

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

UNITED STATES COAST GUARD

Complainant

vs.

JACK ANTHONY JORY

Respondent

Docket No: 08-0471
CG Enforcement Activity No: 3356914

DECISION AND ORDER

Issued: December 5, 2008

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

Appearances:

For Complainant:

Mr. Robert Foster
LT Beth Gregorich
USCG Sector Mobile

For Respondent:

Jack Anthony Jory, *pro se*

PRELIMINARY STATEMENT

This is an action arising under 46 U.S.C. § 7702(d) resulting from the Coast Guard's temporary suspension of Jack Anthony Jory's (Respondent) certificate and merchant mariner's document. Coast Guard regulations, 33 C.F.R. § 20.1201(a), *et seq.*, dictate that whenever the Coast Guard suspends a merchant mariner's license or documents without a hearing, expedited hearing procedures are triggered.

On November 3, 2008, the Coast Guard seized Respondent's merchant mariner's credentials and served him with a copy of the Complaint on the same date.

On November 6, 2008, the undersigned convened a telephonic prehearing conference with the parties. The Coast Guard was represented at that hearing by Mr. Robert Foster and Petty Officer John Norsworthy. Respondent appeared *pro se*. At the telephonic pre-hearing conference, the undersigned fully advised Respondent of his procedural due process rights. Likewise, during the hearing, Respondent filed his Answer to the Complaint orally, as is appropriate under 33 C.F.R. § 20.1202(b)(2). Finally, at the close of the prehearing conference, the undersigned established expedited discovery and hearing.

On November 7, 2008, the Coast Guard filed a Motion to Amend the original Complaint to include relatively minor factual amendments. There being no apparent prejudice to Respondent, the undersigned granted leave to Amend the Complaint on November 10, 2008.

Prior to the hearing in this case, the parties engaged in discovery—in particular, Respondent requested, and was granted, several subpoenas to assist him in his prehearing preparation.

At 1:00 pm, CST, on November 20, 2008, the undersigned convened the expedited hearing in the Federal District Courthouse, Mobile, Alabama, in accord with the provisions of 33 C.F.R. § 20.1201. Mr. Robert Foster and LT Beth Gregorich represented the Coast Guard.

Respondent appeared, *pro se*. The undersigned engaged in a colloquy with Respondent regarding his choice to proceed *pro se*. (Tr. 5 - 6).

Both parties presented opening statements. In its case-in-chief, the Coast Guard called three witnesses to testify. Likewise, the Coast Guard offered eight (8) items into evidence. All eight (8) items were admitted. Thereafter, Respondent testified on his own behalf and called two witnesses to testify. Respondent offered one (1) item into evidence which was also admitted.

See Attachment A.

After both parties rested, the undersigned asked each for post-hearing briefs and written closing arguments. The Coast Guard submitted its post-hearing brief on November 25, 2008. Respondent's brief was received by the undersigned on December 1, 2008. On December 2, 2008, the undersigned closed the administrative record and began final deliberations.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on November 3, 2008, Respondent, Jack Anthony Jory, was the holder of Coast Guard issued merchant mariner's license and merchant mariner's document. (CG Ex. 1).
2. On November 3, 2008, Jack Anthony Jory served aboard the M/V Sea Fox as an Able Seaman, in the employment of Global Industries Offshore, LLC (Global), and under the command of Captain Jeff Cunningham. (CG Ex 3; Tr. 24).
3. Captain Cunningham served as ship's security officer aboard the M/V Sea Fox. (Tr. 20 – 22).
4. On November 3, 2008, Captain Cunningham gave Jack Anthony Jory specific orders regarding one of the ship's anchors. Captain Cunningham specifically told Jack

