

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

UNITED STATES COAST GUARD

Complainant

vs.

MARK GLEN WAIN,

Respondent.

Docket Number CG S&R 03-0586
CG Case No. 1792703

DECISION AND ORDER

Issued: May 4, 2004

Issued by: Joseph N. Ingolia, Chief Administrative Law Judge

Appearances:

Lt. Scott Baranowski
Investigating Officer
United States Coast Guard
Activities Baltimore
2401 Hawkins Point Road Bldg #70
Baltimore, MD 21226

For the Coast Guard

Nicholas A. Sloan
Attorney at Law

For Respondent

I. PRELIMINARY STATEMENT

On October 14, 2003, the United States Coast Guard (Coast Guard), through the Marine Safety Office in Baltimore, Maryland, filed a Complaint against the Seafarer's Training, Certification and Watchkeeping Certificate (STCW Certificate) and Merchant Mariner's document (MMD) issued to Mark Glen Wain (Respondent). The Coast Guard alleges Respondent committed two incidents involving misconduct when acting under the authority of his mariner credentials. The first allegation states Respondent failed to report to the SEA LAND EXPLORER (SEA LAND) for its scheduled departure. The second allegation of misconduct arose from Respondent's application for a duplicate MMD and STCW Certificate. It states that he failed to attach a statement fully disclosing his conviction history. The Coast Guard further alleged an arrest on August 26, 2001 for assault and an arrest on September 14, 2001 for battery would have prevented the issuance or renewal of a license, certificate of registry, or MMD under 46 CFR 10.201(h) to Respondent.¹ The Coast Guard proposed revocation as the appropriate sanction.

~~Respondent filed an Answer dated October 31, 2003. He admitted all~~
jurisdictional allegations, admitted that he accepted a deck crew maintenance position aboard the vessel SEA LAND EXPLORER as a credentialed mariner, and admitted that he failed to meet the vessel at the time of departure. However, Respondent denied that he disobeyed the master's orders. Further, Respondent denied he wrongfully submitted a fraudulent Application by failing to disclose his conviction history.

As to the alleged fraudulent application, the Respondent claims he submitted a truthful and accurate application and, by reference, that he included his prior criminal

¹ Both of these arrests resulted in convictions that served as the basis for misconduct allegations filed by the Coast Guard.

records in earlier Coast Guard applications. Respondent alleged that matters referred to concerning convictions detailed in the Complaint were all public documents and available to the office originally conducting the investigation.

The Chief Administrative Law Judge (Chief Judge) scheduled the suspension and revocation hearing for January 27, 2004, at the ALJ Docketing Center Courtroom (4th Floor), United States Custom House, 40 S. Gay Street, Baltimore, Maryland. However, inclement weather affected the greater Baltimore, Maryland area on January 26 through January 28, 2004 with significant ice and snow accumulation. The weather resulted in the closure of the Federal Government in Baltimore on January 26 and further delayed business on January 27. As a result of the inclement weather the hearing was continued to February 19, 2004.

The hearing commenced on February 19, 2004, and the Coast Guard presented the testimony of three (3) witnesses and admitted sixteen (16) exhibits into evidence. Respondent testified on his own behalf and through his attorney admitted one exhibit into evidence. ~~See Attachment A. Both parties timely filed post-hearing briefs for~~ consideration prior to the issuance of this Decision and Order.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the entire record including: documentary evidence and witness testimony.

1. Respondent began his career as a merchant mariner in 1978. (Tr. 91).²

² The citations in this Initial Decision and Order are as follows: Transcript followed by the page number, (Tr. ____); Agency Exhibit followed by number (Gov't Ex. ____); and Respondent Exhibit followed by a letter (Resp Ex. ____).

