UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

JAMES MICHAEL ELSIK

Respondent.

Docket Number: CG S&R 04-0501

CG Case No. 2078778

Order Ruling on Respondent's Motion to Dismiss

Issued: April 6, 2005

Issued by: Jeffie J. Massey, Administrative Law Judge

GENERAL BACKGROUND

This administrative proceeding was initiated on September 20, 2004, when the United States Coast Guard ("USCG" herein) filed a Complaint seeking the suspension of certain documents issued to Respondent James Michael Elsik, based on alleged acts of misconduct which allegedly occurred on and after May 10, 2004, while Respondent was serving as Master of the UTV JOHN G. MORGAN. After receiving an extension,

Respondent filed an Answer and a Request for Change of Venue on November 23, 2004. The Respondent denied the factual allegations, and pled two affirmative defenses.

The original Complaint was filed pursuant to the statutory authority contained in 46 USC §7703 and the regulatory authority contained in 46 CFR §5.27 (Misconduct). Specifically, the Complaint alleged that the Respondent was operating as the Master of the UTV JOHN G. MORGAN on May 10, 2004 "when it allided with the Army Corps of Engineers Barge CE 869." The Complaint further alleged that the Respondent "did not make any notifications to Bayou Tugs Inc.[1] or the Coast Guard concerning the allision." As an apparent second allegation of misconduct, another paragraph of the first Count of the Complaint alleged that the Respondent, during the "subsequent investigation" stated "to the effect" that he had no knowledge of the allision "whereas Respondent did have knowledge of the allision." A sanction of six months suspension was proposed in the original Complaint.

On December 20, 2004, a telephonic Pre-Hearing Conference was conducted. During that conference, a number of procedural issues were addressed. In addition, the undersigned questioned the USCG as to how it proposed to get into evidence any statements made by the Respondent during the Marine Casualty Investigation conducted by the USCG, in view of the provisions of 46 CFR §5.101(b).[2] It was suggested that an

[1] It appears from the record that Bayou Tugs, Inc. was the employer of the Respondent on May 10, 2004.

[2] 46 CFR §5.101(b) provides: "In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation under this part or part 4 of this title may be used against that person in a proceeding under this part, except for impeachment." Part 4 of Title 46 is entitled "Marine Casualty Investigations."

Amended Complaint would be in order. The USCG indicated that it would amend its Complaint on or before January 4, 2005.

An Amended Complaint was, in fact, filed on December 30, 2004. This Complaint invoked the statutory authority of 46 USC §7703(b) and the regulatory authority of 46 CFR §5.27 (Misconduct) and §5.29 (Negligence). Two separate allegations of Misconduct were alleged—each was materially different from the allegations in the original Complaint. Added to the charges was an allegation of Negligence.

Quickly following the filing of the Amended Complaint, the Respondent filed an Amended Answer, a Motion for Interrogatories, a Motion for Continuance (of the February 3, 2005 hearing date previously established), and a Motion to Dismiss (Counts 2 & 3 of the Amended Complaint). (All filed on or about January 3, 2005.)

On January 6, 2005, the undersigned issued an Order (1) granting the Motion for Continuance (and soliciting input from the parties for the establishment of a new hearing date), (2) allowing service of the Interrogatories, (3) establishing a briefing schedule for Memorandums of Law in support of and in opposition to the Motion to Dismiss; and, (4) requiring the parties to brief an additional issue concerning the applicability of the 5th Amendment privilege against self-incrimination to Marine Casualty Investigations.[3]

The Respondent's Motion to Dismiss (and subsequent Memorandum of Law in Support of the Motion to Dismiss) presented arguments in favor of dismissal (with

[3] The USCG has vigorously criticized the undersigned for acting so swiftly on the Respondent's Motion for Continuance and Motion for Interrogatories. Ironically, at the same time, the USCG has complained that this proceeding was not moved along in a suitably expeditious manner by the undersigned.

prejudice) of both Misconduct allegations contained in the Amended Complaint. In addition, the Respondent argued that the 5th Amendment privilege against self-incrimination (and its *Miranda* doctrine) was applicable to custodial interrogations that took place during the course of a Marine Casualty Investigation by USCG officials. The USCG's Memorandum of Law argued positions opposite to those of the Respondent. Their respective arguments will be summarized below, to the extent necessary for an explanation of the conclusions reached in this Order.

