

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHN F. KILGROE

Respondent.

Docket Number: CG S&R 04-0101
CG Case No. 2010993

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DECISION AND ORDER

Issued: October 4, 2004

Issued by: Hon Parlen L. McKenna, Administrative Law Judge

Appearances:
For the Coast Guard

Lt. Marcella Granquist
Petty Officer Collin Croft
U.S. Coast Guard
Marine Safety Office / Group
Los Angeles - Long Beach
Investigations Department
1001 S. Seaside Avenue, Building 20
San Pedro, California 90731-0208

For the Respondent

Mr. John F. Kilgroe, pro se

PRELIMINARY STATEMENT

On March 2, 2004, the Coast Guard filed a Complaint against the Respondent's Coast Guard issued Merchant Mariner's Document (hereinafter sometimes referred to as MMD). The Coast Guard alleged that the Respondent was incompetent because he was unable to safely perform the required duties as wiper while serving aboard the USNS SEAY. The jurisdictional allegations in the Complaint listed Respondent's address, telephone number, and MMD number. The Complaint also alleged that the Respondent was acting under the authority of his MMD, by serving as a wiper aboard the USNS SEAY as required by law or regulation. On March 2, 2004, the Respondent filed an Answer admitting to the jurisdictional allegations and denying the incompetence allegations. The Coast Guard filed a Motion to Amend the Complaint on March 15, 2004, seeking to change the title of the factual allegation from "Incompetence" to "Professional Incompetence." This Motion was the result of the Respondent's prehearing complaint that the all inclusive charge of "incompetence" was vague and lacked specificity. The undersigned agreed and directed the Coast Guard Investigating Officer to amend the complaint.

On March 22, 2004, the Coast Guard filed its Witness/Exhibit List, a Motion for Telephonic Testimony, and a Motion for Discovery seeking to compel production of documents. The undersigned granted the Motions on March 22, 2004.

A hearing in the above-captioned case was held on March 30, 2004. At the hearing, fifteen exhibits were admitted into evidence, and two witnesses testified as part of the Coast Guard's case. The Respondent was the only witness to testify as part of his case, and six exhibits were admitted into evidence at Respondent's request. The undersigned admitted one exhibit into the record sua sponte.

The Respondent's merchant mariner's document was presented at the hearing for review by the undersigned. After reading it's information into the record, the Respondent's merchant mariner's document was returned to him. (Tr. at 102). Since the conclusion of the hearing, several post-hearing motions have been filed. On April 5, 2004, the Respondent filed a Motion to Reopen along with a Motion to Dismiss. Therein, the Respondent argued that (1) under 46 CFR 12.25-10 there is no professional competency requirement for a wiper; (2) the Coast Guard stipulated Respondent was professionally competent; (3) Respondent is competent because he sailed for 61 days without disciplinary action being taken against him and he was not discharged for cause; (4) the Coast Guard witnesses lacked credibility; (5) if a missing email cannot be obtained, testimony of Mr. Wood should be struck; and (6) Respondent raised objections to Coast Guard's exhibits which were admitted at the hearing. In response to this motion, the Coast Guard argued: (1) Respondent's motion is untimely since it was not filed before the hearing concluded and (2) the maritime industry sets the standards for incompetence.¹

The Respondent filed a Reply to Coast Guards response to his Motion for Dismissal on May 12, 2004 basically repeating the above-recited arguments. The Coast Guard filed an objection to Respondent's Reply. On May 13, 2004, the Respondent filed a "Supplement Reply to the Coast Guard's Response to Motion for Dismissal". On May 12, 2004, the Respondent filed a "Motion for Sanctions and Dismissal" in which he sought to dismiss the Complaint alleging the Coast Guard failed to provide or permit discovery. The Coast Guard filed an objection to this Motion on May 12, 2004.