2. At all relevant times mentioned herein and specifically on or about September 25, 2002, and July 9, 2003, the above-captioned Respondent held and acted under his Coast Guard issued MMD and STCW Certificate as required by law or regulation. (Tr. 79-113).
3. Respondent accepted employment as member of the riding gang aboard the vessel SEA LAND as a credentialed mariner. (Tr. 80-82; Gov't Ex. 10).
4. On September 25, 2002, Respondent failed to be onboard for the SEA LAND's scheduled departure time of 2100 hours while the vessel was docked in Naha Okinawa, Japan. (Tr. 81-82, 87-88; Gov't Ex. 10).
5. Respondent arrived at the empty dock at 2145; thereafter, Respondent returned to the United States at his own expense. (Tr. 88; Gov't Ex. 10).
6. Timothy O'Laughlin, captain of the SEA LAND during the incident, testified that the standard policy for unlicensed personnel was to report to the vessel one hour before departure. (Tr. 80; Gov't Ex. 11).
- ~~7. Respondent admitted in his Answer and Memorandum Supporting~~
Respondent's Position that he committed misconduct by failing to be onboard for the vessel's scheduled departure. (Tr. 87-88).
8. Sometime prior to July 9, 2003, Respondent attempted to file an application for duplicate documents with the Regional Exam Center (REC) in Baltimore, Maryland. (Tr. 89). However, the Coast Guard informed Respondent that his application could not be accepted because of an ongoing investigation in Long Beach, California, concerning his failure to be onboard for the scheduled departure of the SEA LAND in Naha Okinawa, Japan. (Tr. 103).

The investigation broadened to include information affecting Respondent's background and past conviction records. (Tr. 103-104).

9. On July 9, 2003, Respondent submitted an application for a duplicate MMD and STCW Certificate with the REC in Toledo, Ohio. (Tr. 13-15, 102-104; Gov't Ex. 1).
10. Respondent applied for a duplicate MMD and STCW Certificate because his vehicle was stolen and his Coast Guard credentials, located inside the stolen vehicle at the time of the theft, were never recovered. (Tr. 89; Gov't Ex. 1).
11. Respondent answered "yes" to three questions in Section III of the Application which inquired whether the applicant had ever been convicted by any court of an offense other than a minor traffic violation; whether he had ever been convicted of a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on highway, operating a vehicle under the influence of alcohol or a controlled substance; and whether ~~he ever had his driver's license revoked or suspended for refusing to submit~~ to an alcohol or drug test. (Gov't Ex. 1).
12. The application requires an attached statement for any questions answered in the affirmative under Section III. (Gov't Ex. 1).
13. Respondent provided an attachment to his application explaining that he previously disclosed all information to the best of his ability to the Coast Guard in Long Beach, California. Respondent further stated that he did not intend to deceive or mislead the Coast Guard by the absence of information. (Gov't Ex. 1).

14. On October 11, 2001, Respondent pled guilty to misdemeanor battery upon another person arising from an arrest on August 26, 2001, in Orange County, California. (Gov't Ex. 2).
15. On October 11, 2001, Respondent pled guilty to misdemeanor assault and public intoxication stemming from an arrest on September 14, 2001. (Gov't Ex. 3).
16. Scott Dow, Assistant Chief of the Regional Exam Center in Charleston, South Carolina, evaluates and reviews applications of merchant mariners including criminal conviction information. (Tr. 51-52).
17. Previously, Mr. Dow held the same position in Long Beach, California. (Tr. 52). During Mr. Dow's tenure with the Long Beach Office, Respondent submitted four applications: February 16, 1999, application for renewal of MMD; December 13, 1999, application for an endorsement on his MMD; March 13, 2000, application for an endorsement on his MMD, and May 23, 2000, application for a license. (Tr. 53-64; Gov't Ex. 6, 7, 8, 9).
18. Under Section VI of the four applications filed with the Long Beach Office entitled, Narcotics, DWI/DUI, and Conviction Record, Respondent replied "No" in response to the question whether he had ever "been convicted by any court, including military court, for an offense other than a minor traffic violation?" (Tr. 64; Gov't Ex. 6, 7, 8, 9).
19. Respondent's application submitted on February 16, 1999, included an attachment disclosing a previous arrest and charge of driving under the influence in Lafayette, Louisiana on January 1, 1997. Respondent refused a breathalyzer and blood test and subsequently pled no contest to the charges.

