

COPY

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

UNITED STATES COAST GUARD

Complainant

vs.

CARL JOSEPH BUTLER, JR.

Respondent.

Docket Number: CG S&R 06-0166
CG Case No. 2623798

2007 MAR 23 P 3:05
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MAR 23 2007

ORDER

Issued by: Walter J. Brudzinski, Administrative Law Judge

Issued: March 22, 2007

This Order is issued in accordance with 33 CFR sections 20.710, 20.901, and 20.902(c) in that the parties waived submission of post-hearing proposed findings at a suspension and revocation conducted on March 8, 2007 in New York, New York and the undersigned issued findings, conclusions, and sanction at the conclusion of the proceedings. Finding Respondent and the subject matter of this hearing within the jurisdiction vested in the Coast Guard under 46 U.S.C. §§ 7703 and 7704, I found that the Coast Guard proved the remaining allegations in the Complaint by the preponderance of reliable, probative, and substantial evidence and I revoked Respondent's document at the close of the hearing. Respondent then surrendered his only validly issued Coast Guard credential - his Merchant Mariner's Document.

Complaint

On April 13, 2006, the Coast Guard Investigating Officer, LT Richard Gonzalez, issued a five count Complaint against Respondent as follows:

1st Count

Misconduct

1. On April 13, 2001, the Respondent wrongfully submitted a fraudulent Application for License as Officer, Staff Officer, Operator, and Merchant Mariner's Document (CG719B) at the Coast Guard Regional Exam Center in NY, by not disclosing all convictions in Section III on Page 2 of the CG-719B Form.
2. Specifically, Respondent failed to disclose conviction of January 20, 2001, for Driving while under the influence of alcohol, State of New York, Criminal Court of Richmond, Case No. 200041002047. [Richmond County is Staten Island, New York].

The Coast Guard proposes Revocation in accordance with 46 U.S.C. § 7703.

2nd Count

Misconduct

1. On January 18, 2005, Respondent was convicted of Assault (Simple, On Police) in the State of New Jersey, Ocean County Superior Court. Cases #OCN02093687-001.

The Coast Guard proposes Revocation in accordance with 46 U.S.C. § 7703.

3rd Count

Misconduct

1. On February 1, 2006, Respondent wrongfully submitted a fraudulent Application for License as Officer, Staff Officer, Operator, and Merchant Mariner's document (CG-719B) at

the Coast Guard Regional Exam Center in NY, by not disclosing all convictions in Section III on Page 2 of the CG719B Form.

2. Specifically, Respondent failed to disclose the following convictions:

- a. January 20, 2001 – Driving while under the influence of alcohol. State of New York, Criminal Court of Richmond County. Case No. 2000R1001047.
- b. January 18, 2005 – Assault – Simple, On Police. State of New Jersey, Ocean County Superior Court. Case No. OCN02093687-001.
- c. January 18, 2005 – Criminal mischief with damage. State of New Jersey, Ocean County Superior Court. Case No. OCN02093687-001.
- d. February 16, 2005 – Operating a motor vehicle while impaired by drugs (1st). Richmond County Superior Court. Case No. 00236-2004.

The Coast Guard proposes Revocation in accordance with 46 U.S.C. § 7703.

4th Count

Misconduct

1. On February 16, 2005, respondent was convicted upon a plea of guilty of Assault with Intent to Cause Physical Injury to an Officer in the State of New York, Richmond County Superior Court. Case No. 000236-2004.

The Coast Guard proposes Revocation in accordance with 46 U.S.C. § 7703.

5th Count

Conviction for a Dangerous Drug Law Violation

1. Within the last 10 years, the Respondent was convicted of violating a dangerous drug law of the State of New York.

2. Specifically, on February 16, 2005, Respondent was convicted upon a plea of guilty in the Richmond County Superior Court of Operating a motor vehicle while impaired by drugs (1st). Case No. 00236-2004.

The Coast Guard proposes Revocation in accordance with 46 U.S.C. § 7704.