¹ On May 3, 2004, the Coast Guard responded to several of Respondent's post-hearing motions in a single brief entitled "Reply to Respondent's Motion to Reopen Motion for Dismissal of Charges, Motion to Dismiss or Disqualify Judge McKenna, Motion to Subpoena or to Strike the Testimony of Mr. Wood or Mr. Vint, and Request (for Lt. Granquist) to call and threaten the shipping Company." This Response is hereinafter referred to as "Coast Guard's objections."

On May 12, 2004, an Order issued directing the parties to notify the undersigned if they intended to file proposed Findings of Fact or Conclusions of Law. Both parties filed a Notice of their intent to file post-hearing arguments which were subsequently filed.

On May 18, 2004, the Respondent filed a Motion to Admit certain newly proffered Exhibits. In this Motion, the Respondent sought to admit a "Motion for Discovery," a "Declaration of Archie Morgan In Opposition for Summary Judgment," various "Certificates of Training," "Respondent's Arbitration Brief," and the "Coast [Guard's] Witness and Exhibit List." The Respondent filed a Second Motion to Admit on June 1, 2004. In addition to the exhibits the Respondent sought to have admitted in his first Motion to Admit, the Respondent sought to have the following items admitted into evidence: (1) the Memorandum of Understanding between American Ship Management and Seafarers' International Union; (2) the Respondent's "Motion to Dismiss or Disqualify ALJ McKenna;" (3) the Respondent's "Supplement to: Motion to Dismiss or Disqualify ALJ McKenna;" (4) the Coast Guard's Reply with Motion for Filing Extension; (5) the Respondent's "Second Supplement to Motion to Dismiss or Disqualify ALJ McKenna;" (6) the Respondent's "Motion to Clarify the Record"; (7) the Respondent's "Request to Grant Full Disclosure of Ex Parte Communication"; (8) the Respondent's "Third Supplement to Motion to Dismiss or Disqualify ALJ McKenna;" (9) the Undersigned's Orders of May 11, 2004 and May 12, 2004 ruling on Respondent's "Motion to Dismiss or Disqualify ALJ McKenna" and "Supplement to: Motion to Dismiss or Disqualify ALJ McKenna;" and (10) the Respondent's letter to Petty Officer Croft.

Since the relevant portion of the Memorandum of Understanding between American Ship Management and Seafarers' International Union was admitted into evidence at the hearing, it is already part of the record (See 33 C.F.R. § 20.903). In addition, all Motions and other pleadings

are also part of the record in this case. Therefore, Respondent's "Motion to Admit and Number or Letter Exhibit" and "Second Motion to Admit and Number or Letter Exhibits" are dismissed as Moot.

On June 2, 2004, the Respondent filed a "Brief for Decision, Including a Motion to Dismiss under 46 U.S.C. § 11502(d), arguing that the judge has refused to adequately address his Motion to disqualify, along with his conditional Motion to reopen."² In this pleading, the Respondent argued that: (1) the evidence from the USNS SEAY should be excluded because a logbook was not kept; (2) the Amended Complaint must allege Respondent did or failed to do some act; (3) the court proceeded over Respondent's objections that he did not receive discovery and adequate allegations; (5) Respondent properly disembarked the vessel; (6) the Coast Guard did not prove incompetence; (7) the Coast Guard's evidence is entitled to no weight or is insufficient to establish a prima facie case; (8) the undersigned improperly excluded Respondent's letter to Petty Officer Croft dated March 22, 2004. All of these issues, will be addressed herein.

FINDINGS OF FACT

1. The United States Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II.
2. The purpose of suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701 (a); 46 C.F.R. § 5.5.
3. The Respondent is a holder of a United States Coast Guard issued Merchant Mariner's Document. The Document authorizes the Respondent to engage in the following entry-level work activities: Ordinary Seamen, Wiper, Steward's Department (food handler). (IO Ex. 1).

² Hereinafter referred to as "Brief for Decision"

4. The United States Coast Guard has charged the Respondent with “Professional Incompetence” while serving on-board the USNS SEAY because he “was unable to safely perform his required duties as a wiper”.

