, Staff Officer, Operator, and Merchant Mariner's Document" contains a set of questions which require the applicant's answer of either NO or YES. And, if answered YES, an explanatory statement. Among those is the question: "Have you ever been convicted by any court – including military court – for an

offense other than a minor traffic violation?" The Application also contains a "Certification and Oath" which the applicant signs. That certification reads:

I CERTIFY that the information on this application is true and correct and that I have not submitted an application of any type to a Regional Exam Center or Officer in Charge, marine Inspection in any port within 12 months of this application and I have never had an application rejected or denied except as noted on this application.

On his August 17, 2001, January 31, 2002 and December 23, 2002 applications Respondent's answered "No" to the question: "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?," which answer was objectively false. The Respondent signed the certification and oath of truthfulness in each instance. He did so knowing that he had previous convictions for criminal offenses which were other than minor traffic violations.

Respondent says the reason he answered "NO" on those applications as he did, because he earlier inquired of his instructor for his Master's license whether he had to disclose his prior convictions. He says he was told that because these convictions were beyond the statute of limitations, he was not obligated to disclose them. He did not disclose what the applicable statute of limitations was for each of the different criminal offenses.

Essentially Respondent's claim is the defense of *mistake of law*. That is, Respondent knew the facts of his previous convictions, but he had a mistaken belief as to the legal consequences of those facts when completing an application for licensure. See Hambro Automotive Corp v. United States, 603 F.2d 850, 854 (Customs & Patent Appeals, 1979) [quoting 58 C.J.S. *Mistake* p. 832 for what constitutes a mistake of law]

This defense was not corroborated by any witness or document. Respondent's reliance on that advice was unreasonable, misplaced and not credible for these reasons.

First, Respondent had no information which he could share with this Judge or otherwise which provided what were the limitations time periods involved. Respondent could not say with any certainty, much less any knowledge, what the limitations time period in years were for the convictions for driving while impaired, harassment, or possession of a weapon. I don't believe he could have known how to apply the limitations period when confronted with the question about his prior convictions.

Second, on one occasion he answered the pertinent question truthfully and disclosed a prior conviction in his renewal Application of August, 2001. Thus, he knew to truthfully answer the question and make the disclosure. Yet, about six months later, he did not truthfully answer the same question in his renewal application of January, 2002. It is mysterious, at best, to know what limitations period he applied in those two situations. When asked the Respondent did not know.

In sum, Respondent's claim of mistake of law is not credible, and is rejected.

Fraud in these circumstances requires a person to knowingly make a false statement or representation in connection with an application to the Coast Guard for a license or MMD. *Appeal Decision 809 (MARQUES)* (1955). The Respondent's answer of "NO" to the question "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?" on his August 17, 2001, January 31, 2002 and December 23, 2002 renewal applications was made with the knowledge of his convictions for offenses which were other than minor traffic violations.

I have determined that the Coast Guard's complaint is proven.

Precedents dictate that an Administrative Law Judge (ALJ) has only one option to follow when determining the appropriate disposition of a case where the respondent is shown to have fraudulently procured the renewal of a license or document. The Commandant has stated in Appeal Decision 2613 (Slack): "that where fraud in the procurement of a license is proved in a suspension and revocation proceeding, revocation is the *only* appropriate sanction." (emphasis in original and citations omitted). Thus, based on the command of 46 CFR 5.65, I am bound by that statement of principle and policy.

SANCTION

Respondent's fraudulent conduct requires a sanction of revocation.

ORDER

IT IS ORDERED Respondent's license No. 992508 and his Merchant Mariner's Document and credentials are hereby **REVOKED**.

Dated: March 3, 2004.



Edwin M Bladen
Administrative Law Judge