

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

UNITED STATES COAST GUARD

Complainant

vs.

Teak Borchardt,

Respondent.

Docket Number CG S&R 06-0189  
CG Case No. 2612956

**ORDER GRANTING SUMMARY DECISION**

**Issued: September, 1 2006**

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

**Appearances:**

**For Complainant**

LT. Randy S. Waddington  
U.S. Coast Guard  
Marine Safety Office Juneau  
2760 Sherwood Lane, Suite 2A  
Juneau, AK 99801

**For Respondent**

H. Clay Keene, Esq.  
Keene & Currall,  
540 Water Street – Suite 302  
Ketchikan, AK 99901

BALTIMORE, MD

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ALJ: P. MCKENNA  
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## PRELIMINARY STATEMENT

On April 14, 2006, the United States Coast Guard ("Coast Guard") filed a Complaint against Respondent, Teak Borchardt ("Respondent") alleging that the State of Alaska convicted him of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages on February 24, 2006. The Coast Guard argues that Respondent should therefore have his Coast Guard license and Merchant Mariner's Document ("MMD") suspended outright for one month under 46 U.S.C. 7703(3).

On May 16, 2006, Counsel for Respondent filed an Entry of Appearance, a Request for Extension of Time, and an Answer to the Coast Guard's Complaint. Respondent admits the Jurisdictional Allegations, but partially denies the Factual Allegations taking issue with the word "convicted." Respondent admits pleading guilty to Operating a Motor Vehicle Under the Influence of Alcoholic Beverages but draws a distinction between "conviction" and "pleading guilty." In addition, Respondent seeks leniency since he self-reported the incident to the Coast Guard and because he has already suffered the following penalties: 72 hours in the Ketchikan State Correctional Facility, \$1,500 DUI fine, \$270 imprisonment fine, 90 day driver's license suspension, 30 day employment suspension, and a \$12,000 loss of income.

On May 30, 2006, the Coast Guard moved for Summary Decision under 33 CFR 20.901 on the grounds that there is no genuine disputed issue of material fact. Indeed, since the State of Alaska convicted Respondent of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages, the Coast Guard argues that it is entitled to a decision as a matter of law.

On June 6, 2006, Respondent filed an Opposition to Motion for Summary Decision and Cross-Motion for Summary Decision. Respondent contends that there are genuine issues of material fact that would preclude a summary decision on the Coast Guard's proposed order. In the alternative, Respondent argues that given the penalties the State of Alaska already imposed, any further sanction against his Coast Guard license and Merchant Mariner's Document is unwarranted.

On June 14, 2006, the Coast Guard and Respondent filed a Joint Motion for Summary Decision indicating their agreement to Summary Decision in lieu of a formal hearing. The joint motion requests that the decision be made on the record with evidence and arguments currently before the Undersigned.

#### **FINDINGS OF FACT**

1. At all relevant times, Mr. Borchardt was the holder of a Coast Guard license and Merchant Mariner's Document.
2. On February 11, 2006, Mr. Borchardt was arrested for Driving Under the Influence of an Alcoholic Beverage while driving his employer's vehicle. The vehicle was impounded as a result of the arrest.
3. On February 24, 2006, Mr. Borchardt pled guilty to Driving Under the Influence of an Alcoholic Beverage.
4. On February 24, 2006, the State of Alaska adjudged Mr. Borchardt guilty of Driving Under the Influence of an Alcoholic Beverage.
5. On February 24, 2006, the State of Alaska sentenced Mr. Borchardt to a \$1,500 fine, 72 hours of incarceration, a 90 day driver's license revocation, a one year

disqualification from driving a commercial motor vehicle, a one year probation, and other miscellaneous fees and costs.

6. On February 24, 2006, Mr. Borchardt disclosed the details of this incident to the Coast Guard.

### **DISCUSSION**

Respondent did not file his Answer to the Coast Guard's Complaint within 20 days of the April 14, 2006 service date as required by 33 CFR 20.308(a). Respondent's Counsel indicates the late filing resulted from oversight of Counsel and not from Respondent's neglect. The late Answer will be accepted.

