

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

**UNITED STATES COAST GUARD
Complainant**

VS

**DARRELL ROBINSON
Respondent**

**Docket Number CG S&R 03-0613
CG Case No. PA 1934860**

DECISION AND ORDER

Issued by: Edwin M. Bladen, Administrative Law Judge

Issued: March 31, 2004

Appearances:

For the Coast Guard:

**LT Mark Randolph
U.S. Coast Guard Marine Safety Office
510 L Street, Suite 100
Anchorage, AK 99577**

Respondent Appeared Pro Se

PRELIMINARY STATEMENT

Respondent was charged in a November 10, 2003 complaint with violation of law and regulation as the result of filling out an application for a duplicate copy of his Merchant Mariner's Document (MMD) where he is alleged to have falsely stated he had never been convicted by any court including a military court of an offense other than a minor traffic

violation. The Coast Guard has requested Respondent's license No. 757055, and document be revoked.

The Coast Guard asserts this proceeding is brought under the authority of 46 CFR Part 5, 5 USC §§ 551-559, and 46 USC § 7703

Respondent answered the complaint in which he demanded a hearing on the proposed revocation order.

The Chief Administrative Law Judge then assigned this matter to this judge on November 12, 2003.

A hearing was set for and held on February 19, 2004 at the Marine Safety Office, 510 L Street, Suite 100, Anchorage, Alaska.

The Coast Guard appeared at the hearing, and Respondent appeared *pro se*.

At the February 19, 2004 hearing, the Coast Guard offered a First Amended Complaint in which the first factual allegation was changed to show that Respondent on May 20, 2000 made an application in which he requested a renewal of, instead of a duplicate copy of, his license. Also, the charge was changed to one asserting Misconduct instead of Violation of Law and Regulation. The Respondent had no objection and the amended complaint was allowed.

The hearing was then held and recorded.

At the conclusion of the hearing, the parties elected to present oral closing arguments and waived the filing of either written closing arguments, or proposed findings of fact and conclusions of law as provided in 5 USC § 557(c)(1). On March 24, 2004, the Coast Guard submitted to the court its Written Closing Argument.

During the Coast Guard's closing argument, it was asserted the evidence showed Respondent committed fraud in the procurement of his initial license, as well as the renewal of

that license, by falsely stating he had not been convicted of any criminal offense other than a minor traffic violation. This assertion thus raised the question whether this judge had jurisdiction in light of *Appeal Decision 2025 (Armstrong)(1975)*. The Coast Guard argued that Respondent had acquired a *property interest* in his license and that the jurisdiction lay with respect to the request for a renewal of his license citing language to that effect in Volume 3, Chapter 1, Paragraph F of the *Marine Safety Manual*.

At that point, this judge recommended the parties' file written closing arguments particularly emphasizing the jurisdiction issue.

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.*

The Coast Guard has now filed a written closing argument. The Respondent has not filed an argument.

This matter is now ripe for decision.

FINDINGS OF FACT

1. Respondent was originally licensed in 1995, and subsequently renewed in 2000, as a Master of Steam or Motor Vessels of not more than 100 Gross Registered Tons (Domestic) upon Near Coastal Waters, and has a Merchant Mariners Document which authorizes him to serve as an Able Seaman, Wiper and in the Steward's Department. The original issue of the license bears number 757055 and its second issue bears number 939448.¹

2. Respondent's original Application for a license shows a submission date of April 13,

¹ Coast Guard Exhibit 1 [Original copy of license # 939448 retained by the Judge, but will be returned to the Anchorage, AK Marine Safety Office upon issuance of this order].

1995, but also shows it was subscribed under oath on May 12, 1995.²

3. Respondent has been serving as a Master since his original licensure in 1995 and its renewal in 2000.

4. On May 20, 2000, Respondent submitted an application for renewal of his license in which he answered “NO” by placing his initials in the No column 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

5. On August 11, 2003 Respondent made an application for a duplicate copy of his Merchant Mariner’s Document (MMD).⁴

6. In the course of completing the August, 2003 application, Respondent answered “NO” by marking an “X” in the No column 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

7. When completing the May, 2000, and August 11, 2003 applications, Respondent consented to the Coast Guard accessing his driving records or history in the NDR.⁶

8. Respondent's Regional Examination Center license file does not contain any information, which shows that the Coast Guard obtained Respondent's driving history or record from the NDR.