Procedural History

Having received no Answer from Respondent, the Coast Guard Investigating Officer filed a Motion for Default Order on June 15, 2006. Soon thereafter, on July 21, 2006, the ALJ Docketing Center assigned the case to Judge Thomas E. P. McElligott and on August 10, 2006, Judge McElligott issued his Order granting the Coast Guard's Motion for Default Order and Revoked Respondent's Merchant Mariner's Document.

At about the same time that Judge McElligott issued the Default Order, Respondent retained counsel and subsequently moved to have the Default Order vacated. Therefore, the ALJ Docketing Center reassigned the case to Judge McElligott and on October 3, 2006, Judge McElligott re-opened the case and vacated his previous Order Granting Motion for Default and Revocation Sanction. On December 20, 2006, this matter was assigned to the undersigned and on January 3, 2007 the first pre-hearing teleconference was held. After extensive discussion and argument, the undersigned ordered that Respondent finally Answer the Complaint by January 31, 2007. Also, a discovery schedule was ordered and the matter was set down for hearing to commence March 8, 2007 in New York, New York. On January 5, 2007, Respondent filed his Answer and Affirmative Defenses and on January 16, 2007, the Coast Guard filed its Notice of Reassignment of Representation substituting Chief Warrant Officer James G. Pritchard and Lieutenant Martha A. Rodriguez in place of Lieutenant Richard Gonzalez as Investigating Officers.

Motion Practice

Respondent's Witness List and Motion for Further Discovery. Respondent's Witness List included LT Richard Gonzalez, the former Investigating Officer, among others. Also, Respondent filed a Motion for Further Discovery seeking to depose LT Gonzalez because "LT Gonzalez has, on a prior occasion unjustly accused Respondent of a criminal offense, while Respondent was in LT Gonzalez's presence . . . LT Gonzalez's would be able to testify to any previous contact he had with Respondent . . . [and] explain the steps undertaken by Petitioner [Coast Guard] to investigate the claim against Respondent. Most importantly, LT Gonzalez will be able to provide testimony regarding his previous encounter with Mr. Butler, and disclose whether any bias existed, while the investigative process was under way."

On February 7, 2007, the Coast Guard filed its objection to Respondent's Request for Further Discovery stating that it would amount to a "fishing expedition" and an attempt to obtain LT Gonzalez's thoughts and opinions which are not relevant to the issues in this matter. The Coast Guard averred that its investigative process is publicly available in the CFR and in the Marine Safety Manual.

Motion for pre-hearing conference. The Coast Guard filed its motion for another pre-hearing conference to address the issue of calling LT Gonzalez as a witness. On February 13, 2007, the parties and the undersigned participated in a pre-hearing teleconference during which time further argument was made on the issue of calling LT Gonzalez as a witness. Essentially, counsel for Respondent argued that LT Gonzalez's testimony was necessary to show that there were no reasonable grounds for the Coast Guard to conduct the investigation which led to the allegations in the Complaint and also to show LT Gonzalez's bias against Respondent. I found

that LT Gonzalez's anticipated testimony as proffered by Respondent would not be relevant to the matters alleged in the Complaint and therefore would not be allowed. Further, I found that the Administrative Law Judge was without authority to rule on whether reasonable grounds exist for the Coast Guard to initiate and conduct an investigation.

Motions and Cross-Motion for Summary Decision. The Coast Guard filed two Motions for Summary Decision on all counts in accordance with 33 CFR 20.901. On February 21, 2007, Respondent filed his Answer in Opposition to the Coast Guard's Motions for Summary Decision and Cross-Motion for Summary Decision. In his Cross-Motion, Respondent argued for Summary Decision on the First Count because it is time-barred. Specifically, Respondent cites the 46 CFR 5.55 three year time limit for Misconduct offenses not specified in 46 CFR 5.59(a) and 5.61(a). Respondent also asked for Summary Decision on the Second and Fourth Counts because he was not acting under the authority of his license when the alleged conduct occurred. That same day, the Coast Guard Motioned for another Pre-Hearing Conference to address its Motion for Summary Decision and Answer to Respondent's Cross Motion for Summary Decision.