Respondent further stated on his application, "Records on file Long Beach Coast Guard." (Tr. 59-60; Gov't Ex. 8).

20. Respondent's application dated December 13, 1999, included an attachment with similar information regarding his DUI arrest and a statement that records were on file with the Coast Guard in Long Beach. (Tr. 61-62; Gov't Ex. 8).

21. John Cassady, Chief of the Regional Exam Center in Baltimore, Maryland conducted an investigation regarding Respondent's prior applications. (Tr. 11, 36-44). Mr. Cassady testified that he contacted the Marine Safety Office in Long Beach, California, and inquired about Respondent's prior conviction records.

22. Mr. Cassady stated no records were on file with Long Beach to indicate prior convictions or violations. (Tr. 45-46).

23. Mr. Cassady further explained that upon receipt of an application he ~~conducts a background investigation. If an applicant fails to disclose their~~ prior conviction history, he will determine the appropriate assessment period. However, if the Coast Guard has already issued the document and the REC subsequently discovers an applicant's conviction history, Mr. Cassady will void the document and seek its return. (Tr. 23-24).

24. Mr. Cassady explained, given Respondent's prior undisclosed conviction history, he would not have issued a license or MMD to respondent (Tr. 23-24).

25. The following convictions were not disclosed nor was an explanation provided on prior applications filed with the Coast Guard as required:

State of California

January 1, 2003 Case No. SH02SM04029 pled guilty to public intoxication

January 1, 2003 Case No. 03SM00041 pled guilty to possession of alcoholic beverage where prohibited

State of Florida

March 10, 1992 Case No. 92-10636 pled nolo contendere and served jail time for Resisting Arrest Without Violence

January 14, 1993 Case No. 92-14299 pled nolo contendere and to battery and criminal mischief. Respondent served jail time for the battery charge and was placed on six months of probation for the criminal mischief charge.

January 14, 1993 Case No. 92-23093 pled nolo contendere and served jail time for resisting arrest with violence and public intoxication.

January 14, 1993 Case No. 92-23821 pled nolo contendere and paid a fine for making repeated telephone calls for the sole purpose of harassing a person.

(Tr. 100-102, 108-113, 122; Gov't Ex. 4, 5, 12, 13, 14, 15, 16).

26. Respondent did not provide an explanation on his application submitted to the REC in Toledo, Ohio, on July 9, 2003, for convictions that resulted from ~~arrests on August 26, 2001, and September 14, 2001.~~ (Tr. 43-46; Gov't Ex. 1).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703.
2. At all relevant times, Respondent held and acted under the authority of his United States Coast Guard License and Merchant Mariner's Document as required by law or regulation.

3. The Coast Guard **PROVED** by a preponderance of reliable, probative, and substantial evidence that on September 25, 2002, Respondent committed the act of misconduct by failing to follow the master's orders to be onboard the SEA LAND EXPLORER for the vessel's scheduled departure from Naha Okinawa, Japan.
4. The Coast Guard **PROVED** by a preponderance of reliable, probative, and substantial evidence that on July 9, 2003, Respondent committed misconduct by failing to fully disclose his conviction history and submitted a fraudulent application to the Coast Guard, Regional Exam Center, Toledo, Ohio.
5. The Coast Guard **PROVED** by a preponderance of reliable, probative, and substantial evidence that Respondent's conviction history prevents the issuance or renewal of license, certificate, or merchant mariner's document.

IV. DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. 7701. The Commandant delegated to Administrative Law Judges the authority to suspend or revoke a license, certificate, or merchant mariner's document for violations arising under 46 U.S.C. 7703 and 7704. See 46 CFR 5.19. Here, the Coast Guard charged Respondent with two allegations of misconduct arising under 46 U.S.C. 7703. See also 46 CFR 5.27. The Coast Guard seeks revocation of Respondent's merchant mariner's document.