5. Since the factual allegations in the Complaint do not encompass the Respondent’s endorsements as an Ordinary Seaman or steward’s department (F.H.), those endorsements are not at issue herein. However, assuming arguendo that such endorsements were subsumed within the penumbra of the Complaint, the Coast Guard failed to demonstrate by a preponderance of the evidence that the Respondent was “professionally incompetent” to hold such endorsements.

6. The USNS SEAY is a vessel operated by American Ship Management / Patriot Contract Services for the U.S. Navy Military Sealift Command. (IO Ex. 2). The USNS SEAY is 69,365 gross tons. (Resp’t Ex. B). The Respondent signed Shipping Articles for a 120 day minimum tour of duty. (IO Ex. 2).

7. Respondent was a wiper on board the USNS SEAY from January 10, 2003 to March 11, 2003 -- approximately 61 days. The Respondent was told to either resign or be fired for cause. (IO Ex. 2). The fact that the Respondent sailed for 61 days without disciplinary action does not prove that he was professionally competent from a safety standpoint given the overwhelming evidence of record to the contrary.

8. This was his first voyage in the engine department after obtaining a Coast Guard issued Document. (IO Ex. 3; IO Ex. 13; Resp’t Ex. B).

9. A wiper is an entry-level position that does basic cleaning and gofer work. A wiper in the engine room should be able to perform basic mechanical work and provide assistance to other members of the engine department. (IO Ex. 7; IO Ex. 9).

10. On March 11, 2003, the Respondent agreed to resign and a Certificate of Discharge was executed. The document was signed by the Respondent and the Captain of the USNS SEAY.

(IO. Ex. 3)

11. Mr. Bob Vint, First Engineer aboard the USNS SEAY, prepared a performance evaluation for the Respondent from January 10, 2003 to March 11, 2003. Mr. Vint wrote:

“JOHN IS A WILLING AND PLEASANT WORKER WITH A GREAT ATTITUDE. HOWEVER HE DOES NOT POSSESS EVEN THE RUDIMENTARY SKILLS NECESSARY TO BE EFFECTIVE AS A WIPER. HE CANNOT REMEMBER INSTRUCTIONS FROM ONE MINUTE TO THE NEXT ALTHOUGH HIS MEMORY OF EVENTS LONG PAST APPEARS TO BE EXCELLENT. HE HAS NO UNDERSTANDING OF TOOLS AND DOES NOT SEEM TO POSSESS THE MOTOR SKILLS NECESSARY TO USE THEM PROPERLY. HE CANNOT CLEAN, SWEEP, MOP OR SUGEE EFFECTIVELY. THE ONLY THING THAT HE COULD DO WITHOUT HAVING TO BE REDONE ONCE COMPLETED WAS HAUL OR MOVE THINGS. IF WE HAD A POSTION AVAILABLE FOR AN ENTERTAINER, JOHN WOULD BE OUR CHOICE BUT HE IS ABSOLUTELY NO USE IN A MECHANICAL ENVIROMENT. SINCE HE SEEMS TO HAVE NO AWARENESS OF THE DANGERS OF WORKING AROUND MOVING MACHINERY, I AM CONCERNED FOR HIS SAFETY AND THAT OF HIS FELLOW CREWMEMBERS. JOHN WAS ASKED TO GET OFF AT THE END OF VOYAGE AND HE AGREED”. See IO Ex. 4.

12. Mr. Vint rated the Respondent in the lowest category in skill, knowledge, work habits, ability as a supervisor, and administrative ability. See IO Ex. 4.