9. On May 22, 1989, Respondent was convicted in an Alaska District Court at Seward,

² Coast Guard Exhibit 4

³ Coast Guard Exhibit 2

⁴ Coast Guard Exhibit 6

⁵ Coast Guard Exhibit 6

⁶ Coast Guard Exhibits 2 and 6

AK driving while license suspended or revoked.⁷

10 On November 29, 1989, Respondent was convicted in an Alaska District Court of driving while license suspended resulting in his driver's license being revoked.⁸

11. On May 22, 1989, Respondent was convicted in an Alaska District Court of driving while intoxicated and refusal to take a chemical test.⁹

12. On January 29, 1991, Respondent was convicted in an Alaska District Court of driving while intoxicated and refusal to submit to a chemical test.¹⁰

13. Neither the May 22, 1989, November 29, 1989 convictions, nor the November 26, 1990, and August 14, 1992 convictions were for minor traffic violations.

14. None of the 1989, 1990, 1991 or 1992 convictions were disclosed on Respondent's renewal or duplicate Merchant Mariner's Credential applications.

15. Respondent is an alcoholic and has attended nightly, for four months, Alcoholic Anonymous.¹¹

16. Respondent believed that consenting to the Coast Guard's access to his driving record in the National Driver's Registry would be followed up and his record of convictions would accordingly be disclosed.¹²

17. Respondent received a "United States Merchant Marine Expeditionary Award" for service aboard the SS Cape Johnson as an Able Bodied Seaman (unlimited) in support of the

⁷ Coast Guard Exhibit 3

⁸ Coast Guard Exhibit 3

⁹ Coast Guard Exhibit 3

¹⁰ Coast Guard Exhibit 3

¹¹ Transcript p. 33

¹² Transcript p. 33

Operations Enduring Freedom and Iraqi Freedom.¹³

18. The Alaska Vocational Technical Center, Seward, AK has recommended Respondent for employment transitioning from commercial fishing to the maritime industry.¹⁴

19. In January, 2004, Respondent completed training and education as an Emergency Trauma Technician.¹⁵

20. Respondent consented and authorized the Coast Guard on March 15, 1995 to access his driving records with the National Driver Registry.¹⁶

21. In the 1995 application for initial licensure as a Master, Respondent answered "YES" to the question "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?, and disclosed a 1978 conviction for a "Bounced Check to pay Traffic Fine" or an insufficient funds check.¹⁷

22. Respondent testified that his disclosure of the 1978 conviction and his later written consents to access his driving record in the National Driver Registry were sufficient compliance with the disclosure obligations concerning any convictions other than minor traffic offenses.¹⁸

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Jurisdiction is predicated on 46 CFR § 5.57(b) in that Respondent acted under the authority of his Coast Guard credentials when he applied for a renewal of his license in 2000 and when he applied for a duplicate copy of his Merchant Mariner's Document in 2003. Respondent

¹³ Respondent Exhibit A

¹⁴ Respondent Exhibit B

¹⁵ Respondent Exhibit D

¹⁶ Respondent Exhibit C

¹⁷ Coast Guard Exhibit 4

had convictions for traffic or driving offenses in 1989, 1990, 1991 and 1992, which were for other than minor traffic violations.

2. Respondent's answer of "YES" to the question "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?" in his 1995 original Master's license application together with his consent and authorization to access his driving record from the NDR constituted a functional equivalent to the disclosure of all of his convictions in 1989, 1990, 1991, and 1992 for violations which were other than minor traffic offenses.

3. 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?" in his application for renewal of his Master's license in May, 2000 and his August 13, 2003 application for duplicate MMD was false, but Respondent did not know that answer was false, because he believed he had disclosed all of the 1989, 1990, 1991 and 1992 convictions in 1995 and again when he consented to access to his driving record in May, 2000 and August, 2003.

4. Respondent's consent to the Coast Guard for access to his driving records or history in the NDR constituted substantial compliance with his obligation of full disclosure of his driving history or records to the Coast Guard.

5. Respondent's Regional Examination Center license file does not contain information derived from the NDR.

6. Respondent should not suffer adverse consequences on account of the absence of any information in his Regional Examination Center licensing file relating to his driving record including convictions for other than minor traffic offenses in 1989, 1990, 1991 and 1992.

¹⁸ Transcript pp. 35-36

7. The Coast Guard's First Amended Complaint is not proven as to fraud.
8. The evidence demonstrates the Respondent engaged in Misconduct in completing the May, 2000 renewal application, and the August, 2003 duplicate credential application by falsely stating "NO" to the question "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?"