SPECIFIC BACKGROUND

In advance of the issuance of this Order, I have carefully reviewed the Respondent's arguments in support of his Motion to Dismiss and the USCG's counter arguments in the context of the entire record of this proceeding. I have carefully reviewed and considered every legal authority cited by the parties, as well as every legal authority that I could discover that related to those authorities cited by the parties. I have carefully reviewed and considered the provisions of Subtitle II (Vessels and Seamen) of Title 46 (Shipping) United States Code[4], Part 4 of 46 CFR (Marine Casualties and Investigations), 46 USC §7703(b), 46 CFR §5.27 (Misconduct), 46 CFR §5.101(b), 18 USC §1001, and 46 USC §2303. I have specifically reviewed the provisions of the Marine Safety Manual as they pertain to Marine Casualty Investigations (Chapter 3) and Personnel Investigations – Procedures Against Licenses and Documents (Chapter 2).

[4] With special consideration and review given to the provisions of Part D (Marine Casualties), Chapter 61 (Reporting Marine Casualties).

The arguments presented by the parties have been creative and, with respect to the Respondent's arguments, persuasive.[5] My consideration of these issues has taken considerable time. I found it necessary to take the unusual step of convening an in-person conference to discuss the issues raised by the Motion to Dismiss and the Respondent's Motion for Sanctions. This conference, held on the record in Houma, Louisiana on March 22, 2005, resulted in the clarification and amplification of issues and arguments relative to the Motion to Dismiss and the Motion for Sanctions.[6]

Because of the very large amount of information that I have considered in reaching the conclusions outlined in this Order, I do not find it feasible to attempt to discuss every nuance of the issues at hand in this Order. On reflection, I decided that a hyper-detailed presentation would not enhance the reader's understanding of my rulings or the arguments presented by the parties. Accordingly, in this document, I have endeavored to present the essentials of the arguments and the essentials of facts and authorities that impact the conclusions I reach herein.

It should be noted that this Order disposes of only two of the three counts in the Amended Complaint. The allegation of Negligence remains intact, so far as this document is concerned. Further, I do not find it necessary to discuss or decide the issue of application of the 5th Amendment to the Constitution to Marine Safety Investigations. I will say only that if I had not decided to dismiss with prejudice the second allegation of

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[5] Respondent has been ably represented by an attorney. The Investigating Officers have done an admirable job dealing with difficult legal issues. Apparently, they sought the assistance of an attorney (from the D8 Legal Staff), which, under the circumstances of this case seemed appropriate.

[6] Filed by the Respondent after the USCG refused to substantively respond to Interrogatories I authorized for service.

Misconduct contained in the Amended Complaint, I would have, at the appropriate point in time, conducted a hearing specifically designed to elicit testimony about the questioning of the Respondent by USCG officials so as to be able to determine the fact question of whether or not a "custodial interrogation" took place during the Marine Casualty Investigation of the alleged events of May 10, 2004. I also do not find it necessary to discuss or decide in this Order the issue of whether the USCG is prohibited, per the provisions of 46 CFR §5.101(b), from relying on statements made by the Respondent during the course of the Marine Casualty Investigation (The statements which form the basis of the allegations in the second Misconduct allegation.)

DISCUSSION

STATUTORY AUTHORITY OF AMENDED COMPLAINT

The Amended Complaint invokes the statutory authority of 46 USC §7703(b)[7] which provides:

> A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder –
>
> * * *
>
> (B) has committed an act of incompetence, misconduct, or negligence; . . .