On February 23, 2007, the undersigned conducted another pre-hearing teleconference. After lengthy discussion and argument by the parties, I denied the Coast Guard's Motion for Summary Decision because 46 U.S.C. § 7703 allows for suspension as well as revocation; therefore, the issue of sanction is still a material fact in dispute. I also denied Respondent's Cross-Motion for Summary Decision. After additional discussion and argument, the Coast Guard Moved to Withdraw the First Count which I granted and dismissed the First Count Without Prejudice.

Amending the Second and Fourth Counts. The statutory authority cited in the 2nd and 4th Counts is 46 U.S.C. § 7703 (2) which reads, “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder – (2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner’s document. . . .” Respondent’s Cross-Motion for Summary Decision on those counts was predicated on Misconduct under 46 U.S.C. § 7703 (1) (B) which requires that the mariner must be acting under the authority of his license, certificate of registry, or merchant mariner’s document and not 46 U.S.C. § 7703 (2) which requires only that the Respondent be a holder of a Coast Guard license, certificate of registry, or merchant mariner’s document. Counsel for Respondent argued that LT Gonzalez told him that the Second and Fourth Counts were “Misconduct” under 46 CFR 5.27 and that he was therefore misled. The Coast Guard Investigating Officer responded that the 2nd and 4th Counts are brought under 46 U.S.C. § 7703 (2), listed in the Complaint. The undersigned noted that it is only subparagraph (1) of § 7703 which requires a mariner to be acting under the authority of that license, certificate, or document and that subparagraph (2) requires only that a mariner be a “holder.” Therefore, I denied Respondent’s Cross-Motion for Summary Decision concerning the 2nd and 4th Counts. While I found the 2nd and 4th Counts legally sufficient as drafted because they listed 46 U.S.C. § 7703 (2) as authority, to more visibly and clearly delineate the authority cited by the Coast Guard on these Counts, I amended the 2nd and 4th Counts in my Memorandum and Order of February 23, 2007 as follows: On the line entitled Statutory Authority, “46 USC § 7703 (2) is substituted for “46 CFR 7703.” On the line entitled Regulatory Authority, “46 CFR 12.02-4 and Table: is substituted for “46 USC § 7703 (2).” Under “Factual Allegations,” “Conviction of an offense

that would prevent the issuance or renewal of a merchant mariner's document" is substituted for the word, "Misconduct."

Motion Requesting Appearance. On March 1, 2007, the Coast Guard filed its Motion Requesting Appearance [of Respondent] to ensure the Respondent's appearance at the hearing and the production of his Merchant Mariner's Document. That same day, counsel for Respondent filed his Answer advising that Respondent is aware of the hearing and is planning to attend but counsel could not guarantee his appearance because it is beyond counsel's control. On March 2, 2007, the undersigned issued an Order Denying the Coast Guard's Motion Requesting Appearance.

Motion for Adjournment. Also on March 1, 2007, counsel for Respondent filed his Motion for Adjournment advising that he previously scheduled and paid for a vacation to Florida and that he would be available any time after March 11, 2007 for hearing. Counsel also advised that the Coast Guard stated that they would "vigorously oppose" any request for adjournment. On March 2, 2007, the undersigned issued an Order Denying Respondent's request for adjournment stating that the hearing will commence on March 8, 2007 as per the previously issued Scheduling Order.

Hearing

At the hearing on March 8, 2007, the Coast Guard presented the testimony of two witnesses: the Respondent, Mr. Carl Joseph Butler, Jr., and Mr. Kenneth J. Skutches, of Regional Examination Center, New York, who testified on the procedures for applications and renewals of U.S. Merchant Mariner credentials. The Coast Guard also introduced 10 Exhibits. The Respondent presented his own testimony and introduced one exhibit.