A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA authorizes

imposition of sanctions if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural regulations, the burden of proof is on the investigating officer to prove the charges made by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.



B. Misconduct

Misconduct is defined as "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, or a ship's regulation or order or shipping articles and similar sources." 46 CFR 5.27.

1. Failure to Report to the SEA LAND on September 25, 2002 for its Scheduled Departure

The first count of misconduct alleges Respondent failed to be onboard the SEA LAND on September 25, 2002 for its scheduled departure at 2100 hours in Naha Okinawa, Japan. Essentially, he is charged with failure to join the vessel. Section 38 of

the Seafarer's International Union Agreement provides the Sailing Board Time for unlicensed personnel shall be one hour prior to vessel departure. (Tr. 74-76; Gov't Ex. 11). On September 25, 2002, the SEA LAND's scheduled departure time was 2100 hours. The official logbook shows that Respondent arrived to an empty dock at 2145. (Gov't. Ex. 10). The Captain of the vessel testified that Respondent was late for the vessel's departure. (Tr. 80-82). Respondent, serving as a member of the ride-along-gang, also admits he failed to be onboard for the vessel's departure in Naha Okinawa, Japan. (Tr. 87-88).

Under Coast Guard common law, a failure to join a vessel constitutes Misconduct. Appeal Decision 399 (TATE) (1950). The logbook entry documenting a respondent's failure to join the vessel at the scheduled departure time establishes a prima facie case of Misconduct. Appeal Decision 2068 (REED) (1976). A respondent's admission also constitutes a waiver of all non-jurisdictional defects and defenses and is sufficient to support a finding that the charges are proved. Appeal Decision 2376 (FRANK) (1985). Thus, in this case, the logbook entry, Respondent's admission, and the testimony of the Captain of the vessel that Respondent was late for the vessel's departure on September 25, 2002 in Naha Okinawa, Japan is sufficient to establish misconduct.

2. Failure to Fully Disclose Conviction History

The second count of misconduct alleges Respondent wrongfully submitted a fraudulent Application Form (719B) for a duplicate MMD and STCW Certificate on July 9, 2003 by failing to fully disclose his conviction history. Title 46 CFR 12.02-23(b) provides that in the event a mariner loses his MMD in a manner other than a shipwreck or casualty, a duplicate document shall be reissued upon application by the mariner and

payment of the appropriate fee. 46 CFR 12.02-23(b), (c).³ To initiate this process, the mariner may proceed to any Regional Exam Center (REC) to complete an application. 46 CFR 12.02-23(c). Coast Guard regulations further require the mariner to provide “*written disclosure of all prior convictions* at the time of application” and failure to comply with this regulation serves as the basis for denial of a document. 46 CFR 12.02-4(c) (emphasis added).

Here, Respondent submitted an application at the REC in Toledo, Ohio, on July 9, 2003, for a duplicate MMD and STCW Certificate. Respondent explained that his car and all of his documents were stolen while in Laguna Beach, California. (Tr. 89-90; Resp Ex. A). Respondent had previously attempted to file an application for duplicate documents with the REC in Baltimore, Maryland. (Tr. 89). However, the Coast Guard REC in Baltimore, Maryland informed Respondent his application could not be accepted because of an ongoing investigation in Long Beach, California, concerning his failure to be onboard for the scheduled departure of the SEA LAND in Naha Okinawa, Japan. (Tr. 103). ~~The investigation ultimately broadened to include information affecting~~ Respondent’s background and past conviction records. (Tr. 103-104).

