

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

UNITED STATES COAST GUARD

Complainant

v.

James David Graves

Respondent

Docket No: 07-0488
CG Enforcement Activity No: 3066780

DECISION AND ORDER

Issued: June 9, 2008

Issued by: HON. BRUCE T. SMITH
Administrative Law Judge

Appearances:

For Complainant

LT John R. Luff
LT(jg) Lincoln Puffer
Marine Safety Unit Morgan City
800 David Drive, Room 232
Morgan City, LA 70380

For Respondent

James David Graves, *Pro se*
[REDACTED]

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS 2

II. PRELIMINARY STATEMENT..... 3

III. FINDINGS OF FACT..... 5

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW 9

V. DISCUSSION 11

 A. General 11

 B. Burden and Standard of Proof..... 11

 C. Acting Under the Authority..... 12

 D. Misconduct..... 13

 1. Insufficient Credentials 14

 2. Possession and Use of Counterfeit License 18

 3. False Statements to Coast Guard Investigators..... 24

 E. Respondent’s Affirmative Defenses..... 26

 1. Reliance on NVIC 4-01 26

 2. Mistake of Fact 28

VI. SANCTION 33

VII. ORDER 37

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS 39

ATTACHMENT B – SUBPART J, APPEALS 40

Certificate of Service 42

II. PRELIMINARY STATEMENT

The United States Coast Guard (“Coast Guard”) filed a Complaint dated September 27, 2007, against James David Graves (“Respondent”) seeking revocation of Respondent’s Merchant Mariner’s License (“MML”) and Merchant Mariner’s Document (“MMD”) for violation of law or regulation under 46 CFR 5.33. The case involves Coast Guard allegations that Respondent was operating outside the scope of his official Coast Guard credentials, possessed a fraudulent MML bearing unauthorized upgrades to his official MML, and made false statements related thereto in connection with an ongoing Coast Guard investigation.

The ALJ Docketing Center received Respondent’s Answer on October 12, 2007, wherein Respondent generally denied the Complaint’s factual and jurisdictional allegations. Respondent defended by stating that he was “operating within the scope of NVIC 4-01” and requested a hearing before an Administrative Law Judge. The Coast Guard brought this action pursuant to the legal authority contained in 46 U.S.C. 7703, and the proceedings were conducted in accordance with the procedural requirements of 5 U.S.C. 551-59, 46 CFR Part 5, and 33 CFR Part 20.

On October 30, 2008, the undersigned conducted a pre-hearing telephone conference with the parties. The Administrative Law Judge discussed a variety of procedural matters with the parties and explained to Respondent the significance of the instant proceedings. The undersigned also stressed that Respondent should give serious consideration to retaining able legal counsel, given the magnitude of the charges levied against him. The undersigned specifically suggested that Respondent might explore state

pro bono legal programs, law school legal clinics, and/or other legal aid resources.

Despite this suggestion, Respondent chose to proceed *pro se*.

Thereafter, on November 2, 2007, the Coast Guard filed a written Motion to Amend the Complaint. The Amended Complaint alleged three (3) counts of Misconduct under 46 CFR 5.27 defined as behavior that violates some formal, duly established rule. Specifically, the Coast Guard alleged that Respondent violated 46 CFR 15.910(a) by operating an uninspected towing vessel without proper credentials pursuant to applicable regulatory requirements; that Respondent violated 18 U.S.C. 2197 by unlawfully possessing a counterfeit Coast Guard MML in his name while on board the UTV MARIE M. MORGAN; and that Respondent violated 18 U.S.C. 1001(a) by telling Coast Guard investigators that the Coast Guard issued the license in question. The Coast Guard proposed revocation on each count.

On November 13, 2007, the undersigned entered an Order granting the Coast Guard's Motion to Amend the Complaint and directing, *inter alia*, that Respondent had twenty days from his receipt of the Amended Complaint within which to file an Answer thereto. On November 19, 2007, Respondent filed an Answer to the Amended Complaint generally denying all jurisdictional and factual elements and requesting hearing before an Administrative Law Judge.

On December 12, 2007, this matter came on for hearing in New Orleans, LA, with Respondent appearing *pro se*. After the Coast Guard began the initial presentation of its case-in-chief, the undersigned recessed the hearing and asked the Coast Guard to obtain forensic evidence pertaining to the authenticity of Respondent's MML. *See* 33 CFR 20.202(f)-(g).

On March 18, 2008, at 10:00 am, the hearing was reconvened in New Orleans, LA and, after the presentation of both cases, was recessed on the afternoon of March 18, 2008. Both parties appeared and presented their respective cases and rested. Six (6) witnesses testified as part of the Coast Guard's case in chief and the Coast Guard offered seven (7) exhibits into evidence, all of which were admitted. Respondent testified on his own behalf and called four (4) other witnesses. Respondent offered three (3) exhibits into evidence, all of which were admitted.

At the conclusion of the hearing, the undersigned informed the parties that each would be entitled to make their respective closing arguments in writing and also to file post hearing briefs. The deadline for written closing arguments and post hearing briefs was set for close of business on April 2, 2008.

On March 19, 2007, the undersigned conducted a recorded post-hearing conference with the parties and asked for additional evidence and briefing to be filed with their written closing arguments. The undersigned also disclosed receipt of an *ex parte* communication from a third person not party to the instant litigation and ordered that the record would close on April 2, 2008. Both parties submitted their closing arguments as part of their post-hearing written submissions.

III. FINDINGS OF FACT

Based upon the totality of the evidence presented and after due consideration, the undersigned makes the following findings of fact:

1. That on September 24, 2007 and at all relevant times, Respondent was the holder of Merchant Mariner's License number 1114246 and a Merchant Mariner Document. (Tr. 28-28).

2. That Respondent is an experienced mariner and has worked in the marine industry for many years. (CG Ex. 3; Tr. 209, 239).
3. That on September 24, 2007, Respondent was onboard the uninspected towing vessel (“UTV”) MARIE M. MORGAN (O.N. 628798). (Tr. 193, 201-203).
4. That the UTV MARIE M. MORGAN was a 98 GRT vessel, 56.4 feet in length. (CG Ex. 5; Tr. 180).
5. That on September 24, 2007, the UTV MARIE M. MORGAN experienced a minor grounding upon a submerged object. (Tr. 35, 46).
6. That at the time of the minor grounding, Respondent was operating the UTV MARIE M. MORGAN alone in the wheelhouse (without the vessel’s master with him) and was in charge of navigating and maneuvering the vessel. (Tr. 37, 46).
7. That shortly after the minor grounding, Coast Guard Lt. John Luff conducted an investigation on board the UTV MARIE M. MORGAN. (Tr. 45-55).
8. That during the investigation, Lt. Luff questioned Respondent about the grounding and asked the Respondent to produce his Coast Guard credentials. (Tr. 49).
9. That upon Lt. Luff’s request for Respondent’s Coast Guard credentials, Respondent presented to Lt. Luff a purported 200 GRT license, serial number 1114246, issue number 3, dated February 22, 2005, and bearing a towing endorsement and a 2007 radar endorsement on the reverse side. (CG Ex. 2; Tr. 37, 47-52).
10. That during Coast Guard Lt. Luff’s investigation of the minor grounding incident and at several points during the Coast Guard investigation, Respondent

represented, by words and actions, to Coast Guard investigators that he was entitled to a 200 GRT license, that the purported 200 GRT license in his possession was authentic, and that the Coast Guard had issued the purported 200 GRT license to him. (Tr. 47, 49).