Summary Decision on the 5th Count

At the close of the Coast Guard's case in chief, the Investigating Officer Motioned for Summary Decision on all counts. Since the Respondent could still argue for suspension on the remaining 2nd, 3rd, and 4th Counts, I denied the Coast Guard's Motion on those Counts. However, on the remaining 5th Count, Conviction of a Dangerous Drug Law Violation, I granted the Coast Guard's Motion for Summary Decision finding that Coast Guard Exhibits 3 through 7 proved that Respondent was convicted in Richmond County, New York of Operating a Motor Vehicle Under the Influence of Drugs, namely phencyclidine (PCP) on February 16, 2005 and sentenced on April 8, 2005. PCP is listed in 46 CFR 16.113, 49 CFR 40.85, among other dangerous drugs such as marijuana, cocaine, opiates, and amphetamines, which are specifically tested for under the Department of Transportation and Coast Guard regulations. It is also a Schedule III Controlled Substance. See 21 U.S.C. § 812. Title 46 U.S.C. § 7704 (b) provides that "[i]f it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or merchant mariner's document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be suspended or revoked."

Title 46 U.S.C. § 7704 (b), was amended August 9, 2004, by inserting "*suspended or*" after "*shall be.*" See Pub. L. 108-293, Title IV, § 402. Congressional intent illustrates that paragraph (b) was specifically amended to allow the Administrative Law Judge to approve settlement agreements when drug conviction cases involve minor drug offenses. See H.R. CONF. REP. NO. 108-617, at 78 ("The Coast Guard seeks the discretion to suspend a mariner's credentials in dangerous drug law conviction cases. Use of that discretion will allow the use of Settlement Agreements to resolve cases involving minor drug convictions."). However, 49 CFR

5.59 provides that “[a]n Administrative Law Judge enters an order revoking a respondent’s license, certificate or document when . . . (b) . . . [a respondent] has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved.” The fact that 46 CFR 5.59(b) mandates revocation in drug conviction cases does not conflict with 46 U.S.C. § 7704 (b) when the legislative history is taken into account. Reading the statute and regulation together, it is clear that an Administrative Law Judge has no discretion to impose a sanction other than Revocation, absent a Settlement Agreement, after finding proved an allegation of a dangerous drug law violation. In this case, the Coast Guard did not offer Respondent a Settlement. Therefore, the Administrative Law Judge must revoke where convictions of a dangerous drug law violation are found proved in Suspension and Revocation hearings.

Counsel for Respondent objected to the Coast Guard’s Motion for Summary Decision at the hearing. Specifically, counsel for Respondent’s Pre-Trial Memorandum of Law averred that the hearing on Count Five must be continued to allow Respondent to show cure and cited 46 U.S.C. § 7704(c) as authority. The statutory authority for the 5th Count is 46 U.S.C. § 7704 (b), not § 7704 (c). Section 7704 (c) provides, “[i]f it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner’s document shall be revoked unless the holder provides satisfactory proof that the holder is cured.” As shown in the § 7704 (b) text above, a holder of a license, certificate of registry, or merchant mariner’s document is not accorded an opportunity to provide satisfactory proof that the holder is cured as is the case in § 7704 (c).

Findings and Discussion of the Evidence

The 2nd Count. Concerning the 2nd Count, I found that the Coast Guard proved by the preponderance of reliable, probative, and substantial evidence that the Respondent was “convicted” on January 18, 2005 of Simple Assault on Police in New Jersey, an offense that would prevent the issuance or renewal of his document. Referring to the referenced 46 CFR Table 12.02-4 in the Complaint as amended, Simple Assault carries an assessment period from 1 to 5 years. Coast Guard Exhibit 8 shows the certified copy of the Pre-Trial Intervention (PTI) Program Dismissal. Coast Guard Exhibit 10 describes the Pre-Trial Intervention program as requiring supervision from one to three years and that certain standards are imposed such as random urine monitoring, assessments for fees, penalties, and fines. Additional conditions may also be imposed to require the performance of community service, payment of restitution, and submission to psychological and/or drug and alcohol evaluations with compliance to recommended treatment programs such as anger management. If a defendant successfully completes the conditions of PTI, then the original charges are dismissed and there is no record of conviction. One the requirements for his PTI Dismissal were to successfully complete “Anger Management.” See Respondent’s Exhibit “A.”