On the application submitted in Toledo, Ohio, Section III entitled Narcotics, DWI/DUI, and Conviction Record, Respondent marked the “Yes” box which inquired whether the Applicant had ever been convicted by any court of an offense other than a minor traffic violation; whether he had ever been convicted of a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on highway,

³ “The Phrase *or other casualty* as used in this section is interpreted to mean any damage to a ship caused by collision, explosion, tornado, wreck or flooding of the ship, such as a tidal wave or a ground of the ship on a sand bar, or a beaching of the ship on a shore or by fire or other causes in a category with these mentioned.” 46 CFR 12.02-(23)(a) (emphasis in original).

operating a vehicle under the influence of alcohol or a controlled substance; and whether he had ever had his driver's license revoked or suspended for refusing to submit to an alcohol or drug test. (Gov't Ex. 1). Following each of the three questions, the applicant is instructed to attach a statement for any questions answered in the affirmative. (Gov't Ex. 1). Here, Respondent's attachment claimed he previously disclosed all information to the best of his ability to the Coast Guard in Long Beach, California. Respondent further stated, he did not intend to deceive or mislead the Coast Guard by the absence of information. (Gov't Ex. 1).

The Coast Guard's investigation of Respondent's July 2003 application revealed that he failed to disclose his prior convictions as required by 46 CFR 12.02-45(c).⁴ (Tr. 46, 116). Prior to Respondent's July 2003 application, he filed an application for an original license on May 22, 2000, in Long Beach California and an application for a MMD on March 9, 2000, also in Long Beach, California. (Gov't Ex. 6, 7). However, neither application disclosed prior conviction records as claimed by Respondent in his attachment to the July 2003 application. Furthermore, two convictions by the State of California, involving arrests on August 26, 2001 for battery and September 14, 2001 for assault on a person and disorderly conduct, occurred during the time period between applications submitted in Long Beach, California, and Toledo, Ohio. Respondent never disclosed these two convictions to the Coast Guard. (Tr. 46, 53-66; Gov't Ex. 6).

Given the overall evidence of record, it is clear that, at best, Respondent was both inaccurate and cavalier when he filed both the application that was referred to in the

⁴ The Investigating Officer incorrectly cited to 46 CFR 10.201(h) in paragraph 9 of the Complaint as the underlying regulatory authority for supporting an allegation of misconduct. Here, Respondent applied for a duplicate MMD, therefore the appropriate underlying regulation for an allegation of misconduct is 46 CFR 12.02-4(c). See Appeal Decision 2581 (DRIGGERS) (1996) (error does not occur when specifications cite incorrect law).

complaint and when he filed other similar applications on prior occasions where he failed disclose his criminal convictions. Indeed, the former Assistant Chief of the REC in Long Beach testified that four convictions, including the two October 11, 2001 convictions set forth in the complaint and two January 1, 2003 convictions, occurred after Respondent filed his May 23, 2000 application for a license in Long Beach.⁵ Consequently, whatever may have been Respondent's intent in referring the examiner to the Long Beach records as an explanation for his "yes" answers, the reference was untruthful and fraudulent.

Respondent further alleges that his prior convictions were public record and that the responsibility for finding prior convictions was on the Coast Guard. The Commandant, in Appeal Decision 2456 (BURKE) (1997), rejected a similar argument. The Commandant held, "Appellant's reasoning would lead to a situation in which applicants could falsify their applications but escape any sanction if the false information is not immediately discovered." Id. As the Commandant recognized in Appeal Decision 2569 (TAYLOR) (1995), "information concerning the criminal background of an applicant is a crucial factor for the Coast Guard in deciding whether to issue seaman's papers because an applicant's character relates to the risk he may pose to the seafaring world. Consequently, the truth of information provided by applicants for licenses and documents is essential to the Coast Guard's ability to discharge its mission of protecting life and property at sea." The regulations at 46 CFR 12.02-4(c) clearly places the burden of truthfully disclosing all prior convictions on the applicant seeking merchant mariner's credentials. Given the vast number of applications the Coast Guard receives on a daily

⁵ The two January 1, 2003 convictions occurred in the State of California and involved the following cases:

Case No. SH02SM04029 pled guilty to public intoxication

Case No. 03SM00041 pled guilty to possession of alcoholic beverage where prohibited

basis, it would prove to be unduly burdensome for the onus to be placed on the agency to discover prior convictions of all its applicants. Especially since most of these convictions are violations of State laws.