13. The Respondent filed a grievance against Maritime Fireman’s Union (and others) alleging a violation of his rights under a collective labor agreement with respect to not granting him membership in the Union. The Union argued that it’s actions were based on Mr. Kilgroe’s failure to satisfactorily perform his duties as a wiper. The Arbitrator ruled that Mr. Kilgroe’s

performance on-board the ship was unsatisfactory and denied the grievance. In so doing, the Arbitrator stated:

“If the Grievant [Mr. Kilgroe] believed Respondent’s [Employer] did not have a valid basis to ask him to leave the voyage, he could have simply refused to leave. At that point, Respondent would have had the option of terminating his services, an action he could have challenged through the grievance procedure, or of following some other path. As it happened the Grievant voluntarily opted to leave the voyage, and no further action was taken. See IO Ex. 5.

14. Importantly, the Arbitrator found that Mr. Kilgroe does not rebut the Unions claim that he was “absolutely not” a satisfactory employee. Indeed, the “Grievant does not challenge the actual assertions of Respondents [Union, Employer, etc.] so much as he does their right to assert them in the first place.” See IO Ex. 5.

15. The Respondent filed an unfair labor complaint with the National Labor Relations Board. The Respondent’s complaint was not acted upon. Mr. Kilgroe filed an appeal therefrom which was denied. See IO. Ex’s 10 and 11.

16. The USNS SEAY has a massive engine room space which contains numerous pieces of heavy machinery. This ship has four main diesel engines, each approximately 14,000 horsepower, with associated clutches and reduction gears, driving two propeller shafts each of which are over a foot in diameter. The engine room of the ship is actually a series of interconnected rooms containing the main engines, generators, steam generating equipment, pumps and many other pieces of machinery, superheated surfaces, electrical equipment, and high-pressure fuel and hydraulic oil pipelines. As a consequence of this potentially dangerous environment, anyone working in an engine room must be constantly aware of what is going on around them, and they must be concerned with safety at all times. Someone who is not

sufficiently safety-conscious or aware of his surroundings poses a danger not just to himself, but also to the other members of the engine crew and to the vessel itself. See IO Ex. 6.

17. Mr. Robert Barret Wood, Jr., was the Chief Engineer aboard the USNS SEAY at all relevant times. See IO Ex. 8.

18. Mr. Woods stated that during “the first few days of the voyage, Mr. Kilgroe was assigned jobs where there was no direct supervision. It became evident during this period that he was incapable of performing these tasks on his own, and I elected to have supervision provided. I was concerned that he might injure himself or one of his shipmates.” See IO Ex. 8.

19. Mr. Woods also stated “that the engineering plant on board the USNS SEAY is a complicated medium speed diesel installation consisting of four 10 cylinder main engines, four diesel generator sets, and myriad of supporting equipment such as pumps, compressors, collars, and boilers, evaps and the like. There is hot, rotating equipment running at any given time on four levels throughout the plant. Mr. Kilgroe’s job requirements placed him in close proximity to this equipment throughout his workday. I became concerned for Mr. Kilgroe’s safety after observing him upon several occasion out in the engine room in an apparent stupor and seemingly oblivious to his surroundings.” See IO Ex. 8.

20. The “Act of Professional Incompetence” committed by the Respondent is that he could not safely perform his duties as a wiper from January 10, 2003 to March 11, 2003.

21. The fact that the Coast Guard stipulated to the ability of the Respondent to sweep or mop a floor is of no moment. The Respondent’s presences in the engine department created a safety threat to himself, his crewmate’s and the vessel.

22. The Respondent's request for discovery under 33 C.F.R. § 20.309 and 33 C.F.R. § 20.607 was untimely and procedurally improper.

23. The fact that the Respondent received an Expeditionary Award for serving during Operations Enduring Freedom and Iraqi Freedom does not prove that he could perform the job of wiper safely. (See Respondent's Ex. D).

24. On April 26, 2000, the Respondent submitted to a physical examination. As a result thereof, Dr. Perez found that "the applicant has the strength, agility, and flexibility to climb steep or vertical ladders; maintain balance on a moving deck; pull heavy fire hoses; rapidly don an exposure suit; step over door' sills of 24 inches in height; and open or close watertight doors that may weigh up to 56 pounds. See IO. Ex 12.