While counsel for Respondent argued that Respondent actually received no conviction and that he did not participate in a scheme of a state for the expungement of a conviction, I found that the New Jersey PTI program described in Coast Guard Exhibit 10 comports with the definition of “conviction” found at 33 CFR 20.1307 and 46 CFR 12.01-6, as well as Appeal Decision 2629 (RAPOZA) (2002). In RAPOZA, the Vice Commandant held that the Administrative Law Judge may analyze state law to determine whether a plea of nolo contendere or no contest in a state court constitutes a conviction either under state law or for purposes of

federal regulations. Title 46 CFR 12.01-6 defines conviction to include any disposition in which “an applicant pleads guilty or no contest, is granted deferred adjudication, or is required to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forego appeal of a trial court’s conviction, then the applicant will be considered to have received a conviction. A later expungement of the conviction will not negate a conviction” Further, 33 CFR 20.1307(c) (2), provides that “[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 . . . (2) An offense that would prevent the issuance or renewal of a merchant mariner’s license, certificate of registry, or document. . . .” Therefore, the PTI dismissal was a “conviction” within the meaning of 46 CFR 12.01-6 and is conclusive to prove the count under 33 CFR 20.1307.

The 3rd Count. Concerning the 3rd Count, submitting a fraudulent application for his document on February 1, 2006, I found that count proved by the preponderance of reliable, probative and substantial evidence. Respondent listed only one conviction on his CG-719B form - a felony assault conviction in New York in 05/04. That is the same conviction listed in the 4th Count, a conviction that would prevent the issuance or renewal of his document. Mr. Kenneth J. Skutches of the Regional Examination Center, New York testified to receiving only the application as shown in Coast Guard Exhibit 2; that is, the application listing only the felony assault conviction in New York in 05/04. There were no additional convictions listed; nor were any criminal record history print-outs attached to the form. Respondent testified that he attached a computer print out of his criminal record that he obtained from Criminal Court in Staten Island to make sure he did not forget to list any of his convictions. I found Respondent’s testimony not credible. Title 46 CFR 12.02-4(c) requires that “[a]pplicants must provide written disclosure of

all prior convictions at the time of application.” While it might be understandable, but not excusable, to choose not to list the New Jersey PTI dispositions because they resulted in dismissals, and even to forget the DUI conviction in New York which he received in 2001; however, Respondent chose to list only the felony assault in New York in 2005 and purposefully chose not to disclose the Driving While Under the Influence of Drugs (PCP) for which he was also indicted on the same day as the felony assault, convicted on the same day, (February 16, 2005), as the felony assault, and sentenced on the same day (April 8, 2005) as the felony assault. See Coast Guard Exhibits 3 and 4. Respondent’s explanation at the hearing was that by disclosing only the felony assault, he thought that the Driving Under the Influence of Drugs conviction would be included along with it. I find it incredible that affirmatively choosing not to disclose the more serious dangerous drug law violation conviction on a two count indictment could result from mere inadvertence or be based on an assumption that the undisclosed, more serious conviction is subsumed or presumed along with the disclosed, less serious conviction on the same indictment, especially when Respondent testified that he was aware that all convictions had to be listed on the CG-719B form and that his knowledge of that requirement was the reason he attached a computer print-out of his criminal record. The above circumstances and Respondent’s explanation created an inference that he had not only had constructive knowledge but also actual knowledge that the statement on the CG-719B form was incorrect. Since I have found that Respondent had constructive and actual knowledge of the omitted convictions and that his statement on the CG-719B form was incorrect, his merchant mariner’s document must be revoked. Appeal Decision 2613 (SLACK) (1999); Appeal Decision 809 (MARQUES) (1955). Under MARQUES, a statement is made with actual knowledge if the statement is made without belief in its truth or in reckless disregard of its truth or falsity. Constructive knowledge exists if