11. The purported 200 GRT license was counterfeit and had the following characteristics:

- a. Was wholly printed with an ink jet printer. (Tr. 117).
- b. Was printed on standard printer paper. (Tr. 49, 117).
- c. Did not have microline printing in key areas. (Tr. 118).
- d. Bore the purported signature of a former Coast Guard employee who had retired from the Coast Guard six months prior to the signature date which appears on the contested document. (Tr. 141).

12. By contrast, authentic Coast Guard mariner's licenses are created in the following fashion:

The process begins at the Federal Bureau of Engraving and Printing ("FBEP") The FBEP creates blank license templates on special paper stock and pre-prints them (using special offset lithograph type printing) with individual serial numbers; various printed designs and patterns around the border of the document; the text "United States Coast Guard;" and several other designs and security features. The blank license templates are subsequently shipped in batches to the Coast Guard Regional Exam Centers ("REC") for further processing.

The process continues when the Coast Guard RECs later convert these blank templates into official Coast Guard licenses. The REC will then generate a license for an individual mariner by loading the blank template from the FBEP into a black-ink laser printer to add the mariners' name and other pertinent information.

(Tr. 117-124).

13. At no time did the New Orleans REC possess or use color ink jet printers and could only print with black ink using a laser printer. (Tr. 144).
14. The Coast Guard stopped printing radar endorsements on the reverse side of Coast Guard licenses in 2002. (Tr. 140).
15. On January 10, 2005, Respondent sent a letter to the New Orleans, LA REC from his home in Alabama seeking renewal of his 100 GRT “License, MMD and STCW” and also seeking information how to upgrade his 100 GRT License to a 200 GRT license. Respondent also included in that letter several documents necessary to the renewal of his 100 GRT license. (CG Ex. 1, p. 27).
16. That on or about between January 10 and 18, 2005, Respondent tendered a personal check, No. 2377, in the amount of \$140.00 to the REC as part of his application to renew his 100 GRT license. (CG Ex. 1, p. 39; Tr. 260, 262).
17. That on or about between February 18 and 22, 2005, Respondent was present at the New Orleans REC to be fingerprinted as part of the “Renewal License/MMD” process and not to apply for a 200 GRT license. (CG Ex. 1, p. 38).
18. That at all relevant times herein Respondent held a legitimate 100 GRT Coast Guard-issued license but did not possess a legitimate 200 GRT Coast Guard license, nor a Coast Guard Master of Towing Vessels license, nor a Mate (Pilot) of Towing Vessels license, nor or any towing or radar endorsements or designations. (Tr. 47-48, 253-254).
19. The Coast Guard’s records regarding Respondent are complete and not missing any pertinent information. (Tr. 146-147).

20. That Respondent has not accomplished the necessary qualifications or prerequisites to entitle to him to a 200 GRT license. (CG Ex. 1).
21. That Respondent attempted to gain employment as a tow operator under his 100 GRT license by attempting to rely on his reading of Navigation Vessel Information Circular (NVIC) 4-01. That Circular does NOT bear the weight of any controlling legal authority herein. (Tr. 191).

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. James David Graves holds a Coast Guard issued Merchant Mariner's License and Merchant Mariner's Document.
2. At all times pertinent to this case, James David Graves was acting under the authority of his Coast Guard license when operating the UTV MARIE M. MORGAN and when participating in and giving statements in connection to an ongoing Coast Guard investigation.
3. At all times pertinent to this case, James David Graves held a 100 GRT license and never held a 200 GRT license or a towing or radar endorsements or designations.
4. James David Graves' 100 GRT license was an insufficient credential to operate the UTV MARIE M. MORGAN alone in the wheelhouse or for him to be in charge of its maneuvering and navigation.
5. The charge of Misconduct against James David Graves, based upon his operation of the UTV MARIE M. MORGAN with an insufficient credential, is found PROVED.

6. The purported 200 GRT license that James David Graves possessed and presented to the Coast Guard during its investigation was counterfeit.
7. James David Graves knew or should have known that the purported 200 GRT license was counterfeit.
8. The charge of Misconduct against James David Graves, based on his possession and use of a counterfeit Coast Guard license, is found PROVED.
9. That by words and actions, James David Graves told Coast Guard investigators during an ongoing investigation that he was entitled to hold a 200 GRT license, that the purported 200 GRT license was authentic, and that the Coast Guard issued the purported 200 GRT license to him.
10. James David Graves knew or should have known that the statements he made, and referenced in paragraph 9, *supra*, were false.
11. The charge of Misconduct against James David Graves, based on his false statements to the Coast Guard during an ongoing investigation, is found PROVED.
12. The NVIC 4-01 is without binding legal authority and did not authorize James David Graves to operate the UTV MARIE M. MORGAN with only a 100 GRT license alone in the wheelhouse or to be in charge of its maneuvering or navigation on September 24, 2007.

V. DISCUSSION

A. General

This Suspension and Revocation proceeding is remedial and not penal in nature and is “intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea.” *See* 46 CFR 5.5. The Commandant has delegated to Administrative Law Judges the authority to suspend or revoke a license, certificate, or merchant mariner’s document for violations arising under 46 U.S.C. 7703. *See* 46 CFR 5.19.

It is important to note that determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. *See Appeal Decision No. 2640 (PASSARO)* (2003). Also, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. *Id.*; *Appeal Decision No. 2639 (HAUCK)* (2003).