25. On more than one occasion, a deck that Respondent had mopped would be clean on one side and dirty on the other side, because the Respondent did not change the water in the mop bucket. (IO Ex. 13).

26. When sweeping, the Respondent would leave piles of dirt and would not go back and use the dustpan to get the piles. (IO Ex. 13).

27. In the process of cleaning the machine shop and disposing of scrap metal, the Respondent threw a bucket of tools and drill bits over the side into the ocean. (IO Ex. 13).

28. On one occasion, the Respondent slipped and fell on some oil. (IO Ex. 13).

29. Respondent's supervisors believed he did not have a mechanical aptitude to perform the duties of a wiper. In this regard, testimony was given that when the Respondent first came on board he was unable to identify a crescent wrench. Additionally, Respondent had to be given instructions several times. (IO Ex. 13).

30. During two abandon ship drills, the Respondent was not at his assigned lifeboat station. (IO Ex. 13). Onboard the USNS SEAY, there was a watch bill where everybody from the captain to the wipers were assigned emergency duties in the event of an emergency such as a fire, man overboard, or abandon ship. (IO Ex. 13). However, Respondent could not fit into the damage control suit and had to switch positions with the other wiper, causing confusion about who was supposed to be at which lifeboat. (Tr. at 74, 96-101) During the drill, Respondent and the other wiper ended up at the same lifeboat. (Tr. at 96-97). Respondent went back to the piece of paper listing crewmembers' stations, and after consulting the list, he again ended up at the same station. (Tr. at 100-101). Respondent subsequently clarified which boat he was supposed to be on with the officer in charge, and there were no further problems. (Tr. at 74, 96-101).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Coast Guard proved by a preponderance of the evidence that Respondent, while acting under the authority of his Merchant Mariner's Document, was "professionally incompetent" to hold a "wiper" endorsement; as it relates to his safety and the safety of the crew and vessel;
2. Assuming arguendo that the "Ordinary Seaman" and "Steward's Department" endorsement are at issue herein, the Coast Guard has not proven by a preponderance of the evidence that the Respondent is "professionally incompetent" to hold these endorsements as it relates to his safety and the safety of the crew and vessel; and
3. The Respondent's Merchant Mariner Document shall be re-issued with the following endorsements - - "Ordinary Seaman, Steward's Department (F.H.)."

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed 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). “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 showing something 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, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). The Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent, more likely than not, committed the violation so charged.

Before addressing the merits of this case, I will first address Respondent’s objections to the Coast Guard’s witnesses and exhibits. The Respondent argues that the Coast Guard’s witnesses are not credible. In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence. The findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. Appeal Decision 2639 (HAUCK) (2003). After carefully listening to the testimony of Steven Robert Callahan and Archie Morgan, I specifically find that they were credible. Additionally, I find that the

Respondent's testimony lacked credibility as to the issue of his ability to adequately perform the job duties of a wiper in the engine department from a mechanical and safety point of view. The Respondent is a convicted felon (mail fraud). (TR at 78-79). The Chief Engineer of the USNS SEAY indicated that Mr. Kilgroe was a lawyer in his other life. (See IO Ex. 8, pg 7). Whether this statement is true or not, the record does so indicate. This issue is important since this Respondent failed to properly defend himself and upon realizing his dilemma, has unjustly attacked this Judge in an attempt to somehow receive a new trial with a different Judge. Thus, the Respondent's credibility concerning his ability to safely perform the duties of a wiper must be viewed with a jaundiced eye.