The original Complaint invoked the statutory authority of "46 USC 7703." I note that §7703 actually contains four different "options" or different bases for suspending or revoking a USCG issued credential. I believe the identification of a sub-paragraph is the appropriate way to identify statutory authority for a complaint. Where appropriate, the

[7] The technically correct cite would be to "46 USC §7703(1)(B)."

USCG could even designate more than one sub-paragraph as authority for the proceeding.

On its face, it seems appropriate that, in this proceeding, the Amended Complaint invokes only the authority of sub-paragraph (1)(B), because that is where the authority for charging misconduct violations is contained. Misconduct is defined as follows:

> *Misconduct* is 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, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.[8]

I find it necessary to point out the change in statutory authority that occurred between the original Complaint and the Amended Complaint for two reasons: First, at the in-person conference, Respondent's counsel made a point of this change in support of his arguments in his Motion to Dismiss. Second, in its Memorandum in opposition to the Motion to Dismiss, the USCG cites not to §7703(1)(B), but to §7703 (1)(A) in support of its arguments, as if the original Complaint was still in place in this proceeding.[9]

With respect to the Amended Complaint--the charging document that is now before me--the provisions of §7703(1)(A) are not available to the USCG as support for its arguments in opposition to the Motion to Dismiss. The distinction between the authorities granted via (1)(A) and (1)(B) is an important one. If the Amended Complaint invoked the authority of §7703(1)(A), then the USCG would be entitled to argue that the decision to charge the Respondent with violations of criminal statutes was authorized

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[8] 46 CFR §5.27.

[9] At page 4.

under the theory that the Respondent had violated a "law or regulation intended to promote marine safety or to protect navigable waters . . ." In fact, this was the argument advanced during the in-person conference and in the USCG's Memorandum of Law filed in opposition to the Motion to Dismiss. With the change in Statutory Authority to (1)(B), this argument is no longer available to the USCG.

Lest the USCG decide that they should argue, on appeal of this Order to the Commandant, that they should *now* be allowed to amend the Amended Complaint to expand the statutory authority relied on to include §7703(1)(A), let me digress from the real issues at hand long enough to say their argument would still fail. Although they have been given ample opportunity to identify controlling authority to support their argument that 18 USC §1001 and/or 46 USC §2303 are laws "intended to promote marine safety or to protect navigable waters", they have failed to do so.[10] As will be discussed fully below, I am not of the opinion that allegations of criminal conduct belong in a Suspension & Revocation ("S&R" herein) proceeding, which by law, is purely a remedial proceeding "and not penal in nature." See 46 CFR §5.5, "Purpose of Administrative Actions."

THE FIRST MISCONDUCT ALLEGATION

Turning to the second count in the Amended Complaint—the first Misconduct allegation—the essence of the allegation is that while acting as the Master of the UTV JOHN G. MORGAN, the Respondent allided with a barge, which constituted a "Marine

[10] For the reasons discussed infra, the decision in **BENNETT (Appeal Decision 2610 (1999))** does not accomplish this objective. Nowhere in BENNETT is it held that §1001 is a law intended to promote marine safety or to protect navigable waters.

Casualty" (as defined in 46 CFR §4.03-1(b)); then, the Respondent failed to render necessary assistance or provide identifying information to the barge involved in the allision, as required by 46 USC §2303(a). 46 USC §2303 (a) & (b) provides as follows:

> (a) The master or individual in charge of a vessel involved in a marine casualty shall -
> (1) render necessary assistance to each individual affected to save that affected individual from danger caused by the marine casualty, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or to individuals on board; and
> (2) give the master's or individual's name and address and identification of the vessel to the master or individual in charge of any other vessel involved in the casualty, to any individual injured, and to the owner of any property damaged.
> (b) An individual violating this section or a regulation prescribed under this section shall be fined not more than $1,000 or imprisoned for not more than 2 years. The vessel also is liable in rem to the United States Government for the fine.[11]

The Respondent argues that, because §2303(b) provides a criminal penalty for violation of §2303(a), an Administrative Law Judge ("ALJ" herein) does not have the authority or jurisdiction to enforce this statute because S&R proceedings are "remedial" and not "penal" in nature. (Per the previously cited 46 CFR §5.5.) In further support if his argument, Respondent cites to *Bulger v. Benson*, 262 F. 929 (9th Cir. 1920).

