

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

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UNITED STATES COAST GUARD

Complainant

vs.

TERRY M. GRAHAM

Respondent

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Docket Number CG S&R 04-0069  
CG Case No. 1982128

**ORDER GRANTING REQUEST FOR THE ISSUANCE OF A TEMPORARY LICENSE**

**Issued: December 19, 2005**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

Procedural History

This matter came to be heard on Respondent's request for a temporary license pending appeal. In its Decision and Order, dated November 16, 2005, the Undersigned suspended Respondent's Merchant Mariner's License after finding PROVED the Coast Guard's Complaint alleging negligence in that Respondent failed to post a lookout in violation of Rule 5 of the Rules of the Road (Inland Navigation Rules). The additional allegations of Negligence for failure to maintain safe speed (Rule 6) and negligently committing an act or failing to perform an act that contributed to a collision were found NOT PROVED. Respondent's Merchant Mariner's License was suspended for a period of six (6) months outright.

## Law

An individual may seek the issuance of a temporary license pursuant to 46 CFR 5.707(a), which states:

A person who has appealed from a decision suspending outright or revoking a license, certificate or document, except for revocation resulting from an offense enumerated in § 5.59, may file a written request for a temporary license, certificate or document. This request must be submitted to the Administrative Law Judge who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.

Title 46 CFR Section 5.59, **Offenses for Which Revocation of Licenses, Certificates or Documents is Mandatory** lists offenses for which an Administrative Law Judge enters an order of revocation upon conviction or determination of a proven charge. This section essentially applies to offenses associated with the use, possession, sale, association or conviction involving dangerous drugs. As applied to the offense charged in this matter, Section 5.59 is not relevant to the determination of Respondent's request for temporary license.

Title 46 CFR Section 5.707(c) prescribes the criteria for the issuance of a temporary license and states:

A determination as to the request [for the issuance of a temporary license] will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the applicant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary document or license may be denied for that reason alone.

Title 46 CFR Section 5.61(a), **Acts or Offenses for Which Revocation of Licenses, Certificates, or Documents is Sought** lists eleven (11) enumerated offenses, none of which

pertain to the charge of Negligence as applied in this matter. Therefore, Section 5.61(a) is also not relevant to the determination of Respondent's request for temporary license.

### Decision

Respondent file his Request for Issuance of Temporary License ("Request") on December 2, 2005, following his December 1, 2005 Notice of Appeal. Respondent seeks a temporary license to offset financial concerns during the pendency of his appeal in accordance with the regulatory provisions found in 46 CFR Part 5.

On December 14, 2005, the Coast Guard filed its Response to Respondent's Motion Requesting a Temporary License ("Response"). The Coast Guard opposes Respondent's Request. It supports its position based on the facts found in the record, which notably, are on appeal and are not considered to be final agency action and also argues "due to the fact that the Respondent has personally shown an inability to understand the requirements of Rule 5, Lookout, and there is no proof of remediation of this inability ..., therefore, the respondent has not personally met the requirements for being safe at sea."

On December 15, 2005, Respondent filed a Memorandum in Support of the Issuance of a Temporary License ("Memorandum"). Respondent argued issuing a temporary license is compatible with the regulatory requirements noting that he has an unblemished record before, during, and after these proceedings; that he surrendered his license in compliance with the issuance of the Initial Decision and Order; and, that "there is no evidence that issuing the temporary license would compromise safety in any way."

A temporary license “inquiry serves to balance two conflicting policies: first, removal of an unfit mariner from the industry and elimination of further risk of harm to the public and, second, protection of an accused mariner’s due process right to state his case on appeal without having already suffered the penalty, as well as the financial hardship, imposed by the decision at the hearing level.” Appeal Decision 2499 (AILSWORTH) (1990).