#### **I. Standard of Proof**

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and Revocation Proceedings. 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 [United States] Supreme Court." Appeal Decision 2477 (TOMBARI) (1998). The burden of proving a claim 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 Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

Under Coast Guard substantive and procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701-702(a). Therefore, the Coast Guard must prove with reliable, substantial and probative evidence that Respondent more likely than not satisfied the requirements for liability.

## **II. Summary Decision**

The parties have jointly filed a motion agreeing to Summary Decision in lieu of a formal hearing. The parties' joint motion is hereby granted and this case will be decided on the record currently before the Undersigned.

### **A. No Genuine Issue of Material Fact**

The Coast Guard has alleged in its Complaint that on February 24, 2006 the State of Alaska convicted Mr. Borchardt of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages. The record herein includes a copy of the Judgment indicating that Respondent pleaded guilty to this crime and that the State of Alaska indeed adjudged him guilty thereof.

Respondent takes issue with the word "conviction" as used in the Coast Guard's Complaint stating that Respondent pled guilty and was therefore not convicted of the aforementioned crime. For the purpose of 46 U.S.C. 7703, the Coast Guard treats a guilty finding predicated on a guilty plea as a "conviction" despite that there was no trial or jury finding. 33 CFR 20.1307(d). This is not a novel concept unique to the Coast Guard. On the contrary, courts do not generally draw a distinction between an adjudication of guilt predicated on a guilty plea and one predicated on a jury verdict. See, e.g., White v. Department of Justice, 328 F.3d 1361, 1371 (Fed. Cir. 2003). But cf. North Carolina v. Alford, 400 U.S. 25 (1970) (allowing for the possibility of a guilty plea

while defendant maintains innocence). They are instead treated as one in the same. See White, 328 F.3d at 1371. Mr. Borchardt clearly pleaded guilty to the crime, was adjudged guilty, and therefore received a conviction.

Accordingly, the Coast Guard has supported its allegation that the state of Alaska convicted Mr. Borchardt of the alleged crime on February 24, 2006.

**B. Coast Guard Entitled to Decision as a Matter of Law**

The Undersigned finds that based on reliable, substantial and probative evidence, the Coast Guard has met its burden of proof under 46 U.S.C. 7703(3), which serves as a basis for suspension or revocation of his Coast Guard license and MMD.

Under 46 U.S.C. 7703(3), a mariner's license or MMD may be suspended or revoked if the holder, within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49. A state law conviction for "operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance (or comparable offenses)" is a covered offense and conclusive in a suspension and revocation proceeding. 49 U.S.C. 30304(a)(3)(A), 33 CFR 20.1307(c)(3).

As previously discussed, Respondent holds a Coast Guard license and MMD and the State of Alaska convicted him of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages on February 24, 2006. Since this administrative proceeding initiated in April 2006, the conviction therefore, occurred considerably less than three years prior to that date. 33 CFR 20.401.

The Coast Guard is therefore entitled to a decision as a matter of law.

### **III. Conclusion**

Given the above and upon review of the record taken as a whole, the Undersigned finds that the allegations of the Complaint are hereby deemed PROVED. Therefore, the Agency has met its burden.

### **SANCTION**

The remaining issue to be decided is the appropriate sanction. As discussed above, the State of Alaska convicted Mr. Borchardt of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages and the Coast Guard subsequently charged him under 46 U.S.C. 7703(3). Under this section of the United States Code, any individual that is the holder of a Coast Guard issued credential who is convicted of an offense described in the National Driver's Registry Act, such as Driving Under the Influence of Alcoholic Beverages, is under the Jurisdiction of the Coast Guard. 46 U.S.C. 7703(3), 49 U.S.C. 30304(a)(3)(A). By its plain language, this is a holder offense. 46 U.S.C. 7703(3). Therefore, by virtue of the fact that Respondent holds a Coast Guard license and MMD and was convicted of Driving Under the Influence of Alcoholic Beverages, the requirements of 46 U.S.C. 7703(3) have been satisfied. Id.

The Coast Guard argued in its proposed Order that Mr. Borchardt's Coast Guard credentials should be suspended outright for one month. The Undersigned regards this type of conduct as very serious and has historically given out sanctions much harsher than that proposed herein for very similar charges. See USCG v. Nelson, 02-0035 (USCG ALJ January 24, 2002) (6 months suspension for misconduct charge predicated on a state DUI conviction). This conduct must be dealt with severely to preserve the safety of life and property at sea.