The underlying facts of *Bulger v. Benson* are somewhat analogous to the facts at hand. Those underlying facts involved a government entity charging a violation of a law which provided a specific penalty against a "licensed officer of steam vessels." Once it was decided that a violation of law had occurred, the government entity then suspended

[11] Subsection (c) of this provision is not relevant to the discussion here, so it has been omitted.

the license of the officer—a punishment which was not provided for by the law alleged to have been violated. (That law provided only for the assessment of a monetary fine.) Because the "violated law" did not provide for a suspension of the licensee's document, the Court held that the government entity had exceeded their authority.

So far as I can tell, the Court's decision in *Bulger v. Benson* has never been discredited or overturned by a court of competent jurisdiction. In an attempt to discredit the validity of *Bulger*, the USCG has cited to a Commandant Decision on Appeal (**STEPKINS (Appeal No. 1574 (1966))**, for the proposition that *Bulger* has "no vitality."

I have read the opinion in STEPKINS several times. With all due respect, I find it to be peculiar. The most troubling aspect of the opinion is the fact that the Commandant concludes that the opinion in *Bulger* "has no vitality" because the Commandant construes the opinion of the Court of Appeals in such a way as to *sua sponte* void the conclusions reached therein. In other words, it appears that the Commandant decided to ignore the specific rulings of the Court of Appeals in Bulger because he believed the Court was "wrong."[12]

I brought up this issue at the in-person conference, and asked the USCG to provide me with any authority they could find that would allow me to follow the Commandant's lead in STEPKINS, and disregard a Court of Appeals decision. In its post-conference submission, the USCG refused to do so, stating:

> The Coast Guard will respectfully not provide such an analysis on whether the Commandant has the authority

[12] The Commandant's exact language is: "In such construction I could assert very simply that the Court of Appeals in 1920 was wrong in stating that when a statute provides a monetary penalty for its breach, and does not mention suspension of a license as a result, no action to suspend the license may be taken."

> to disregard a federal court decision, as it is not an issue relevant to adjudicating the Complaint.[13]

That response rivals the STEPKINS decision in its creativity—the USCG cites to a case as support for a legal argument it is advancing then argues that the validity of that decision is not relevant. I find that logic to be as peculiar as that in the STEPKINS decision.

As a licensed lawyer (an "officer of the court") and an ALJ, I don't share the same freedoms as, apparently, the Commandant enjoyed in 1966. I am not free to discard the clear ruling of a Court of Appeals. I decline to so discard *Bulger v. Benson* now.

Separate and apart from *Bulger*, there are numerous statutory/regulatory proceedings which govern Marine Casualty Investigations and S&R proceedings which consistently require a separation of functions, all designed to prevent Marine Casualty Investigations and S&R proceedings from becoming a forum where blame is fixed or criminal conduct is assessed. First, as cited above, 46 CFR §5.5 identifies S&R procedures as remedial "and not penal in nature." Consistent with this philosophy, consider 46 CFR §5.569[14]:

> Evidence of criminal liability discovered during an investigation or hearing conducted pursuant to this part will be referred to the Attorney General's local representative or other appropriate law enforcement authority having jurisdiction over the matter.

Further, consider the provisions of 46 CFR §4.07-1(b):

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[13] At page 5.