It should also be noted that, in the Respondent's post-hearing brief, he raises four additional arguments in response to the Coast Guard's position in this case. The first argument is that the relevant questions in Section III are all answered "Yes," which ultimately discloses Respondent's conviction record. Answering "Yes" to the questions, however, is insufficient. As previously stated, Respondent had a duty to provide a written disclosure of all prior convictions at the time of his application. See 46 CFR 12.02-4(c); see also (Gov't Ex. 1). When an application is made for Coast Guard credentials, the Coast Guard must rely on the applicant to supply information that is both accurate and truthful in order to effectively evaluate the applicant's character to serve on board a vessel. The fact that Respondent's explanation to the questions in Section III did not include all of his convictions potentially deprived the Coast Guard of its ability to accurately evaluate Respondent's fitness to serve on board a vessel.

The second argument is that certification for Section III is not signed and that should have triggered a discussion with Respondent instead of forwarding the case to the Investigating Officer (IO) for an S&R proceeding. The fact that the certification of Section III was not signed is not relevant to the issues in this case. It may well be that if all that was lacking was a signed certification a simple inquiry rather than reference to an IO would have sufficed. However, more than just a missing signature is involved in this case. Hence, one cannot reasonably question the referral of the case to an IO.

The third argument is that the Coast Guard submitted into evidence an incomplete application that did not contain the page involving the Privacy Statement. The portion of

the statement of greatest interest to Respondent sets forth the principle purpose for which the information is intended to be used. See Memorandum Supporting Respondent's Position, Attachment.⁶ It in no way affects the issues involved in this proceeding. Respondent also asserts that he should be able to rely on the testimony of LCDR John Fassero, who testified that the policy of Long Beach REC is to forward all documents pertaining to an investigation to the investigation station if the investigation were transferred. Respondent totally misses the point. The record reveals that the two convictions that are referenced in the Coast Guard's complaint were never disclosed by Respondent and thus were not part of the record in Long Beach. Moreover, there were other convictions that were not mentioned in the complaint, which never became part of his Coast Guard record in Long Beach. There is nothing in the Privacy Statement or LCDR Fassero's testimony that supports Respondent's position. Indeed, it explains why an applicant should be careful to supply accurate information.

Given all of the above, based on the entire record made in this case, I find that the ~~United States Coast Guard has proved by a preponderance of the evidence that the~~ Respondent's July 9, 2003 application failed to disclose two convictions from the State of California in violation of 46 CFR 23.02-4(c) resulting in misconduct as defined in 46 CFR 5.27 and the failure to disclose the convictions was fraudulent.

⁶ The relevant portion of the Privacy Statement provides as follows:

2. Principle purposes for which information is intended to be used.
 - A. To establish eligibility for a Merchant Mariner's Document, duplicate documents, or additional endorsements issued by the Coast Guard.
 - B. To establish and maintain a continuous record of the persons documentation transactions.
 - C. Part of the information is transferred to a file management computer system for a permanent record.

V. SANCTION

The predominant issue in this case is whether the Coast Guard's request for revocation should be granted. The law and regulations are clear that "where fraud in the procurement of a license [or document] is proved in a suspension and revocation hearing, revocation is the only appropriate sanction." Appeal Decision 2613 (SLACK) (1999). See also Appeal Decision 2570 (HARRIS) (1995) (revocation appropriate sanction where fraud in procurement of license proved); Appeal Decision 2569 (TAYLOR) (1995) (revocation appropriate sanction for fraudulent application submitted for MMD); Appeal Decision 2346 (WILLIAMS) (1984) (revocation affirmed for wrongful and fraudulent application submitted to Coast Guard); Appeal Decision (ROBLES) (1980) (fraud in procurement of license, revocation only appropriate disposition). In essence, the Administrative Law Judge has no discretion.