If the Respondent had been drinking while operating a motor vessel, the Coast Guard would have charged him with misconduct and the outcome could have been revocation. See USCG v. Duncan, 04-0592 (USCG ALJ March 15, 2005). In a previous Coast Guard suspension and revocation proceeding, a respondent received a 6 month suspension (3 outright and 3 remitted on 12 months probation) for a misconduct charge predicated on a charge and conviction for Driving Under the Influence of Alcohol. USCG v. Nelson, 02-0035 (USCG ALJ January 24, 2002). According to the Coast Guard table of average orders, the mere possession of intoxicating liquors in a misconduct case carries a recommended penalty of 1-4 months outright suspension. 46 CFR 5.569(d).

On the other hand, Respondent argues that no penalty should be imposed because of previously incurred penalties and hardships related to the charge and conviction for Operating a Motor Vehicle Under the Influence of Alcoholic Beverages. While Respondent has indeed suffered as a result of this charge and conviction, this argument is rejected. It is a well established legal principle that "a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one." United States v. Wheeler, 435 U.S. 313 (1978) (citing Bartkus v. Illinois, 359 U.S. 121, (1959), and Abbate v. United States, 359 U.S. 187 (1959)). There is therefore no correlation between a penalty suffered in a state criminal proceeding relative to a driver's license and that imposed in a federal suspension and revocation proceeding relative to the privilege of holding Coast Guard credentials and Double Jeopardy does not apply. See Id.

While the proposed Coast Guard Order of a one month outright suspension is viewed as diminutive and at the lower end of the spectrum of appropriate sanctions, the

Undersigned recognizes that there were mitigating factors present in this case.

Accordingly, the Coast Guard's proposed sanction is hereby ACCEPTED.

**ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent was the holder of a Coast Guard License and MMD at all relevant times.
2. The Coast Guard has jurisdiction in this case under the provisions of 46 U.S.C. 7703.
3. The State of Alaska convicted Respondent of Operating a Motor Vehicle Under the Influence of Alcoholic Beverages within three years of this administrative proceeding's initiation.
4. It is PROVED by a preponderance of the evidence that the Respondent satisfied the Requirements for liability under 46 U.S.C. 7703(3).

WHEREFORE,

**ORDER**

**IT IS HEREBY ORDERED THAT** the Joint Motion for Summary Decision is hereby **GRANTED**.

**IT IS HEREBY ORDERED THAT** the allegations of the Complaint filed against Respondent, Teak Borchardt on April 14, 2006 is hereby **PROVED**.

**IT IS FURTHER ORDERED THAT** the Coast Guard license and Merchant Mariner's Document and all other credentials issued by the U.S. Coast Guard to Respondent, Teak Borchardt are hereby **SUSPENDED OUTRIGHT** for **ONE (1) month** (commencing on the date they are in the possession of the Coast Guard).

**IT IS FURTHER ORDERED THAT** Respondent, Teak Borchardt is to tender his Coast Guard license and Merchant Mariner's Document and all other credential issued by the Coast Guard immediately to the nearest Coast Guard Marine Safety Office or mail those credentials to the following office: U.S. Coast Guard, Marine Safety Office Juneau, 2760 Sherwood Lane, Suite 2A, Juneau, AK 99801.

**IT IS FURTHER ORDERED THAT** Respondent, Teak Borchardt is hereby prohibited from serving aboard any vessel requiring a Coast Guard license or Merchant Mariner's Document issued by the U.S. Coast Guard until the suspension described herein is served.

**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).

**SO ORDERED.**



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**Hon. PARLEN L. MCKENNA  
ADMINISTRATIVE LAW JUDGE  
U.S. COAST GUARD**

Done and dated September 1, 2006  
Alameda, California

## **ATTACHMENT A**

### **NOTICE OF ADMINISTRATIVE APPEAL RIGHTS**

#### **33 CFR 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that *no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.*
- (d) The appeal must follow the procedural requirements of this subpart.