DISCUSSION

Jurisdiction

During the Coast Guard's closing argument, it was asserted the evidence showed Respondent committed fraud in the procurement of his initial license, as well as the renewal of that license, by falsely stating he had not been convicted of any criminal offense other than a minor traffic violation. If the Respondent had indeed answered NO and the truth was that he had been so convicted and he knew that, but still answered NO, such constituted fraud and would have rendered the original license void. *Appeal Decision 2025 (Armstrong) (1975)*.

The Coast Guard Investigating Officer (IO) argued, this judge had jurisdiction predicated on 46 CFR § 5.57(b) and Volume 3, Chapter 1, Paragraph F, *Marine Safety Manual* which reads as follows:

The S&R process should also be sought when it is discovered upon reissue of a license that the applicant's original license was initially issued by fraudulent means. Licensed mariners holding second and later issuance licenses have acquired 'property interest' in the license. This 'property interest' is protected by the due process clause of the Fifth and Fourteenth Amendments of the Constitution. In such cases the Coast Guard Senior Investigating Officer (SIO) shall be notified by the Chief Regional Exam Center.

The IO emphasized the property interest aspect of this instruction. I am not persuaded by the property interest argument. See *O'Neill and Caldwell v. Town of Nantucket*, 545 F. Supp 449

(D.C. Mass, 1982) [holding that a license initially issued which was fatally defective was a nullity, and applicants were not entitled to any due process nor did they have any property interest in the void license].

Additionally, the provision of the *Marine Safety Manual* cited is directed to the Investigating Officer and not to an Administrative Law Judge.

I, am however, more persuaded by the facts that Respondent had relied upon his license for almost eight years serving as a Master on various motor vessels. The Coast Guard renewed his license and did not bring this action until 2003 when he sought a duplicate copy of his Merchant Mariners credential.

Thus, over those years he relied upon the validity of his license to serve as a Master on various vessels, and is accordingly entitled to a due process hearing before the license or document may be affected by a disciplinary proceeding such as this.

It would be a clear violation of the due process principles set out in the Fifth and Fourteenth Amendment of the U.S. Constitution to deny Respondent the right to be heard in a meaningful time and manner. This hearing satisfies that right.

I conclude there is jurisdiction to hear this matter.¹⁹

Merits of the Charge of Fraud

The Coast Guard has alleged that because 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?" in both his May, 2000, and August, 2003 applications, he

¹⁹ As discussed later, an additional basis for finding jurisdiction exists because of the absence of any likelihood that Respondent committed fraud in procuring his initial 1995 license. In such circumstances, *Appeal Decision*

committed fraud for which his license and document must be revoked.

Fraud in these circumstances requires a person to make a false statement or representation in connection with an application to the Coast Guard for a license or MMD, *knowing* the statement or representation is not true. Appeal Decision 809 (MARQUES) (1955).

I must determine whether the Respondent's answers 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?" in his May, 2000 and August, 2003 applications, was made knowing the answers to be untrue. If so, this constitutes fraud.

Respondent contends that he did not answer the question with a "YES" because he believed he had truthfully disclosed his prior driving record to the Coast Guard in his initial application and his renewal applications. This disclosure came, he says, in his 1995 original application for his Master's license when he answered "YES" to the question and disclosed a 1978 Florida conviction for an insufficient funds check together with his consent and authorization the Coast Guard's access to his records in the NDR. He believed that the question called for a disclosure of convictions other than traffic related ones, and that the traffic related convictions would be disclosed with a National Drivers Registry inquiry. When viewed together, he believed he had made the appropriate disclosure and did not intend to hide the record. All of the traffic related convictions occurred prior to 1995 and were of the kind, which would be expected to be found in the NDR.

The record here is devoid of any evidence in Respondent's Regional Examination Center license file that the Coast Guard actually accessed the Respondent's driving record. The evidence is more consistent with a finding, that the Regional Examination Center did not access the NDR.

2025(Armstrong) would not apply. Thus, Respondent's initial license was likely not not void ab initio.

For if it had done so, Respondent's comments upon the driving record likely would have been in the file, together with the results of the records inquiry. Again, there is no such material in the file.²⁰

Additionally, when Respondent completed the May, 2000 and August, 2003 applications he again consented and authorized the Coast Guard to access his records in the NDR. Again, the record contains no evidence of any such records.

Respondent says, and I believe him, that he truly thought that he had made a truthful answer in 1995 and again in May, 2000 and August, 2003. The Coast Guard had a "YES" answer to the pertinent question in 1995 together with a completed National Driver Registry consent. The Coast Guard had Respondent's consents to access the National Driver Registry in May, 2000, and again in August, 2003.