An “appellant’s application for a temporary license is not an opportunity to re-litigate the factual and legal issues surrounding the Coast Guard’s” Suspension and Revocation (“S&R”) proceeding but whether or not the Coast Guard “has satisfied its obligation under the Administrative Procedure Act (“APA”) to explain why [the] appellant is ineligible for a temporary license....“ Commandant v. Moore, NTSB Order No. EM-200 (2005). Simply stated, the Coast Guard must articulate an explanation on why this Respondent’s particular application for temporary license warrants denial. An argument restating the underlying offense or a statement of policy is insufficient to support a denial of a temporary license. See id.; see also, Appeal Decision 2499 (AILSWORTH) (1990) (finding that an ALJ may not justify the denial of a temporary license in a non-presumption case by simply restating, without more, the charges and specifications of the case).

Here, the Coast Guard’s overall argument is that Respondent, having been found negligent in the underlying proceeding is not eligible for a temporary license because he has failed to take efforts to remediate himself. The argument is similar to that raised in Commandant v. Lyons, 5 NTSB 2678 (Order EM-142, 1987), where a temporary license denial was based on the position that “appellant is likely to repeat the behavior that led to the [allegation] charged....”as indicated by an arrest history that had not been fully adjudicated. In reaching its

opinion, the National Transportation Safety Board (“NTSB”) found that the former rule under 46 CFR 5.565(a)(4) which precluded consideration of “unproved charges” in arriving at a sanction, also applied when considering whether or not a temporary license should be denied. Today’s 33 CFR Part 20 rules governing Suspension and Revocation Proceedings contain a similar provision. See 33 CFR 20.1315. The Coast Guard’s argument cannot be supported on the singular basis that Respondent is somehow required to show rehabilitation or remediation for an allegation that has not yet reached final agency action. This is not to say, however, that underlying matters cannot be considered when determining whether or not an individual should, or should not, be issued a temporary license. See Appeal Decision 2405 (LEON) (1985), Appeal Decision 2397 (GEWANT) (1985), Appeal Decision 2372 (COLLA) (1984), Appeal Decision 2318 (STRUDWICK) (1983).

Further, the Commandant has stated that the “nature of the offense is not the only circumstance which may bear upon whether the service of a particular person on board a vessel is compatible with the requirements for safety of life and property at sea ....” Appeal Decision 2343 (WILLIAMS) (1984). “The relevant factors to be balanced also include the circumstances surrounding the offense and its severity or seriousness” and “must also consider other evidence presented by the Appellant concerning his fitness to hold a temporary license or document.” Id.

Here, Respondent has an unblemished record and has operated safely under his Coast Guard issued credentials for many years. Aside from the overall finding in the underlying allegation of negligence, there is nothing in the record that demonstrates Respondent would not abide by the rules and regulations or that he would present a threat to safety at sea during this

time on appeal. See Appeal Decision 2329 (FIFER, II) (1983). It is noted that the charge of negligence is based on an “act” and is not imbedded with intent or knowledge or forethought.

In sum, the Coast Guard has not articulated any *individual* reason or basis as to why the issuance of a temporary license to Respondent is not compatible with the requirements for safety at sea. See Commandant v. Moore, NTSB Order No. EM-200 (2005), Commandant v. Amoury, 3 NTSB 4532 (Order EM-94, 1981). There is no presumption against the issuance of a temporary license in this matter and while the underlying event resulted in catastrophic consequences, nothing has been submitted nor does the record indicate any action on the part of Respondent that would suggest he remains a threat to safety at sea if he was issued a temporary license during this appellate period. A “denial of Appellant’s request for temporary license would have to be supported by evidence sufficient to enable a reasonable predictive judgment that Appellant’s continued service would be incompatible with safety at sea” Appeal Decision 2499 (AILSWORTH) (1990) and also require a brief statement of the grounds for denial as required by 5 U.S.C. 555(e). Given all the above, Respondent’s Request for Issuance of Temporary License is hereby GRANTED.

WHEREFORE,

**ORDER**

IT IS HEREBY ORDERED that Respondent be issued a Temporary License as provided by the rules found at 46 CFR 5.707.

Done and dated December 19, 2005  
New York, NY

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**WALTER J. BRUDZINSKI  
ADMINISTRATIVE LAW JUDGE  
U.S. COAST GUARD**

## Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

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