B. Burden and Standard of Proof

The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 CFR 20.701-02. *Appeal Decision Nos. 2468 (LEWIN); 2477 (TOMBARI)*; *See also, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 101-3 (1981). It is important to note that this standard also applies in deciding whether an underlying criminal statute has been violated when it has been alleged as an element of a Misconduct charge. *Appeal Decision No. 2346 (WILLIAMS)* (1984). To prevail under this standard, the Coast Guard must

establish that it is more likely than not that Respondent committed the violations alleged in the Complaint. *See* 33 CFR 20.701-702(a). *See also, Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). To satisfy the burden of proof, the Coast Guard may rely on direct and/or circumstantial evidence. *See generally, Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-765 (1984). The proceeding is conducted under the provisions in 33 CFR Part 20, 46 CFR Part 5, and the Administrative Procedure Act, 5 U.S.C. 551 *et. seq.*

C. Acting Under the Authority

The Coast Guard charged Respondent with three (3) counts of Misconduct under 46 CFR 5.27. It alleged that on September 24, 2007, Respondent operated an uninspected towing vessel without the proper credentials; that he unlawfully possessed a counterfeit Coast Guard MML in his name while on board the UTV MARIE M. MORGAN; and that he subsequently told Coast Guard investigators that the Coast Guard issued to him the license in question – a fact the Coast Guard alleges to be untrue.

These charges cannot be found proved unless the Coast Guard establishes that Respondent was acting under the authority of his Coast Guard license during the alleged Misconduct. *See* 46 U.S.C. 7703(1). “A person employed in the service of a vessel is considered to be acting under the authority of a license . . . when the holding of such license . . . is [r]equired by law or regulation.” *See* 46 CFR 5.57(a). Furthermore, “a person is considered to be acting under the authority of the license, certificate or document . . . while engaged in official matters regarding the license, certificate or document. This includes, but is not limited to, such acts as applying for renewal of a license, taking examinations for upgrades or endorsements, requesting duplicates or

replacement licenses, certificates or documents, or when appearing at a hearing under this part.” *See* 46 CFR 5.59(b).

This was not a point of contention at any time during the case and the weight of the evidence clearly shows that Respondent was serving on board the UTV MARIE M. MORGAN under 46 CFR 15.812 on September 24, 2007 during counts one and two of the alleged Misconduct. With respect to the subsequent Coast Guard investigation regarding the origin of the license in question, I find that Respondent’s participation therein and statements given in connection thereto are within the scope of official matters regarding the license, certificate or document. *See* 46 CFR 5.59(b). Respondent is therefore found to have been acting under the authority of his Coast Guard MML and MMD at all relevant times.

D. Misconduct

As discussed below, Respondent is found to have committed three (3) acts of Misconduct by operating the UTV MARIE M. MORGAN without sufficient credentials, by possessing and using a counterfeit Coast Guard license, and by making false statements to Coast Guard investigators in connection with an ongoing investigation. Misconduct is defined as a “behavior which violates some formal, duly established rule. Such rules are found in . . . statutes, regulations, the common law, the general maritime law . . . and similar sources. It is an act which is forbidden or a failure to do that which is required.” *See* 46 CFR 5.27. Each of the three (3) counts of Misconduct is discussed in turn.

1. Insufficient Credentials

The Coast Guard alleged that on September 24, 2007, Respondent violated 46 CFR 15.910(a) by operating the towing vessel UTV MARIE M. MORGAN without holding sufficient credentials.

Title 46 of the Code of Federal Regulations Section 15.910(a) specifies that “[n]o person may serve as master or mate (pilot) of any towing vessel without meeting the requirements of 46 CFR 15.805(a)(5) or 15.810(d)” 46 CFR 15.805(a)(5) requires that “[e]very towing vessel of at least 8 meters (at least 26 feet) or more in length must be under the command of a master of towing vessels, or a mariner licensed as a master of inspected, self-propelled vessels greater than 200 gross register [sic] tons (GRT) holding either: (i) A completed Towing Officer’s Assessment Record (TOAR), bearing the signature of a Designated Examiner and stating that the Examiner found the candidate proficient; or (ii) a license endorsed for towing vessels.”

Likewise section 15.810(d) requires, “[e]ach person in charge of the navigation or maneuvering of a towing vessel of at least 8 meters (at least 26 feet) in length must hold a license authorizing service as either, (1) Mate (pilot) of towing vessels; or (2) Mate of inspected self-propelled vessels greater than 200 GRT within any other restrictions on the officer’s license, holding either: (i) A completed Towing Officer’s Assessment Record (TOAR) bearing the signature from a Designated Examiner found the candidate proficient; or (ii) A license endorsed for towing vessels.”

It is undisputed that the UTV MARIE M. MORGAN was a 98 GRT towing vessel and was 56.4 feet in length. (CG Ex. 5; Tr.180). Thus, it fell within the class of vessels described in 46 CFR 15.805(a)(5) and 15.810(d) Furthermore, the parties agree that on

September 24, 2007, Respondent was serving as master or mate (pilot) and was in charge of navigation and maneuvering of the UTV MARIE M. MORGAN when he was operating the vessel alone in the wheelhouse. (Tr. 193, 201, 203). The only issue for resolution of this allegation turns on whether Respondent had sufficient credentials to serve on the UTV MARIE M. MORGAN in this capacity.

Respondent testified that he never held a Coast Guard-issued mariner's master of towing vessel license or a mate or pilot of towing vessel license. (Tr. 254).

Lt John Luff, the Coast Guard Investigating Officer, testified that on September 24, 2007, he conducted an investigation into the minor grounding incident involving the UTV MARIE M. MORGAN on the Intercoastal Waterway near Houma, LA. During the course of his investigation, Lt. Luff interviewed the Respondent who explained how the incident had occurred. (Tr. 35).

During the course of his investigation, Lt Luff received from the Respondent a set of documents which the Respondent described as his "TOAR" (Towing Officer's Assessment Record). The Coast Guard did not provide any direct or circumstantial evidence regarding the sufficiency of the Respondent's TOAR. Respondent testified that the TOAR documents he provided to Lt Luff were aboard the UTV MARIE M. MORGAN per his employer's guidance. (Tr. 262).

During the course of his investigation, Lt Luff also received from the Respondent a purported 200 GRT license, serial number 1114246, "issue number 3," dated 22 February 2005, and bearing a radar endorsement on the reverse side dated 30 May 2007. (CG Ex. 2; Tr. 66-67).

Upon receipt of Respondent's license, Lt Luff noted a discrepancy between the 200 GRT license he was given and the 100 GRT, "issue number 2" license, which Coast Guard records reflect the Respondent was entitled to. Moreover, Lt Luff also testified that Coast Guard records reflected that the Respondent's 100 GRT license (which, incidentally, was also dated 22 February 2005) did not include either a towing endorsement OR a radar endorsement. (Tr. 47-48).

Lt Luff testified that based upon his cursory evaluation of the Respondent's license (CG Ex 2), *vis a vis* Coast Guard records, he believed the document to be a forgery. (Tr. 48).

The Coast Guard introduced evidence that Respondent was never entitled to hold a Coast Guard-issued 200 GRT license or a towing or radar endorsement. Specifically, the Coast Guard introduced evidence that Respondent only held a 100 GRT license with no towing or radar designations or endorsements whatsoever. (CG Ex. 1; Tr. 47-48).