- Anthony Jory to attend to a bow anchor and line to ensure it did not bang against the vessel's guard in anticipation of high seas. Captain Cunningham ordered Respondent to take appropriate steps (such as ensuring the ratchet binder was tight) to ensure neither banged against the guard or the vessel's hull. (Tr. 26-28).
5. During the early morning hours of November 3, 2008, at approximately 0300 hours, Captain Cunningham was awakened from his sleep by the sound of an anchor banging against the hull of the M/V Sea Fox. Captain Cunningham departed his cabin, went to the deck of the vessel and prepared to secure/tighten the slack anchor chain and line. (Tr. 26-28).
 6. As Captain Cunningham secured the anchor, Respondent confronted him. Captain Cunningham reprimanded Respondent for failing to attend to the anchor chain and line as previously ordered. (Tr. 27 – 31). This reprimand was followed by Respondent's use of vulgar and defiant words to the Captain. (Tr. 27-28).
 7. Thereafter, Captain Cunningham departed the deck and went below to create a written report relative to the incident on deck involving Respondent. After completing the report, Captain Cunningham went to the galley, where he found Respondent. Captain Cunningham offered the document to him and asked him to read and sign it. Respondent refused to read or sign the report and, again, responded with vulgarity. (Tr. 27 – 31).
 8. Captain Cunningham turned around to return to the wheelhouse and Respondent lunged at him, trying to grab the paper out of Captain Cunningham's hand. Respondent knocked Captain Cunningham's hand down, causing a pen to fall out of his hand. (Tr. 27 – 31).

9. At approximately 0517 hours on November 3, 2008, Captain Cunningham contacted his employers and supervisors at Global informing them of Respondent's threatening conduct. (CG Ex. 6; Tr. 30,67-69).
10. At approximately 0630 hours on November 3, 2008 and upon guidance from his employers, Captain Cunningham relieved Respondent of his duties and confined him to his quarters (which included Respondent's stateroom, galley and smoking area). In response, Respondent stated to Captain Cunningham "I will kill you." (CG Ex 6, 7; Tr. 31, 59 and 60).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 CFR § 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. § 7703(5). Under §7703(5), a Coast Guard issued credential may be suspended or revoked if the holder of that credential is a security risk [who] poses a threat to the safety or security of a vessel.

Title 46 of the United States Code section 7702(d) provides that the Secretary of Transportation, or his delegee, may, temporarily, for not more than 45 days, suspend and take possession of a mariner's license or document. However, in the case of a temporary suspension an expedited hearing under subsection (a) shall be held within 30 days after the temporary suspension. The government is obliged to prove that:

- (A) That individual performs a safety sensitive function on a vessel, as determined by the Secretary; and
- (B) There is probable cause to believe that the individual ... (iv) is a security risk that poses a threat to the safety or security of a vessel...

See also 46 U.S.C. § 7703(5).

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Investigating Officer to prove the charges are supported by a preponderance of the evidence. 33 CFR §§ 20.701, 20.702(a). “[T]he term ‘substantial evidence’ is synonymous with ‘preponderance-of-the-evidence’ as defined by the Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more-likely-than-not committed the violation charged.

In the instant case, the Coast Guard was obligated to prove by substantial evidence that Respondent performed a safety sensitive function aboard the M/V Sea Fox and that there is/was probable cause to believe that Respondent is a security risk that poses a threat to the safety or security of a vessel.

The facts of this case are straightforward and are generally uncontested by Respondent (Tr. 83-89).

On and before November 3, 2008, Respondent served as an able seaman aboard the Global's vessel "M/V Sea Fox" as one of a crew of eight. (Tr. 22). At all relevant times herein, the M/V Sea Fox was underway in the Gulf of Mexico and under the command of ship's Master, Captain Jeff Cunningham. (Tr. 22).

While at sea, each member of the eight-person crew of the M/V Sea Fox and each worked a twelve hour shift; thus ensuring that the vessel was manned with a captain, able-bodied seaman, ordinary seaman, engineer and oiler. (CG Ex. 2; Tr. 24). The M/V Sea Fox is approximately one-hundred-eighty feet long with a weight of approximately one-hundred-seventy gross tons. (Tr. 42 – 43.). Each member of the four-person watch was essential to the safe operation of the vessel of that size and weight.

a. Respondent performed a "safety sensitive function" on the M/V Sea Fox.