The fact that Coast Guard may not have actually accessed Respondent's driving records in 1995, 2000, or 2003 should not penalize him. Respondent should not suffer some adverse consequence because the Coast Guard failed to access the National Driver Registry in May, 2000 and August, 2003.

For those reasons, I believe Respondent did not form the requisite intent to lie about his prior driving history when he completed his 1995, 2000 and 2003 applications. Stated otherwise, I believe Respondent did not know that his answer of "NO" was false.

I must conclude the charge of fraud in the procurement of the renewal of Respondent's Master's license and the application for a duplicate MMD fails for the lack of an essential element of knowledge.

²⁰The lack of such material information was confirmed at the hearing when this Judge inquired on the subject, of the IO, who looked in the file at the hearing.

However, a distinction needs to be made between fraud and a false statement. Here Respondent answered "NO" to the pertinent question. That answer was objectively false since Respondent had been convicted of several traffic violations which were other than minor offenses. This constitutes misconduct based on a false statement. Appeal Decision 2608 (SHEPHERD) (1999) and Appeal Decision 1381 (CLINTON) (1963). In SHEPHERD the Commandant stated that submitting a false license renewal application is a lesser-included offense of submitting a fraudulent license renewal application.

Based on Appeal Decision 1381 (CLINTON) (1963), a "false statement" is an incorrect statement of material fact. This definition is also consistent with the statement in SHEPHERD that Misconduct based on a "false statement" is a lesser-included offense of Misconduct based on a "fraudulent statement," because the definitions of "fraudulent" and "false statements" share the element of materiality but not the element of knowledge. A truthful answer to the question was material to the Coast Guard's evaluation of Respondent's character and living habits.²¹

Accordingly, I will find Respondent made a false statement in his May, 2000 and August, 2003 applications based on his 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?" Since I have not found proof of fraud, revocation according to Appeal Decision 2613 (SLACK) (1999) will not be ordered.

²¹ See 46 CFR § 12.02-4 *et seq.*

I will consider the factors in 46 CFR § 5.569(b) in determining the sanction to be imposed.

SANCTION

At the hearing, Respondent was apologetic and contrite. Had he known, he said, that the Coast Guard had not obtained his driving record, or that he had not truly believed that his driving record was a settled matter,²² he would have done things differently. He has been commended in his work and has endeavored to improve his education and skills.

Respondent has taken remedial action to deal with his alcoholism. He is an Alcoholics Anonymous attendee. From my examination of the driving record at issue here, these appear to be the kind that arise from drinking alcoholic beverages and driving a motor vehicle.

Respondent appears to have cleaned up his driving habits. There is nothing in this record which shows any major driving violation after 1992. Indeed, the Coast Guard could easily have evaluated his driving record had it originally been obtained.²³

According to the table of Guidelines for Evaluating Applicants for Merchant Mariner's Documents who have Criminal Records,²⁴ the more severe vehicular crimes (*e.g.* conviction involving a fatality, reckless driving, and racing on the highway) allow for a one year to 5 years assessment period. All of Respondent's convictions were none of those, although still serious (*e.g.* driving under the influence, and refusal of a chemical test), they occurred more than five years prior to the May, 2000 and August, 2003 applications. Essentially, they were beyond the

²² Transcript pp. 35 ff

²³ If it was obtained, I can only presume a favorable evaluation was made given the issuance of the license and MMD.

²⁴ 46 CFR § 12.02-4(c)

maximum assessment period which authorized the Coast Guard to exercise its discretion to issue a license or document in very severe cases.²⁵

Based on my findings, the 1995 application also serves to mitigate any sanction, for that application actually shows Respondent had in fact truthfully answered 'YES' to the pertinent question.

Accordingly, I will suspend Respondent's license and document outright for 3 months.²⁶

ORDER

IT IS ORDERED the Respondent's license No. 939448, and his Merchant Mariner's Document is **suspended outright for three (3) months** commencing on February 19, 2004 the date Respondent's license was verified and retained pursuant to 46 CFR § 5.521.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

Dated: March 31, 2004



Edwin M Bladen
Administrative Law Judge

²⁵ 46 CFR § 12.02-4(c)(6)

²⁶ In *Appeal Decision 2607 (ARIES)* (1999) a Judge's order of revocation was found too harsh when the Judge concluded the Appellant committed Misconduct by making false statements in a renewal application.