The Coast Guard produced Respondent's entire complete paper file and introduced an excerpt of said file as Coast Guard Exhibit 1. This exhibit clearly shows that Respondent held a 100 GRT license; that he applied to have the 100 GRT license renewed in 2005; that he paid \$140.00 dollars for the renewal; and that the Coast Guard actually renewed the 100 GRT license in February 2005. (CG Ex. 1, p. 5, 8). The Coast Guard's records relating to Respondent contain no evidence or indicia that Respondent was ever issued, or even applied for, a 200 GRT license. (CG Ex. 1).

Respondent insisted, however, that he did apply for an upgrade to a 200 GRT license and a towing and radar endorsement and that the Coast Guard subsequently granted them. However, the only evidence of this assertion is the counterfeit license

itself. Respondent could not produce a canceled check or any other documentary evidence indicating that he ever applied for an upgrade to a 200 GRT license or for a towing or radar endorsement. Furthermore, there was no evidence that Respondent accomplished any of the necessary prerequisites to be qualified to hold a 200 GRT license. It is also noteworthy that the counterfeit 200 GRT, license bearing the unauthorized upgrades, is dated February 22, 2005 – the same date that the Coast Guard actually renewed Respondent’s legitimate and authorized 100 GRT license. (CG Ex. 2).

Throughout the hearing Respondent suggested that the counterfeit credential was authentic and speculated that the Coast Guard must have lost the records of his purported upgrade during Hurricane Katrina. The Coast Guard offered evidence and testimony that the Coast Guard fully recovered Respondent’s entire file after the storm. (CG Ex. 1; Tr. 146-147).

There was also strong circumstantial evidence that Respondent never applied for a 200 GRT license that would have authorized him to lawfully operate the UTV MARIE M. MORGAN. For instance, there was credible testimony that Respondent went to great lengths to convince his former employer, Bayou Tugs, Inc., that a 200 GRT license was unnecessary and that his 100 GRT license was sufficient to operate the UTV MARIE M. MORGAN, per an interpretation of Navigational Vessel Inspection Circular (NVIC) 4-01. (Tr. 191).

It is counterintuitive that Respondent would have tried to obtain employment with an inferior license by relying on a perceived loophole in the NVIC 4-01 if he actually held sufficient credentials – specifically the purported 200 GRT license which he presented to the Coast Guard. ***Query: Why would Respondent assert that NVIC 4-01***

permitted him to work with a 100 GRT license as he did on September 24, 2007, if he actually held a properly endorsed 200 GRT license?

The great weight of the evidence presented at hearing establishes by a preponderance that Respondent did not possess sufficient credentials to operate the UTV MARIE M. MORGAN as he did on September 24, 2007 and thereby violated 46 CFR 15.910(a) Therefore Respondent committed Misconduct by violating this duly established rule while acting under the authority of his authentic Coast Guard license. Count 1 is found PROVED.

2. Possession and Use of Counterfeit License

In the Amended Complaint, the Coast Guard alleged that on September 24, 2007, Respondent unlawfully possessed a counterfeit Coast Guard license issued in his name while onboard the UTV MARIE M. MORGAN and argued that by doing so he violated 18 U.S.C. 2197.

18 U.S.C. 2197, is a federal statute, which prohibits a variety of acts, including:

Whoever, ***not being lawfully entitled thereto***, uses, exhibits, or attempts to use or exhibit, or, with intent unlawfully to use the same, receives or possesses any certificate, license, or document issued to vessels, or officers or seamen by any officer or employee of the United States authorized by law to issue the same; or

Whoever, without authority, alters or attempts to alter any such certificate, license, or document by addition, interpolation, deletion, or erasure; or

Whoever forges, counterfeits, or steals, or attempts to forge, counterfeit, or steal, any such certificate, license, or document; or unlawfully possesses or knowingly uses any such altered, changed, forged, counterfeit, or stolen certificate, license, or document; or

Whoever, without authority, prints or manufactures any blank form of such certificate, license, or document, or

Whoever possesses without lawful excuse, and with intent unlawfully to use the same, any blank form of such certificate, license, or document; or

Whoever, in any manner, transfers or negotiates such transfer of, any blank form of such certificate, license, or document, or any such altered, forged, counterfeit, or stolen certificate, license, or document, or any such certificate, license, or document to which the party transferring or receiving the same is not lawfully entitled.

(emphasis added).

The parties are in agreement that on September 24, 2007 Respondent possessed and presented to the Coast Guard a purported 200 GRT license, serial number 1114246, “issue number 3,” dated 22 February 2005, and bearing a radar endorsement on the reverse side dated 30 May 2007. (CG Ex. 2; Tr. 66-67). As previously discussed, Respondent was only entitled to carry 100 GRT license with no towing designations or radar endorsements and was not authorized to carry a 200 GRT license with purported radar and towing endorsements.

The outcome of this charge depends upon the authenticity of the purported document that Respondent possessed and presented to the Coast Guard on September 24, 2007.

The Coast Guard presented compelling evidence and testimony that the purported 200 GRT license was a forgery, a counterfeit. Coast Guard witness Lt. Luff was the Coast Guard investigator who interviewed Respondent on September 24, 2007 and thereafter. At the hearing Lt. Luff testified that upon receipt of Respondent’s purported license, he noted a discrepancy between the 200 GRT license that Respondent presented

and the 100 GRT, “issue number 2” license, which Coast Guard records reflect Respondent was entitled to. (Tr. 47-48). Moreover, Lt Luff noted that Coast Guard records did not reflect that Respondent’s 100 GRT license (which, incidentally, was also dated 22 February 2005) included the radar endorsement displayed on the reverse side of the questioned license. (Tr. 47). Lt. Luff testified that based upon his cursory evaluation of Respondent’s purported license *vis a vis* Coast Guard records, he believed the document to be a forgery. (CG Ex. 2; Tr. 48-49).

Pursuant to the Administrative Law Judge’s direction, the Coast Guard submitted the Respondent’s questioned license to Mr. George Virgin, Forensic Document Examiner, U.S. Department of Homeland Security. Mr. Virgin produced a report of his evaluation of the Respondent’s license and the same was admitted into evidence. (CG Ex. 9).

Mr. Virgin’s report, and his subsequent testimony at the hearing, revealed that the questioned license was indeed a forgery. (Tr. 117). Mr. Virgin, who was qualified as an expert in questioned document evaluation, elaborated on how he formulated his conclusion and testified why the questioned license was not authentic. (Tr. 117-131).

The undersigned found Mr. Virgin’s testimony to be compelling and highly persuasive; particularly regarding the procedure and elements inherent to the creation of an authentic Coast Guard mariner’s license.