It is also true that where false statements are involved in the application, rather than fraudulent statements, an ALJ has discretion and may consider mitigating and aggravating factors when considering the appropriate sanction. See Appeal Decision 2607 (ARIES) (1999); Appeal Decision 2456 (BURKE) (1987). The exercise of that discretion on an ad hoc basis may range from suspension to revocation being imposed by the ALJ in a given case.

The definition of fraudulent statement and false statement in Coast Guard law is quite subtle. The applicable case law establishes that a statement on an application is fraudulent if it is made with actual or constructive knowledge that the representation is

false. Appeal Decision 809 (MARQUES) (1955).⁷ On the other hand, a false statement is a lesser-included offense of fraud and does not require knowledge as an element of proof. See Appeal Decision 2608 (SHEPHERD) (1999); BURKE. The essential difference between fraudulent statement and false statement may affect the severity of the sanction.

A. Revocation is Mandated

The facts and surrounding circumstances of this case indicate that much more than an unintentional error or inadvertent inaccuracy occurred. In arriving at the sanction, I considered the testimony of Mr. John Cassady, the Chief of the REC in Baltimore Maryland. He stated that Long Beach had no record of the two convictions by way of a plea of guilt to the two separate incidences of battery and assault resulting from arrests in August and September 2001. During the hearing, Mr. Cassady was referred to 46 CFR 12.02-4 which enumerates convictions and assessment periods for different offenses giving minimum and maximum assessment periods. When asked what the assessment period would be for a person having both an assault conviction and a battery conviction in 2001, Mr. Cassady replied, "The minimum, maximum is 1 to 5 years and given the circumstances, probably five years looking at the totality of the offenses."

So here, if the REC knew of Respondent's convictions, Respondent most likely would have had to wait 5 years (the assessment period in the regulations) before he could reapply for a license or document or their renewal. In other words, under the regulations and REC practices, the existence of the prior convictions, even without a

⁷ A statement is made with actual knowledge if the statement is made without belief in its truth or with reckless disregard of the truth. MARQUES. Constructive knowledge exists if the person had a reason to know the representation was false. Id.

fraudulent statement, would, of themselves, warrant denial of the application for five years.

Here, Respondent's actions regarding his prior convictions and the manner, timing and content of his application all lead to a rather transparent attempt toward knowingly submitting a misleading application and his actions were fraudulent within the meaning of Appeal Decision 809 (MARQUES). Respondent acted in a fraudulent manner by failing to provide written disclosure of the prior convictions as required by 46 CFR 12.02-4(c). His statement in Section III of the application to the questions concerning his prior convictions and direction to the records in Long Beach only served to mislead the reviewer rather than to explain and clarify.

After the date of his application in Long Beach, California, and prior to submitting his application in Toledo, Ohio, Respondent was convicted by pleading guilty to two separate incidences of battery and assault resulting from arrests in August and September 2001. Respondent actively participated in the court proceedings regarding probation issues in both cases until May 2003. I find Respondent could not have truthfully believed his answer that prior convictions were on file with Long Beach, California knowing that the last application filed in Long Beach was in May 2000. Further aggravating facts were admitted regarding seven additional conviction records which Respondent never disclosed on four prior applications filed with Long Beach between March 1999 and May 2000.⁸ I find Respondent's failure to disclose his lengthy

⁸ Respondent did not disclose the following convictions:

State of California

Case No. SH02SM04029 pled guilty to public intoxication

Case No. 03SM00041 pled guilty to possession of alcoholic beverage where prohibited

conviction history further demonstrates his reckless disregard of submitting truthful applications. I further find that Respondent did not act in good faith when he submitted the application to the Toledo, Ohio, REC following rejection of his application for duplicate documents in Baltimore, Maryland because of the ongoing investigations that led to a review of his criminal convictions. Based on the foregoing, I find Respondent's statement attached to his application was made with knowledge of its untruthfulness and that his application statement was fraudulent. Thus, revocation is mandated.