the person knew or had a reason to know the representation was incorrect. If the respondent did not have actual or constructive knowledge, the Administrative Law Judge has discretion to determine the appropriate sanction. See Appeal Decision 2607 (ARIES) (1999) and Appeal Decision 2608 (SHEPPARD) (1999).

By disclosing only the 2005 non-drug conviction contained in an indictment comprised of two offenses: felony assault on a police officer and operating a motor vehicle while impaired by drugs, an inference of fraudulent intent arises because the statement is made without a belief in its truth or reckless disregard of its truth or falsity. The circumstances of the joint indictment, joint conviction, and joint sentencing show that Respondent had actual knowledge of the drug conviction and had a reason to know that the representation was not wholly truthful. In Appeal Decision 2613 (SLACK) (1999), the Commandant stated that revocation is the only appropriate sanction when a license is procured through fraud. Respondent had actual and constructive knowledge of his prior convictions, and even admitted in his testimony that he stapled a computer print out of his criminal record so the he would not forget any of them.

The 4th Count. On the 4th Count, I found that the Coast Guard proved by the preponderance of reliable, probative, and substantial evidence that Respondent was convicted of an offense that would prevent the issuance or renewal of his document in that on February 16, 2005, Respondent was convicted of Assault in the Second Degree with Intent to Cause Physical Injury to an Officer in the State of New York. Coast Guard Exhibits 3 and 4.

Referring to 46 CFR Table 12.02-4, there are 2 listings for assault: simple assault and aggravated assault. The assessment period for simple assault is 1 to 5 years and the assessment period for aggravated assault is 5 to 10 years. Counsel for Respondent objected to the Coast

Guard Investigating Officer characterizing Respondent's conviction as aggravated assault because Respondent was convicted of Assault in the Second Degree which he claims is not as serious as aggravated assault. I take official notice that felony assault in the second degree is a more serious crime than simple assault. Therefore, it is reasonable to infer that the assessment period for a felony assault in the second degree will be longer than the assessment period for simple assault. Title 46 CFR 12.02-4(c) (2) states that Table 12.02-4 "lists major categories of criminal activity and is not to be construed as an all-inclusive list. If an applicant is convicted of an offense that does not appear on the list, the Officer in Charge, Marine Inspection will establish an appropriate assessment period using the list as a guide."

At the end of the hearing, I inquired of the parties whether they wished to submit post hearing proposed findings in accordance with 33 CFR 20.710 and 5 U.S.C. § 557(c) (1). The parties waived submission of proposed findings and, after oral argument, I announced that the remaining 2nd, 3rd, and 4th Counts are found proved. On the 5th Count I had previously granted Summary Decision and imposed Revocation as discussed above. On the 2nd and 4th Counts, I imposed the sanction of outright suspension for 24 months on both, and on the 4th Count, I imposed the sanction of Revocation. In drafting this Order, I realized that assigning separate sanctions for each count was incorrect and that I should have imposed one sanction, Revocation, covering all counts. Therefore, I conducted a post-hearing teleconference on March 16, 2007 to correct the record. I advised the parties of my mistake and invited them to submit post-hearing briefs/proposed findings which they had previously waived. The Coast Guard Investigating Officer advised that the Coast Guard would not be submitting post-hearing briefs and counsel for Respondent advised that he would discuss this matter with his client and would inform the

undersigned and the Coast Guard in writing by March 21, 2007. On March 21, 2007, counsel for Respondent advised that he would not submit post hearing briefs/proposed findings.

WHEREFORE,


ORDER

IT IS HEREBY ORDERED that having previously dismissed the 1st Count Without Prejudice, the remaining 2nd, 3rd, 4th, and 5th Counts in the Complaint are found **PROVED**.