Mr. Virgin testified that the process begins at the Federal Bureau of Engraving and Printing (“FBEP”). (Tr. 123). The FBEP creates blank license templates on special and unique paper stock. The FBEP then pre-prints that stock with individual serial numbers; various printed designs and patterns around the border of the document; the text

“United States Coast Guard;” and several other designs and security features, including microline printing. (Tr. 117-120). The FBEP uses a unique offset lithography type printing when generating these blank license templates. (Tr. 118). Mr. Virgin further testified that after the FBEP completes the offset lithograph type printing, those license templates are then sent in batches to the various Coast Guard Regional Exam Centers (“REC”) for further processing.

Mr. Virgin testified that employees at the Coast Guard RECs later convert these blank templates into official Coast Guard licenses. The REC then generates a unique individual license for a given mariner by loading the blank FBEP template into a black-ink laser printer to add the mariner’s name and other pertinent information. Therefore, an authentic Coast Guard license would necessarily be made with the FBEP special paper stock, bearing various designs and wording printed with offset lithograph type printing technology – then locally detailed using black laser ink technology.

Mr. Virgin specifically noted that the Respondent’s purported license was printed entirely with a color ink jet printer on standard printer paper. (Tr. 117). Notably, the markings which should have been printed with special offset lithograph technology were printed with only color ink jet printing technology on the questioned document.

Mr. Virgin also testified that the questioned license lacked a “letter press printed serial number” and that the serial number on the questioned document had also been created by a color ink jet printer. (Tr. 117). Mr. Virgin further noted that genuine Coast Guard licenses contain microline printing in several key areas, which the license in question lacks. (Tr. 118). Mr. Virgin testified that even the signature on the front of the questioned license (ostensibly that of a “B.A. Cordero”) was printed using ink jet

technology and was not created by a writing instrument, such as a hand-held pen. (Tr. 118-122).

Coast Guard witness Mr. Wells, director of the New Orleans REC, testified as an expert in Coast Guard licensing procedure and testified that the New Orleans REC never possessed or used color ink-jet printers and that the REC can only print in black ink using a laser printer. (Tr. 144).

There was other considerable evidence supporting the conclusion that the questioned document was a counterfeit. For instance, the questioned license displayed a radar endorsement on the reverse side. Mr. Wells testified that the Coast Guard stopped printing radar endorsements on the reverse sides of such documents in 2002. (Tr. 140).

It is additionally instructive that Lt. John Luff also testified that after 2002, the Coast Guard no longer printed radar endorsements on the reverse side of mariner's licenses and that radar endorsements are separate documents, distinct and apart from the Mariner's License. (Tr. 54). This, in stark contrast to Respondent's purported license which shows a reverse-side radar endorsement dated 2007.

Respondent admitted that, apart from the alleged endorsement on the reverse side of the document in question, he never possessed or was issued a separate radar endorsement from the Coast Guard. (Tr. 254).

Of great interest in this case are the discrepancies between the purported 200 GRT license that Respondent submitted to his employer on September 17, 2007 and the 200 GRT license recovered by the Coast Guard only one week later.

Mr. Sean Naquin of Bayou Tugs, Inc. testified that on or about September 17, 2007, the Respondent applied for a job with Mr. Naquin's company. Mr. Naquin testified

that as part of Respondent's job application, the Respondent produced copies of both the front and back sides of his purported 200 GRT mariner's license. Mr. Naquin testified that when he received Respondent's license, there was NO radar endorsement typed or printed on the reverse side of the document. (Tr. 184). An examination of CG Ex. 3, p. 5-6 plainly reveals the absence of a radar endorsement on the reverse side of the questioned license as that document appeared on September 17, 2007.

The undersigned then compared CG Ex. 3, p. 5-6 to CG Ex 2 is the document recovered from the Respondent on September 24, 2007. It plainly shows a radar endorsement dated 30 May 2007. The undersigned notes that the May 30, 2007 date is nearly four months before the same document was e-mailed to Mr. Naquin without a radar endorsement. The radar endorsement was absent from the document sent to Mr. Naquin.

Clearly, the forged Mariner's License at issue had been altered from the time Respondent applied for a job with Bayou Tugs on September 17, 2007 to the time he presented the document to Coast Guard investigators on September 24 2007. Moreover, the alteration was done in a manner wholly inconsistent with current Coast Guard practice regarding radar endorsements. (TR 140).

Most damning to Respondent's case is that the controverted radar endorsement on the license at issue bears the signature of a "Jessie Bilbo" and is dated "30 May 2007." Per the testimony of the New Orleans REC director, Mr. Richard Wells, the very same Jessie Bilbo retired from the Coast Guard in December, 2006—and could NOT have signed or issued the radar endorsement in May 2007. (TR 141).

The undersigned notes that the Coast Guard need not prove who forged the document or who altered the document, only that it was a counterfeit and/or the Respondent used the document in its forged or adulterated condition. See Appeal Decision No. 2346 (WILLIAMS) (1984).

It is abundantly clear from the evidence and testimony that the questioned document was entirely counterfeit. Furthermore and as previously discussed, Respondent was only entitled to carry a 100 GRT license and he therefore knew or should have known the purported 200 GRT license bearing unauthorized upgrades was a counterfeit.

The weight of the evidence presented at hearing establishes by a preponderance that the purported license Respondent offered to the Coast Guard on September 24, 2007 was a counterfeit and that Respondent thereby violated 18 U.S.C. 2197. Therefore Respondent committed Misconduct by violating this duly established rule while acting under the authority of his authentic Coast Guard license. Count 2 is found PROVED.

3. False Statements to Coast Guard Investigators

In the Amended Complaint, the Coast Guard alleged that on September 24, 2007 while onboard the UTV MARIE M. MORGAN, Respondent told a U.S.C.G. Investigating Officer from MSU Morgan City, LA that the counterfeit license in his possession was issued to him by the Coast Guard. The Coast Guard alleged that statement to be false and argues that Respondent violated 18 U.S.C. 1001(a) by making such a statement.

18 U.S.C. 1001(a) provides in relevant part: “whoever . . . knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation; or . . . uses any false writing or document knowing the same to contain

any materially false, fictitious, or fraudulent statement or entry shall be fined or imprisoned.”

As previously discussed, the weight of the evidence clearly establishes that Respondent was only entitled to carry a 100 GRT license and that the 200 GRT license in question was a counterfeit. Respondent made affirmative representations that he was entitled to the credentials displayed on the counterfeit license during the Coast Guard investigation. He used the counterfeit license when he applied for a job with Bayou Tugs, Inc. Thus, proof of his Misconduct turns on whether the Respondent knowingly made materially false statements or knowingly used or possessed a false document.