[14] Contained in Part 5 "Marine Investigations Regulations—Personnel Action", Subpart C (Statement of Policy and Interpretation). The *same Part* that contains the definition of Misconduct.

> The investigations of marine casualties and accidents and the determinations made are for the purpose of taking appropriate measures for promoting safety of life and property at sea, **and are not intended to fix civil or criminal responsibility.** [emphasis supplied]

Also see 46 CFR §4.23-1:

> If as a result of any investigation or other proceeding conducted hereunder, evidence of criminal liability on the part of any licensed officer or certificated person or any other person is found, such evidence **shall** be referred to the U.S. Attorney General. [emphasis supplied]

These last two sections are contained in Part 4 (Marine Casualty Investigations) of 46 CFR. The plain language of these provisions compel me to conclude that allegations of Misconduct that are based on an alleged violation of 46 USC §2303 have no place in a S&R proceeding. In fact, how can I avoid concluding that the "duly established rule[s]" referred to in the Misconduct definition do NOT include criminal laws when §5.69 specifically requires that "*evidence of criminal liability discovered during an investigation or hearing conducted pursuant to this part*" **must** be referred to another entity "having jurisdiction over the matter." To read the definition of Misconduct as embracing criminal statutes within the meaning of "duly established rule[s]" would be to render §5.69 *completely meaningless and superfluous.*

The USCG suggests that the logic of **BENNETT** somehow expands beyond itself so as to authorize the USCG to charge a Respondent with Misconduct anytime the USCG believes a Respondent's actions have violated a criminal statute—any criminal statute—but in this case, especially 46 USC §2303.

In the **BENNETT** case, the Appellant was charged with Misconduct because he sent in a fraudulent sea time letter in support of an application for an increase in grade on an existing USCG issued credential. The Appellant challenged the ALJ's finding that submission of a fraudulent sea time letter was "human behavior which violates some formal, duly established rule." The Commandant affirmed the ALJ's cite to 18 USC §1001, and without explanation, stated that this statute was an appropriate source of a "formal duly established rule." This decision does not reconcile its rationale with the regulations I have cited above, any and all of which call into question the validity of the use of a criminal statute as a basis for an act of Misconduct.

To support the conclusion that the charge of Misconduct was applicable to the Appellant's case, the Commandant noted that "In submitting a license application to the Coast Guard, Appellant was required to submit true and accurate information [per the instructions on the application itself]." Because the Appellant failed to do that which was required of him, the Commandant found that a charge of Misconduct was appropriate. This fact that a license application requires, on its face, the submission of truthful information appears to be the salient fact in this case—the fact that bridges a remedial proceeding (S&R action) to a criminal statute.

In this proceeding, the USCG relies exclusively on the BENNETT case as support for its bid to expand the use of criminal statutes in Misconduct cases. The USCG argues that, because the Commandant found that use of 18 USC §1001 was appropriate under the facts of **that** case, the use of a separate and distinct criminal statute in **this** proceeding as a basis for a Misconduct charge is also authorized.

Despite the USCG's arguments to the contrary, I have concluded that BENNETT is a unique event—not the tip of an iceberg, as argued by the USCG. I have reached this conclusion because the logic of BENNETT flies in the face of the statutes and regulations I have cited herein—a contradiction that the USCG has not even attempted to explain, and possibly refuses to recognize. Significantly, the BENNETT decision does not mention the statutes that I have cited, above. Indeed, the BENNETT decision does not even acknowledge their existence. To expand BENNETT as suggested by the USCG in this proceeding, I would have to conclude that the regulations which provide for the separation of evidence of criminal conduct from a remedial proceeding, such as a S&R proceeding, were superfluous and meaningless. I am not willing to relegate those statutes to an obsolete status.

Besides the authorities cited above, which specifically identify S&R proceedings as remedial (not penal) and direct that evidence of suspected criminal activity be referred to the Department of Justice, the statutory source of these regulations further buttress my conclusion as to the impropriety of attempting to use §2303 as a charging statute in a S&R proceeding. Specifically, I am referring to 46 USC §6301, "Investigation of Marine Casualties."