In so holding, the undersigned is aware of the fact, that Respondent's difficulties are related to alcoholism and that he is participating in rehabilitation. However, ensuring safety at sea weighs heavily against considerations that may involve a respondent's personal circumstances. In any event, with or without a holding of fraud, the appropriate sanction here is revocation. While it is severe, it is not necessarily permanent and Respondent's attention is directed to 33 CFR 20.904, which allows a respondent to reopen a matter when he can show specific and significant progress. Respondent's attention is also directed to 46 CFR 5.901, which allows a respondent to apply for administrative clemency after revocation.

B. The Order Applies to All Coast Guard Credentials

In addition, although not raised by the parties, the boiler plate language in the complaint notifies respondent that the "Coast Guard has initiated an administrative proceeding against [his] license, certificate, and/or merchant mariner's document

State of Florida

Case No. 92-10636 pled nolo contendere and served jail time for Resisting Arrest Without Violence

Case No. 92-14299 pled nolo contendere and to battery and criminal mischief. Respondent served jail time for the battery charge and was placed on six months of probation for the criminal mischief charge.

Case No. 92-23093 pled nolo contendere and served jail time for resisting arrest with violence and public intoxication.

(MMD).” However, the jurisdictional allegations of the complaint only reference Respondent’s MMD and the factual allegations of the complaint reference Respondent’s MMD and STCW Certificate. There is no reference to Respondent’s license authorizing him to serve as a Third Mate. Having found misconduct proved and that revocation is warranted, the next question is whether the order should be directed against all licenses, certificates, or any document issued to Respondent. For the reasons stated below, I find that the Order should affect all of Respondent’s Coast Guard credentials.

Title 46 CFR 5.567(b) describes the permissible scope of an order by an Administrative Law Judge in a suspension and revocation hearing, stating that “[t]he order is directed against all licenses, certificates or documents, except that in cases of negligence or professional incompetence, the order is made applicable to specific licenses, certificates or documents. . . .” In Appeal Decision 2593 (MOWBRAY) (1997), the Commandant rejected the argument that an order of revocation directed against all of respondent’s credentials constituted a denial of due process where the Notice of Hearing and Charges issued by the Coast Guard only spoke of potential action against Respondent’s license. The Commandant held that 46 CFR 5.567 is “clear that an order by an Administrative Law Judge in suspension and revocation hearings is to be directed against all licenses, certificates, and documents, except in limited cases where someone is charged with negligence or incompetence.” The Commandant found that the publication of 46 CFR 5.567 provided respondent with sufficient notice of its content. As such, there was no due process violation or a violation of the clear language of 46 CFR 5.567 when the ALJ directed the order against all Respondent’s Coast Guard credentials.

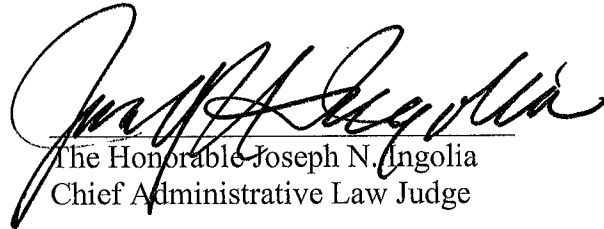
Case No. 92-23821 pled nolo contendere and paid a fine for making repeated telephone calls for the sole purpose of harassing a person.

In this case, since allegation in this case does not fall under the exceptions set forth in 46 CFR 5.567, revocation of all licenses, certificates, or documents issued to Respondent Mark Glen Wain is required.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that Respondent's License, Merchant Mariner's Document, and STCW Certificate are hereby REVOKED and shall be immediately surrendered to Lt. Scott Baranowski, Investigating Officer, United States Coast Guard, Activities Baltimore, 2401 Hawkins Point Road, Building #70, Baltimore, Maryland.


The Honorable Joseph N. Angolia
Chief Administrative Law Judge

Dated May 4, 2004
Baltimore, Maryland