The undersigned rejects the suggestion that the counterfeit license came from the Coast Guard. There is extensive evidence that the document and its purported upgrades were forged. To believe that the counterfeit license came from the Coast Guard would require cognizable proof, beyond mere suggestion or conjecture, that a rogue employee generated an obviously false license, was personally motivated to sabotage the Respondent, and then sent him a counterfeit license bearing improper upgrades.

Respondent is presumed to know that he was only entitled to carry a 100 GRT license. As an intelligent and experienced mariner, he is appropriately versed in Coast Guard licensing procedures. It is improbable that the Respondent actually believed the affirmations he made to Bayou Tugs, Inc. and to the Coast Guard investigators regarding the validity of the illegitimate 200 GRT license.

The weight of the evidence presented at hearing establishes by a preponderance that Respondent violated 18 U.S.C. 1001(a) by knowingly and willfully making materially false, fictitious, or fraudulent statements to the Coast Guard during an ongoing

investigation. Furthermore, the weight of the evidence presenting at hearing also establishes by a preponderance that Respondent also violated 18 U.S.C. 1001(a) by making use of a false writing or document knowing the same contained materially false, fictitious, or fraudulent statements or entries when he presented the counterfeit license to Bayou Tugs, Inc. and to the Coast Guard on September 24, 2007. Therefore Respondent committed Misconduct by violating this duly established rule while acting under the authority of his authentic Coast Guard license. Count 3 is found PROVED.

E. Respondent's Affirmative Defenses

Respondent essentially asserts two alternative affirmative defenses. The first affirmative defense is in regard to the first count of Misconduct. Respondent argues that his properly-issued 100 GRT license was sufficient under NVIC 4-01.

Respondent's second affirmative defense is in regard to Counts 2 and 3. Respondent essentially argues that the counterfeit license was sent to him by the Coast Guard, or an employee thereof, and that he should not be held accountable for using it or making false statements related to the document if the license is a forgery.

Both of Respondent's affirmative defenses are rejected as discussed below.

1. Reliance on NVIC 4-01

NVICs are not controlling legal authority but are, instead, merely advisory in nature and serve as guidance regarding implementation of statutory or regulatory law.

See Queen of Hearts Cruises v. U.S., WL 195298 S.D.N.Y. (1999).

Here, NVIC 4-01 is Navigation and Vessel Inspection Circular No. 4-01, issued by the U.S. Department of Transportation as COMDTPUB 16700.4 and dated May 21, 2001. The "subject" of the circular is "Licensing and Manning for Officers of Towing

Vessels.” A copy of the regulation was admitted as Respondent’s Exhibit A, of which the undersigned took judicial notice.

Respondent argues that at the time he applied for work with Bayou Tugs and at the time of the September 24, 2007 grounding, he was “operating within the scope of NVIC 4-01” in that:

The NVIC 4-01, dated May 21, 2001 entered into evidence as Respondents exhibit A, on page nine (9), (1),(d), in very plain English state, ‘between May 20, 2001 and May 21, 2006, and BEFORE any license transaction during this period, any of the following licenses will serve as adequate evidence on a vessel operating within the limitations of their faces.’ And then down to paragraph (d), it states ‘Master of inspected self-propelled vessels within any restriction on the license (issued before May 21, 2001)’ the Respondent was issued a one hundred ton license on August 1, 2000 by the Regional Exam Center, NOLA and according to Lt Luff’s testimony, was renewed in February 2005 and is shown on the U.S.C.G computer as valid today. [sic]

See Graves, written closing arguments @ 3.

When Respondent applied for a job with Mr. Naquin and Bayou Tugs, Inc., *see supra*, he asserted that NVIC 4-01 created a “loophole” that allowed him to work for Bayou Tugs without possessing a 200 GRT license with the appropriate endorsements. (Tr. 191).

Respondent’s argument that NVIC 4-01 fails for three reasons.

First, NVIC 4-01 is not controlling legal authority and does NOT supersede 46 CFR 15.805(a)(5) or 15.810(d).

Second, I note that NVIC 4-01 defines the time period of “Between May 20, 2001 and May 21, 2006” as the applicable life-span of the circular. The incident at issue occurred on September 24, 2007, more than a year beyond the effective dates of the

circular. Respondent received the second issue of his 100 GRT license after May 21, 2006. Hence, even if the NVIC 4-01 was controlling legal authority, Respondent's second-issue license AND the events of September 24, 2007 fall outside the circular's effective dates.

Third, assuming that Respondent genuinely believed that NVIC 4-01 relieved him of the need to possess a 200 GRT license, then why did he apply for one or have one in his possession on September 17, 2007 (the day he applied for a job with Bayou Tugs) or September 24, 2007 (the day of the grounding)? Conversely, if the Respondent possessed a legitimate 200 GRT license on September 17, 2007, why did he feel the need to rely upon the NVIC 4-01 when he applied for the job with Bayou Tugs, Inc.? Finally, if Respondent had possessed a legitimate 200 GRT license since February 22, 2005 (*See* CG Ex. 2) why did he affirmatively defend, here, that NVIC 4-01 relieved him of the obligation to hold a 200 GRT license?

2. Mistake of Fact

Respondent's second affirmative defense is that he was relying on what he believed to be an authentic Coast Guard license and that he believed the Coast Guard sent him this license. This argument is analogous to a mistake of fact defense in a criminal prosecution. Even though the instant proceedings are remedial and not criminal in nature, the framework for a legal analysis of a defense based upon a "mistake" is helpful here.

The essence of this defense is that in a criminal proceeding, an accused might assert a "mistake of fact" defense where the mistake negates the existence of a mental state essential to a material element of the offence. *Com. v. Lopez*, 745 N.E.2d 961

(2001). This defense is not available, however, where the mistake arises from the defendant's own negligence or deliberate ignorance. *See US v. Gaines*, 690 F2d 849 (11th Cir. 1982); *People v. Dillard*, 201 Cal. Rptr 136 (1984). Instead, the mistake must have been both honest and reasonable and the conduct of others will only be considered to the extent that it contributes to the defendant's mistaken belief. The validity of this defense, here, turns on whether Respondent was in fact mistaken and the extent to which his mistake was objectively reasonable.

The facts adduced at the hearing reveal that on January 10, 2005, Respondent sent a letter to the REC asking how to upgrade his license to 200 GRT. (CG Ex. 1 p. 27). Further, in February, 2005, Respondent was working in the waters off of Brazil and that he made a brief return to the United States. (Tr. 242-243).