This statute authorizes the USCG to prescribe regulations for the investigation of Marine Casualties, so as to determine (1) the cause of the casualty; (2) whether misconduct, incompetence, negligence, unskillfulness, or willful violation of law by a licensed individual contributed to the casualty, "*so that appropriate remedial action under Chapter 77 of this title may be taken* [emphasis added]; (3) whether any similar act committed by a member of the USCG contributed to the casualty; (4) whether there is

evidence of an act which submits the actor to a civil penalty under the laws of the United State, so that appropriate action may be undertaken to collect the penalty; (5) "whether there is evidence that a criminal act under the laws of the United States has been committed, *so that the matter may be referred to appropriate authorities for prosecution* [emphasis supplied]"; and (6) whether new laws or regulations are needed or existing laws or regulations need to be repealed, to prevent the recurrence of the casualty.

The regulatory scheme applicable to the investigation of marine casualties clearly separates (1) evidence of conduct to be dealt with through remedial action from (2) evidence of criminal conduct, which is to be referred to an authority outside of the USCG for prosecution. The difference in the two is basic: one system is for actions against documents (S&R proceedings) and the other system is for actions against individuals (criminal prosecutions).

In this proceeding, the *only* way that I could conclude, after a hearing on the merits, that the second count of the Amended Complaint had been proven, would be to determine whether the Respondent failed to render necessary assistance or provide identifying information "*as required* by 46 USC §2303(a). [emphasis supplied]" In other words, to render a decision that was in favor of the USCG on this count, I would have to step into the shoes of a criminal court judge to determine if the evidence satisfied the evidence that was *required* by §2303(a).

I am authorized to preside over S&R proceedings—proceedings which are only remedial in nature. What authority do I have to make determinations on issues of penal responsibility? Clearly, per the statutory scheme that is in place, such matters are to be referred to another authority for determination.

THE SECOND MISCONDUCT ALLEGATION

Turning to the last count of the Amended Complaint—the second Misconduct charge, the essence of the allegation is that during the USCG's investigation of the alleged allision, the Respondent (1) stated he had no knowledge of the allision; (2) stated "to the effect that he had no knowledge of the allision whereas the Respondent did have knowledge of the allision. This is a violation of 18 USC §1001, as the Respondent made statements containing false information, including both written statements on a CG-2692 and verbal statements to the Investigating Officer on-scene."

Stated another way, the USCG alleges that the Respondent violated §1001 when he denied, on a CG-2692 and orally, that he had no knowledge of the allision. Respondent's initial challenge to this count of the Amended Complaint is based on the fact that S&R proceedings are remedial, and not penal in nature. The Respondent then argues:

> Clearly, 18 U.S.C. §1001 is a criminal statute because it is a federal law which was enacted by Congress defining and setting forth punishment for specific conduct. Accordingly, since this proceeding is not criminal in nature, but rather is remedial, it logically follows that the ALJ does not have jurisdiction under 46 U.S.C. §7703 to decide whether that criminal statute was violated by Mr. Elsik.

Respondent then goes on to argue that there is no authority for me to change my role from an adjudicator within the Executive Branch to a legislator within the Legislative Branch by possibly suspending the Respondent's credentials (if I found a violation of §1001) instead of imposing a fine or imprisonment, which Congress required as a result of a violation of §1001 by using the word "shall" in the statute.

The logic of this argument makes sense to me. But more important than its logic, is the fact that this argument is consistent with the regulatory scheme that operates as a separation of functions (S&R proceedings for remedial actions; referral to other authorities for criminal violations) discussed *supra*. This argument is also supported by *Bulger*, also discussed *supra*.