#### **33 CFR 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) *If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,*
  - (2) *If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.*

#### **33 CFR 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
- (ii) Reasons supporting the appeal; and
- (iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

- (1) The party has petitioned the Commandant in writing; and
- (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

### **33 CFR 20.1004 Decisions on appeal.**

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

**ATTACHMENT B**

**EXHIBIT LISTS**

**COMPLAINANT'S FILINGS**

- IO 1 - Complaint
- IO 2 - Certification of Answer
- IO 3 - Motion for Summary Decision
- IO 4 - Joint Motion for Summary Decision
- IO 5 - Status Request

**RESPONDENT'S FILINGS**

- Resp't A - Entry of Appearance
- Resp't B - Request for Extension of Time and Order
- Resp't C - Answer
- Resp't D - Copy of Guilty Plea, Judgment, and Sentence for Driving Under the Influence in Alaska.
- Resp't E - Copy of Respondent's Letter to Coast Guard Disclosing Charge and Guilty Plea
- Resp't F - Copy of Letter from Respondent's Employer Placing him on Leave Without Pay
- Resp't G - Email Reporting Impound
- Resp't H - Copy of Respondent's Letter to Coast Guard Disclosing Outcome of Conviction
- Resp't I - Opposition to Motion for Summary Decision and Cross-Motion for Summary Decision
- Resp't J - Joint Motion for Summary Decision

## ATTACHMENT C. APPLICABLE STATUTES AND REGULATIONS

### A. Statutes

The relevant statutes read in pertinent part as follows:

**5 U.S.C. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.**

\* \* \*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

\* \* \*

**46 U.S.C. 7702. Administrative procedure.**

(a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.

(b) The individual whose license, certificate of registry, or merchant mariner's document has been suspended or revoked under this chapter may appeal, within 30 days, the suspension or revocation to the Secretary.

(c)(1) The Secretary shall request a holder of a license, certificate of registry, or merchant mariner's document to make available to the Secretary, under section 206(b)(4) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), all information contained in the National Driver Register related to an offense described in section 205(a)(3)(A) or (B) of that Act committed by the individual.

(2) The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner's document for use of alcohol and dangerous drugs in violation of law or Federal regulation. The testing may include preemployment (with respect to dangerous drugs only), periodic, random, and reasonable cause testing, and shall include post-accident testing.

**(d)(1)** The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner's document held by an individual if--

**(A)** that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and

**(B)** there is probable cause to believe that the individual—

**(i)** has, while acting under the authority of that license, certificate, or document, performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;

**(ii)** has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document;

**(iii)** within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49; or

**(iv)** is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

**(2)** If a license, certificate, or document is temporarily suspended under this section, an expedited hearing under subsection (a) of this section shall be held within 30 days after the temporary suspension.

\* \* \*

#### **46 U.S.C. 7703. Bases for suspension or revocation.**

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder--

**(1)** when acting under the authority of that license, certificate, or document—

**(A)** has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

**(B)** has committed an act of misconduct or negligence;

**(2)** is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document;

**(3)** within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49;

(4) has committed an act of incompetence relating to the operation of a vessel; or

(5) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

\* \* \*

**49 U.S.C. 30304. Reports by chief driver licensing officials.**

(a) Individuals covered.--As soon as practicable, the chief driver licensing official of each participating State shall submit to the Secretary of Transportation a report containing the information specified by subsection (b) of this section for each individual--

\* \* \*

(3) who is convicted under the laws of that State of any of the following motor vehicle-related offenses or comparable offenses:

(A) operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance.

(B) a traffic violation arising in connection with a fatal traffic accident, reckless driving, or racing on the highways.

\* \* \*

**B. Regulations**

The applicable regulations read as follows:

**33 CFR 20.308 Answers.**

(a) The respondent shall file a written answer to the complaint 20 days or less after service of the complaint. The answer must conform to the requirements of this subpart for filing and service.

\* \* \*

**33 CFR 20.401 Initiation of administrative proceedings.**

An administrative proceeding commences when the Coast Guard representative files the complaint with the Hearing Docket Clerk and serves a copy of it on the respondent.

\* \* \*

**33 CFR 20.701 Standard of proof.**

The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence.

**33 CFR 20.702 Burden of proof.**

(a) Except for an affirmative defense, or as provided by paragraph (b) of this section, the Coast Guard bears the burden of proof.