Respondent testified that on or about February 18, 2005, he presented himself to the New Orleans REC for the expressed purpose of applying for a 200 GRT license. (Tr. 255-261). He testified that he paid, by check, the \$140.00 fee for processing his application for the 200 GRT license. (Tr. 260, 262). It is noteworthy that the Respondent could not produce any evidence of a check written by him to the New Orleans REC in February 2005. (Tr. 260-261). While it is true that documents from Respondent's file reveal his presence at the New Orleans REC on or about between February 18 and 22, 2005, it appears that he presented himself to be fingerprinted as part of the "Renewal License/MMD" process and not for the purpose of obtaining a 200 GRT license. (CG Ex. 1, p. 34-38).

The undersigned notes that the counterfeit 200 GRT license bore an issue date of February 22, 2005. That is only four days from when Respondent claims that he applied

for the upgraded license on February 18, 2005. REC director Richard Wells testified it takes between two and six months from the time a mariner applies for a 200 GRT upgrade to the time when he or she actually receives the upgraded license. (Tr. 195-196). It is a practical impossibility that Respondent applied for a 200 GRT upgrade on or about February 18, 2005, and that the Coast Guard issued it only four days later on February 22, 2005.

What is more likely is that Respondent applied for a renewal of his existing 100 GRT license on or about January 18, 2005. The evidence clearly reflects that Respondent applied for a renewal of his 100 GRT license and paid that entity \$140.00 with a personal check on January 18, 2005 -- not February 18, 2005. (CG Ex. 1, p. 39). Indeed, Respondent admitted that the only evidence of a check written to the New Orleans REC is dated January 18, 2005. (Tr. 260).

Also suspicious is the entry pertaining to "issue date" on Respondent's 100 GRT renewal application. The Coast Guard issuing official entered "2.22.05" as the issuing date for Respondent's 100 GRT renewal. (CG Ex. 1, p. 5, 8). This is the exact same issue date displayed on the counterfeit 200 GRT license at issue in this case.

Furthermore, Respondent's REC file, contained at CG Ex. 1, contains NO indication that he ever filed an application or paid a fee for a 200 GRT license (Tr. 150-151) despite his testimony that he had paid an application fee for a 200 GRT license, by check, in February 2005. (Tr. 258).

Respondent's REC records also do not reflect either a Coast Guard-issued test for a 200 GRT license or that Respondent had taken the Coast Guard-required courses which can serve in lieu of the test as preconditions to the issuance of a 200 GRT license. In

fact, Respondent's own January 10, 2005 letter to the REC (CG Ex. 1, p. 27) indicates the Respondent was unaware of the needed prerequisites to obtain a 200 GRT license. This undercuts the notion that the Respondent had gathered and submitted sufficient documentation in time to be granted a 200 GRT upgrade on February 22, 2005.

To reiterate: Respondent testified that in February, 2005, he had paid for his 200 GRT application with a personal check. (Tr. 258). At the conclusion of the hearing, the undersigned specifically asked Respondent to contact his bank to obtain a copy of that check that he supposedly wrote to the Coast Guard in early February, 2005 for the 200 GRT license. (Tr. 261).

Despite the undersigned's request, Respondent produced no other documents that might substantiate a claim that he ever applied or paid for a 200 GRT license or that he ever wrote a check in any amount for any purpose in February 2005.

As previously discussed, Respondent argues that during Hurricane Katrina, thousands of mariner's records normally maintained at the New Orleans REC were lost. He argues that even though his file was located and restored during the recovery process, several key documents -- those related to his 200 GRT upgrade -- were lost. The undersigned finds it odd that only those documents pertaining to his alleged 200 GRT upgrade, and no others, are missing from CG Ex. 1. The "Katrina" argument is entirely too convenient to be persuasive.

Curiously, Respondent testified that he did not personally maintain or possess any documents pertaining to his application for the 200 GRT license. He further testified that he never maintained copies of ANY applications for ANY Coast Guard licenses. (Tr. 254, 255). The undersigned finds this odd, inasmuch as a reasonable person would

maintain any and all communications, documents, copies, etc., which relate to one's professional licensure and livelihood.

Respondent's testimony (Tr. 257) and his closing argument suggests that he had an unfortunate confrontation with an REC employee and speculated that the disgruntled REC employee might have created and mailed the counterfeit license to Respondent in reprisal for the unhappy encounter.

There is no evidence that proves a conspiratorial effort on the part of a disgruntled REC employee beyond Respondent's suggestions. Respondent did provide circumstantial information from a source not party to the instant proceedings that suggest a history of poor internal practices and strained customer relations between REC staffers and the maritime public. Assuming, *arguendo*, that these allegations may be true: It is too great of a stretch to connect these vague allegations with any specific evidence that has probative bearing on these proceedings. Anecdotes of poor customer relations may be true and, perhaps, are worthy of investigation, but the undersigned Administrative Law Judge is not thusly empowered to carry out this task. The "evidence" of a conspiracy is too tangential to the issues at bar to be of value here.

All of the above-mentioned factual determinations and analysis render it highly unlikely that Respondent, who demonstrated that he is intelligent and knowledgeable as to Coast Guard licensing procedure, could have actually believed that the counterfeit license was authentic or that the Coast Guard issued this license to him.

Even if Respondent actually and honestly believed these facts, this mistake would be far from reasonable. On the contrary, there exists a substantial body of proof that Respondent was never entitled to the upgraded license, was never issued said license, and

never even applied for these upgrades. These facts, together with the fact that the purported 200 GRT license was such an obvious counterfeit, make it wholly unreasonable for anyone (not to mention an experienced mariner such as Respondent) to believe that the license was authentic or issued by the Coast Guard.

Respondent's mistake of fact defense is therefore rejected because the alleged mistake of fact was neither honest nor reasonable.

VI. SANCTION

The selection of an appropriate sanction is the responsibility of the ALJ, per 46 CFR 5.569(a). As discussed above, Respondent committed three distinct acts of Misconduct while acting under the authority of his document by operating the UTV MARIE M. MORGAN without sufficient credentials; by possessing and using a counterfeit Coast Guard license; and by making materially false statements to Coast Guard investigators during an ongoing investigation.

The Amended Complaint seeks revocation of the Respondent's Mariner's License and Documents per 46 U.S.C. 7703. That Code section provides in relevant part:

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.

(emphasis added)

Respondent argues that revocation is only appropriate if he has committed one of the eleven enumerated acts listed in 46 CFR 5.61(a). However, Respondent fails to note (b) of the

same regulation which provides that an investigating officer may seek revocation of a respondent's license, certificate or document:

when the circumstances of an act or offense found proved or circumstances of the respondent's prior record indicates that permitting such person to serve under the license, certificate or document would be clearly a threat to the safety of life or property, or detrimental to good discipline.