The USCG's sole challenge to this logic is—again—the decision in BENNETT. At the in-person conference I challenged the USCG to point out to me the language in BENNETT that suggested that §1001 was an appropriate statute to base a charge of Misconduct on *outside of a fraudulent application case*. Specifically, I challenged the USCG to point out to me language in BENNETT that suggested that a false statement on a CG-2692 was, under the logic of BENNETT, a valid basis for a Misconduct charge. Remember—on an application for a license renewal of upgrade, specific language requires the applicant to submit truthful information. (An examination of CG-2692 reveals that no such caveat is included.) The USCG was unable to point to that language in BENNETT at the in-person conference. In their post-conference brief, they argued that " . . . the Commandant did not restrict the analysis to [the licensing process] or to the false document provided by the Appellant . . . " They added:

> No decision could be found where the Commandant directly addressed a situation wherein a mariner had provided a false statement to the Coast Guard on a CG-2692. However, the Coast Guard asserts that BENNETT stands for the proposition that providing a false statement in derogation of 18 USC §1001 is chargeable as misconduct under 46 CFR §5.27 because it is a violation of a "formal duly established rule."

The above-statement assumes that providing a false statement on a CG-2692 is a "derogation" of §1001—that assumption goes to the basic issue here: Is providing a false statement on a CG-2692 the legal equivalent of providing a false statement on a license application? The USCG has failed to identify any authority which has held that a person who provides false information on a CG-2692 violates the general penal provisions of §1001. Instead, the USCG bootstraps its conclusion (that a false statement on a CG-2692 is a violation of §1001) by assuming he truth of the very conclusion that is necessary to reach the conclusion it espouses. Remember, the CG-2692 has no requirement on its face (as does the license application) that the person filling out the form is required to provide accurate information.[15]

If I were to find in this case that BENNETT authorized the USCG to bring a charge of misconduct for an alleged violation of §1001, based on a statement contained in a CG-2692 (or an oral statement made during the course of a marine casualty investigation), I would be blurring the lines between remedial proceedings and penal proceedings, and stretching the limits of my jurisdiction in a way that I cannot find is authorized under existing statutes, regulations, or judicial authority. I also would be extrapolating the finding in BENNETT to facts that were not before the Commandant when he issued that opinion. I decline to do either one of those things.

CONCLUSION

Based on the record of this proceeding, and after considering all of the arguments presented by the parties, and in consideration of the authorities discussed herein, I find

[15] Paragraph 8 in the "Instructions" section of the form states: "This form should be filled out as completely and accurately as possible."

that basing a charge of Misconduct on an allegation that 46 USC §2303(a) has been violated is outside the legal (statutorily intended) scope of a S&R proceeding, and thus outside of my jurisdiction. I further find that basing a charge of Misconduct on an allegation that 18 USC §1001 has been violated *outside the circumstances of a fraudulent license application*, is outside the legal (statutorily intended) scope of a S&R proceeding, and thus outside of my jurisdiction.

Based on these findings, both of the Misconduct counts contained in the Amended Complaint in this proceeding are dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED that the second and third counts of the Amended Complaint (both Misconduct allegations) are dismissed with prejudice. The count alleging Negligence becomes the only viable count in the Amended Complaint.

Done and dated April 6, 2005
New Orleans, Louisiana

JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
DEPT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded the attached document to the parties by the methods indicated:

ENS Matthew Spolarich
U S Coast Guard
Morgan City MSO
800 David Drive Room 232
Morgan City, LA 70380
(by regular mail)

J. Mac Morgan
Attorney At Law
879 Robert E. Lee Boulevard
New Orleans, LA 70124
(by regular mail)

ALJ Docketing Center
U.S. Custom House, Room 412
40 S. Gay Street
Baltimore, MD 21202
(by FedEx)

Livia Torres

Livia Torres, Paralegal to
Jeffie J. Massey
Administrative Law Judge

Done and Dated on April 6, 2005 at
New Orleans, Louisiana