\* \* \*

**33 CFR 20.901 Summary decisions.**

(a) Any party may move for a summary decision in all or any part of the proceeding on the grounds that there is no genuine issue of material fact and that the party is entitled to a decision as a matter of law. The party must file the motion no later than 15 days before the date fixed for the hearing and may include supporting affidavits with the motion. Any other party, 10 days or less after service of a motion for summary decision, may serve opposing affidavits or countermove for summary decision. The ALJ may set the matter for argument and call for the submission of briefs.

(b) The ALJ may grant the motion if the filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noted show that there is no genuine issue of material fact and that a party is entitled to a summary decision as a matter of law.

(c) Each affidavit must set forth such matters as would be admissible in evidence and must show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Once a party has moved for summary decision and supported his or her motion as provided in this section, no party opposing the motion may rest upon the mere allegations or denials of facts contained in his or her own pleadings. The response to the motion, by affidavit or as otherwise provided in this section, must provide a specific basis to show that there is a genuine issue of material fact for the hearing.

(d) If it appears from the affidavit of a party opposing the motion that this party cannot, for reasons stated, present by affidavit matters essential to justify his or her opposition, the ALJ may deny the motion for summary decision, may order a continuance to enable the obtaining of information, or may make such other order as is just.

(e) No denial of all or any part of a motion for summary decision is subject to interlocutory appeal.

\* \* \*

**33 CFR 20.1307 Use of judgments of conviction.**

\* \* \*

(c) A judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if an S&R proceeding alleges conviction for--

\* \* \*

(3) An offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C.S. 401, note).

\* \* \*

**46 CFR 5.569 Selection of an appropriate order.**

\* \* \*

(d) Table 5.569 is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits. The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for "Failure to Obey a master's written instructions." An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

**TABLE 5.569-SUGGESTED RANGE OF AN APPROPRIATE ORDER**

Type of offense	Range of order (in months)
<b>Misconduct:</b>	
Failure to obey master's/ship officer's order.....	1-3.
Failure to comply with U.S. law or regulations.....	1-3.
Possession of intoxicating liquor.....	1-4.
Failure to obey master's written instruction.....	2-4.
Improper performance of duties related to vessel safety.....	2-5.
Failure to join vessel (required crew member).....	2-6.
Violent acts against other persons (without injury)....	2-6.
Failure to perform duties related to vessel safety.....	3-6.
Theft.....	3-6.
Violent acts against other persons (injury).....	4-Revocation.
Use, possession, or sale of dangerous drugs.....	Revocation (Note:

see § 5.59).

**Negligence:**

- Negligently performing duties related to vessel navigation..... 2-6.
- Negligently performing non-navigational duties related to vessel safety..... 1-3.
- Neglect of vessel navigation duties..... 3-6.
- Neglect of non-navigational safety related duties..... 2-4.

Incompetence..... The only proper order for a charge incompetence proved is revocation.

**Violation of Regulation:**

- Refusal to take chemical drug test..... 12-24.
- Refusal to take required alcohol test..... 12-24.

Dangerous drugs (46 U.S.C. 7704)..... The only proper order for a charge under 46 U.S.C. 7704 found proved is revocation.

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\* \* \*

**49 CFR 1503.218 Motions.**

\* \* \*

(f) Specific motions. A party may file the following motions with the Enforcement Docket Clerk:

\* \* \*

(5) Motion for decision. A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge must grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact.

**Certificate of Service**

**I hereby certify that I have this day served the foregoing Order (Docket No. 06-0189) upon the following parties and limited participants (or designated representatives) in this proceeding at the listed facsimile address:**

**Commanding Officer  
LT Randy S. Waddington, IO  
Marine Safety Office Juneau  
2760 Sherwood Lane Suite 2A  
Juneau, Alaska 99801  
Comm: (907) 463-2471  
Fax: (907) 463-2445**

**ALJ DOCKETING CENTER  
Docketing Specialist  
40 South Gay Street, Room 412  
Baltimore, MD 21202-4022  
Fax: (410) 962-1746**

**I further certify that I have served the foregoing documents(s) upon Counsel for Respondent at the following facsimile address:**

**H. Clay Keene Esq.  
Keene & Currall  
540 Water Street – Ste 302  
Ketchikan, AK 99901  
Comm: (907) 225-4131  
Fax: (907) 225-0540**

**Done and Dated this 1st day of September, 2006  
Alameda, California**



**Cindy J. Roberson  
Paralegal Specialist to the  
Hon. Parlen L. McKenna**