In its post-hearing submission, the Coast Guard cites Appeal Decision No. 2346 (WILLIAMS) (1984), for the proposition that revocation is the appropriate sanction in a case involving forgery or alteration of a mariner's document. In Williams, the Commandant approved revocation as a sanction for a mariner's falsification of an endorsement on his MML, saying:

A person with a false endorsement on his document may be placed in a critical position aboard ship, although he is, in reality, unqualified. The entire ship and crew could well be endangered by such a person. Because of the serious threat to safety posed by alteration of documents, I believe revocation is appropriate.

Williams at 2.

Williams, a 1984 decision, was followed by a pronouncement from a superior appellate body, the NTSB, in *Coast Guard v. Moore*, *NTSB Order No. EM-201 (2005)*. There, in an action brought against a mariner for misconduct (refusal to submit to a drug test), the NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 CFR Table 5.569. The NTSB clearly explained that the guidance contained in the Table is "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered."

While it is true that 46 CFR 5.569(d) ALSO says: *This table should not affect the fair and impartial adjudication of each case on its individual facts and merits*, it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to this Respondent, absent some proof.

With the exception of Misconduct for wrongful possession, use, sale, or association with dangerous drugs, revocation is not a mandatory sanction for Misconduct. *Allen v. Shae*, NTSB Order No. EM-204 (2008). In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by the respondent; respondent's prior records; and evidence of mitigation or aggravation. *See* 46 CFR 5.569(b)(1)-(3).

Remedial Action: Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. *See* 33 CFR 5.569(b)(1).

Respondent's Prior Records: The undersigned does note that the Respondent did lawfully have a 100 GRT license which had never been the subject of previous disciplinary action. *See* 33 CFR 5.569(b)(2).

Mitigation or Aggravation: By way of mitigation, Respondent's evidence and witnesses indicated he is a man of generally good character and is an able and experienced seaman. (Tr. 233-238); *See*, 33 CFR 5.569(b)(3).

It is incumbent upon the Coast Guard to prove matters in aggravation if it desires revocation. Here, the Coast Guard did not present any matters in aggravation that would support revocation. The Coast Guard might have presented expert testimony from an experienced master or a safety investigator to explain how Respondent's conduct posed a

threat to life, property or good discipline, but it did not. The Coast Guard provided no evidence, beyond mere speculation, regarding the threat Respondent may pose to the safety of life or property on the waterways. *See* 33 CFR 5.569(b)(3).

Therefore, absent evidence in either aggravation or mitigation, I am constrained by the guidance contained in 46 CFR 5.569 and its attendant table. There the suggested range of appropriate orders suggests a suspension for 1-3 months for misconduct; occasioned by a respondent's failure to comply with US laws or regulations.

The Coast Guard has proved that the Respondent did operate a vessel in violation of 46 CFR 15.805(a)(5) and 15.810(d). The table indicates that this particular act of misconduct warrants a suspension of up to three months.

Also, the Coast Guard has proved that the Respondent possessed and used a forged mariner's document. The table indicates that this unique act of misconduct also warrants an additional suspension of up to three months.

Likewise, the Coast Guard has proved that the Respondent knowingly made materially false statements to Coast Guard investigators regarding that document. Again, the table indicates that this unique act of misconduct warrants an additional suspension of up to three months.

Proof of the underlying infractions, however, does not constitute proof of aggravation. They are separate and distinct burdens borne by the Coast Guard.

Intuitively, all of the charges found proved are serious and relate directly to safety on the waterways. The charges are unique and not multiplicitious. A distinct societal and maritime interest is served by a sanction for each. Here, Respondent served in a critical position aboard the vessel, although he was unqualified to do so. If it were not for an

accidental grounding, it is likely that Respondent would have continued to operate beyond the scope of his expertise, thus risking safety on the waterways. The mendacity reflected in his use of a forged mariner's document, together with his false statements to investigators, weigh in favor of a more severe penalty vice the recommendations contained in Table 5.569. However, absent proof of independent aggravating factors offered by the Coast Guard and absent more stringent regulatory sanctions, I am constrained by the guidelines contained in Table 5.569. Therefore, a suspension of three months apiece for each of the three proved infractions is the very least I can impose and the very most the law seems to allow.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED THAT all elements of the Complaint filed against James David Graves on September 27, 2007 and amended on November 13, 2007 are found PROVED.

IT IS FURTHER ORDERED THAT the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to James David Graves are SUSPENDED OUTRIGHT for NINE (9) months commencing on the date they are in the possession of the Coast Guard. This will be followed by a suspension of twelve (12) months stayed on twelve (12) months probation.

IT IS FURTHER ORDERED THAT James David Graves is to tender his valid Merchant Mariner's Documents, Merchant Mariner's Licenses, 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: Marine Safety Unit Morgan City, 800 David Drive, Room 232, Morgan City, LA 70380.

IT IS FURTHER ORDERED THAT James David Graves is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Document or Merchant Mariner's License issued by the U.S. Coast Guard until the suspension described herein is served in full.

PLEASE TAKE NOTE that issuance of this Decision and Order serves as the parties' right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and dated this ____ of June, 2008 at
New Orleans, LA

Honorable Bruce T. Smith
Administrative Law Judge
United States Coast Guard

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS

I. Coast Guard's Exhibits. IO Ex. 1 through IO Ex. 9.

1. Purported 200 GRT Coast Guard License.
2. Excerpt from Coast Guard's record of Respondent's license file.
3. September 25, 2007 email from Sean Naquin to Lt. John Luff, with attachments.
4. Document entitled Application for Employment for Bayou Tugs, Inc.
5. Certificate of Documentation for UTV MARIE M. MORGAN.
8. Curriculum Vitae of George Virgin.
9. December 27, 2007 letter from George Virgin to Richard Wells.

II. Respondent's Exhibits. R Ex. A through R Ex. C.

- A. Navigation Vessel Information Circular 4-01.
- B. Report of Marine Accident Injury or Death.
- C. Report of Marine Accident Injury or Death.

III. Judge's Exhibit.

1. March 19, 2008 email from Richard Block to Hon. Bruce T. Smith.

IV. Coast Guard's Witnesses

1. Boatswain Mate 1 Stuart Stryker
2. Coast Guard Lt. John Luff
3. Richard Wells
4. George Virgin
5. Sean Naquin
6. Jesse Pierre
7. Marcus Broussard

V. Respondent's Witnesses

1. Coast Guard Lt. John Luff
2. Jim Wilson
3. Daniel Wray
4. Mary Jane Graves
5. James David Graves

ATTACHMENT B – SUBPART J, APPEALS

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 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.

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 Federal Express:

LT John R. Luff
Marine Safety Unit Morgan City
800 David Drive, Room 232
Morgan City, LA 70380
Facsimile: 985-380-5379

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 Federal Express:

James David Graves
[REDACTED]

Done and dated this ____ of June, 2008 at
New Orleans, LA

Lauren M. Meus
Paralegal Specialist