After the conclusion of the hearing, Respondent filed a "Motion to Reopen to File Motion to Dismissal, Motion to Dismiss" objecting to the exhibits admitted into evidence as part of the Coast Guard's case. In response, the Coast Guard argued that Respondent's objections were untimely. The Respondent filed a Reply arguing that his objections were timely, because the Administrative Law Judge assumed all of Respondent's objections went to the weight of the evidence. Under 33 CFR 20.202, the Administrative Law Judge has the power to rule on motions and regulate the course of a hearing. In this case, Respondent had an opportunity to object to the Coast Guard's exhibits at the hearing and in fact did so. (Tr. at 19-22). Indeed, the Respondent made his objections to the Coast Guard's evidence at the hearing, and I do not see any legitimate basis upon which to allow Respondent to raise additional objections now that could have been raised at the hearing. Therefore, the Respondent's wholesale objections are denied.

In Respondent's "Brief for Decision," he argues that the undersigned should refuse evidence of the alleged offenses occurring on the USNS SEAY, because a log book was not

produced at the hearing as required by 46 U.S.C. § 11502(d). Section 11502(d) of Title 46 of the United States Code provides that the court may refuse to receive evidence if entries required by this section are not produced or proved in a subsequent legal proceeding. However, 46 U.S.C. § 11502(a) provides that entries shall be made in a vessel's logbook when an offense listed in 46 U.S.C. § 11501 is committed. Since incompetence is not one of the offenses listed 46 U.S.C. § 11501, an entry in the vessel's logbook was not required by section 11502(a). Therefore, Respondent's motion to exclude evidence from the USNS SEAY is denied.

I will now turn to the substantive issues of the case. The Coast Guard's Amended Complaint alleges that the Respondent is "Professionally Incompetent" to properly and/or safely perform his duties as a wiper. The United States Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II. The purpose of suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701 (a); 46 C.F.R. § 5.5. Title 46 U.S.C. 7703(1)(B) provides, in pertinent part, that a merchant mariner's document may be suspended or revoked if the holder, when acting under the authority that document, commits an act of incompetence.

A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR 5.57(a).

Incompetence is defined as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof." 46 CFR 5.31. "The duties required are those which are inherent in the license or document at issue." Appeal Decision 2547 (PICCIOLO) (1992); See also Appeal

Decision 328 (SKJAVELAND) (1949) (Incompetence should be based on a license or certificate holder's inability to perform duties required by license or certificate.). For the Coast Guard to prove its case, there must be evidence that tends to prove Respondent is unable to perform the required duties expected of a holder of a document with a "wiper" endorsement. Appeal Decision 2547 (PICCIOLO) (1992).

On February 23, 2004, the Coast Guard served a Complaint against the Respondent under 46 C.F.R. § 5.31 alleging "Incompetence". The factual allegations assert that 1) the Respondent was dispatched to serve as a Wiper onboard the USNS SEAY for a period of 4 to 6 months; and 2) from January 10, 2003 to March 10, 2003, the Respondent was unable to safely perform his required duties as a Wiper while onboard the USNS SEAY.

Pursuant to a prehearing objection by the Respondent that the Complaint was vague and lacked specificity, the undersigned directed the Coast Guard to amend its Complaint. By Motion filed on March 11, 2004, the Coast Guard moved to amend the original charge from "Incompetence" to "Professional Incompetence". The factual recitation did not change which argued that "the Respondent was unable to safely perform his required duties as a wiper".

46 C.F.R. § 12.25-10 (a) provides that "merchant mariner's documents shall be issued without professional examinations ... and shall be endorsed for one or more ratings ...". Thus, a merchant mariner document may be issued with only one endorsement, some combination thereof, or all of the following: Ordinary seaman, wiper, or steward's department (food handler). Given this fact, I find that the only endorsement at issue in this proceeding is the endorsement of "Wiper". However, even assuming arguendo that that Coast Guard's Complaint was sufficiently inclusive so as to encompass all three endorsements, there is clearly a lack of proof that the

ordinary seaman and/or steward's department (F.H.) endorsements should be revoked for "Professional Incompetence" because of safety considerations.