IT IS FURTHER ORDERED that Respondent's Merchant Mariner's Document is **REVOKED**.

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**). Since the Administrative Law Judge subsequently revised the Sanction to reflect Revocation on the remaining 2nd through 5th Counts, the 30 day time period for the parties to file notice of appeal pursuant to 33 CFR 20.1001(a) commences this date, March 21, 2007.

Done and dated March 22, 2007
New York, New York


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

ATTACHMENT A

NOTICE OF 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

WITNESS AND EXHIBIT LISTS

COAST GUARD'S WITNESSES

1. Carl Joseph Butler, Jr., Respondent
2. Kenneth J. Skutches, Regional Examination Center, New York

RESPONDENT'S WITNESSES

1. Carl Joseph Butler, Jr., Respondent

COAST GUARD'S EXHIBITS

CG Ex. 1 – Respondent's Merchant Mariner's Document, 2 pages.

CG Ex. 2 – CG – 719B, Application for License as Officer, Staff Officer, Operator, and Merchant mariner's Document: Carl Joseph Butler, Jr., dated February 1, 2006, 4 pages.

CG Ex. 3 – Certificate of Disposition No. 300236-2004, Supreme Court of the State of New York, Richmond County, showing convictions for Assault 2nd Degree and Operating Motor Vehicle Under Influence of Drug or Alcohol, 1 page.

CG Ex. 4 – Indictment of the two offenses described in CG Ex. 3 and Resisting Arrest, 3 pages.

CG Ex. 5 – Application and Search Warrant to test Respondent's blood for phencyclidine (PCP), also known as "angeldust" as the result of Respondent's remark to medical personnel that he had about four hits of PCP earlier, 4 pages.

CG Ex. 6 – NYPD Property Clerk's Invoice #M048954 Respondent's Blood Sample, 1 page.

CG Ex. 7 – Toxicology Lab Report showing presence of PCP in Respondent's blood, 1 page.

CG Ex. 8 – Certificate of Disposition, Criminal Court of the City of New York, People v. Carl Butler showing 1/30/2001 conviction of DUI, 1 page.

CG Ex. 9 – Pre-Trial Intervention Indictment and Order of Dismissal showing Indictment of Criminal Mischief – Fourth Degree and Aggravated Assault – Third Degree.

CG Ex. 10 – State of New Jersey Pre-Trial Intervention Program (PTI), 3 pages.

RESPONDENT'S EXHIBITS

Resp. Ex. A. – Certificate of Completion – Anger Management Program, New Horizons, 1 page.

CERTIFICATE OF SERVICE

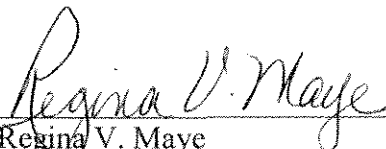
I hereby certify that I have this day served the foregoing **ORDER** via express mail courier, namely Federal Express, upon the following parties and limited participants (or designated representatives) in this proceeding at the addresses indicated as follows:

CWO James G. Pritchard
LT Martha Rodriguez
LT Charles Cobb
USCG Sector New York
Investigations Division
212 Coast Guard Drive
Staten Island, NY 10305
Telephone: (718) 354-4230
Facsimile: (718) 354-4224

Cornelius A. Mahoney, Esq.
Jorge A. Rodriguez, Esq.
Mahoney & Keane, LLP
111 Broadway, Tenth Floor
New York, NY 10006
Telephone: (212) 385-1422
Facsimile: (212) 385-1605

USCG - ALJ Docketing Center
40 South Gay Street
Baltimore, MD 21202
Telephone: (410) 962-7434
Facsimile: (410) 962-1746

Done and dated March 22, 2007
New York, New York



Regina V. Maye
Paralegal Specialist to the
Administrative Law Judge
Telephone: (212) 668-2970
Facsimile: (212) 825-1230