This is a case of first impression. Ordinarily, a case of "Professional Incompetence" would not lie for a person holding an entry-level merchant mariner's document. This is because the duties inherent are minimal and the document is mainly issued for identification purposes. See 46 U.S.C. §§ 7302-3. However while the duties inherent in a merchant's mariner's document with Respondent's endorsements are minimal, the holder of an MMD must be able to safely perform those duties, and if the holder poses a danger to himself, his shipmates or the vessel, then the public policy embodied in 46 U.S.C. § 7703(1)(B), 46 CFR 5.31, and 46 CFR 5.61(a)(9) clearly dictate that such a safety risk be removed. All arguments of the Respondent to the contrary are hereby rejected. Importantly, the above-recited Findings of Fact unequivocally establish that this Respondent is a danger to himself, his shipmates and the vessel when working as a "wiper" in the engine department. Indeed, 46 C.F.R. § 12.25-10 provides, in pertinent part, that a "wiper endorsement" authorizes a mariner to serve "in any unqualified rating in the engine department". Thus, if the Respondent is a danger in the engine department, the Coast Guard is required to REVOKE said endorsement.

The Coast Guard's argues that under Appeal Decision 1636 (MOZIER) (1967), the maritime industry sets the competency standards for entry-level personnel, such as a wiper. However, neither MOZIER nor any other Appeal Decisions support the Coast Guard's position. MOZIER involved a licensed engineer and did not state that incompetence standards are determined by the maritime industry. If the Coast Guard's argument were correct and incompetence standards for entry-level personnel were established by marine employers, every time a mariner was fired from a job, his/her Coast Guard credentials would be subject to

revocation proceedings. It is only where a "safety" issue is involved for an entry-level merchant mariner document position that the Coast Guard has a duty to inject itself into a employer-employee job performance dispute.

The Commandant has held that, "there is certainly a difference between the ability to perform work, and negligence in performing it." Appeal Decision 328 (SKJAVELAND) (1949).

Negligence and incompetence are not convertible terms, since one may be thoroughly competent and be negligent and while a series of acts of negligence or even a single act may so indicate the character and mental disposition as to prove incompetency, a well qualified and entirely competent person may be negligent on occasion without being incompetent. Appeal Decision 328 (SKJAVELAND) (1949).

While, the Coast Guard proved that the Respondent was a danger to himself, his shipmates and the vessel when working as a "wiper" in the engine department, there is no such proof as to his performance as an "ordinary seaman" or steward's department (F.H.). Indeed, the Coast Guard did not levy charges against the "Ordinary Seaman" and "Stewards Department" endorsements. Moreover, the Coast Guard has not submitted evidence of record that the Respondent's work as a "wiper" should be used to fatally impugn his privilege to hold "ordinary seaman" and steward's department (F.H.) endorsements. It is clear that the Respondent's work (excluding the safety component in the engine department) was sloppy and on occasion may have been performed in a negligent manner. In this case, proof that Respondent's sweeping and mopping left room for improvement is not proof that he is unable to perform the duties required of a holder of an MMD with ordinary seamen, or, steward's department (food handler) endorsements. Although there was testimony that Respondent was unable to identify a crescent wrench when he first came on board the USNS SEAY, this was Respondent's first voyage as a wiper in the engine department

and testimony that when Respondent first came aboard he could not identify a crescent wrench implies Respondent's mechanical aptitude improved during the voyage.³

ORDER

IT IS HEREBY ORDERED that the "wiper" endorsement for John F. Kilgroe's Coast Guard issued Merchant Mariner's Document be, and it hereby is, REVOKED; and

IT IS HEREBY FURTHER ORDERED, that the Coast Guard re-issue the Respondent's Merchant Mariner's Document with "Ordinary Seaman" and "Stewards Department" (F.H) endorsements.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated on this 4th day of October, 2004
Alameda, California



HON PARLEN L. MCKENNA
Administrative Law Judge
United States Coast Guard

³ Additionally, under 46 U.S.C. 7313(b), the ratings of Ordinary Seaman and Stewards Department (F.H.) are entry ratings and are not ratings as a qualified member of the engine department.