The Coast Guard defined those duties that constitute a "safety sensitive" position include: control, navigation or management of a vessel; operation of propulsion, pump, electrical and related mechanical systems; lifesaving, firefighting, and communication equipment; mooring, anchoring, and towing cargo; and fuel handling, vessel stability or watertight integrity. See generally, <http://www.uscg.mil/d5/dapi/programs.asp>.

Here, Respondent was assigned the task of securing an anchor cable and safety chain connecting one of two ten-thousand pound bow anchors. See infra. Clearly, that task falls within the ambit of a "safety sensitive" position as defined by the Coast Guard and, by reference, the Secretary of Transportation.

Title 33 of the Code of Federal Regulation section 104.200, et seq. is read as the Secretary's delegation of authority to the owner of a marine vessel to prescribe and define the "security organizational structure" for each vessel and to provide to crewmembers the support

necessary to exercise security duties. Id. at §104.200(b)(1). Likewise, 33 C.F.R. § 104.205, bestows upon the ship's Master nearly exclusive authority to define the various security and safety roles of his crew members.

In the instant case, Global did promulgate such a security plan. (CG Ex. 5 and 8). Jeffery Lynn Daley testified that he is the Global "company security officer." (Tr. 65). Mr. Daley testified that the ship's Master is ultimately responsible for security of the vessel under the Global security plan. (Tr. 69).

Aboard the M/V Sea Fox, Captain Cunningham was not only ship's Master, he also served as ship's security officer. (Tr. 20, 22). Captain Cunningham testified that one of his duties aboard the M/V Sea Fox was to protect against "...terrorist threats, outside attacks, from threats from within." (CG Ex. 5 at p3, "Safety Rep Expectations" and p. 4 "SOR/BBSI"; Tr. 55).

Hence, as the person dual-hatted as both ship's Master and as ship's security officer, Captain Cunningham was responsible to define what personnel would staff a given safety and security position and what acts constituted a threat to the safety and security of the M/V Sea Fox. Captain Cunningham specifically assigned to Respondent the task of securing an anchor at sea. That tasking was designed to ensure the safety of the vessel. Respondent, therefore, clearly performed a "safety sensitive function" on the M/V Sea Fox vessel, as that role is defined by the Secretary, his designee the Coast Guard or his ultimate designee, Captain Cunningham.

The undersigned notes, with particularity, that in his post-hearing submission, Respondent entered a response of "no contest" to the Coast Guard's allegations that he "is a security risk that poses a threat to the safety or security of a vessel." (See Respondent's written Closing Argument.)

b. There is probable cause to believe that Respondent is a security risk that poses a threat to the safety or security of a vessel.

During the late-night hours of November 2, 2008, as he was going off-shift, Captain Jeff Cunningham gave specific guidance to Respondent about securing one of the vessel's two bow anchors, in the face of anticipated high seas as a result of the vessel's change of direction. (Tr. 26). Each bow anchor weighs approximately ten-thousand pounds (Tr. 42) and is secured by an inch-and-an-eighth wire rope and a safety chain. (Tr. 44 – 45). Captain Cunningham directed Respondent to secure an anchor chain in a particular fashion to ensure that the chain/cable and anchor did not bang against the guard or hull of the vessel. Captain Cunningham testified that during the early morning hours of November 3, 2008, he was awakened by the sound of an anchor banging very loudly against the M/V Sea Fox's hull. Captain Cunningham then went topside to address the problem. (Tr. 27). As Captain Cunningham undertook the manual task of securing the anchor chain, Respondent presented himself. Thereafter, the Captain admonished Respondent for Respondent's failure to secure the anchor chain as previously directed. (Tr. 28.)

After an angry exchange of words with Respondent, Captain Cunningham went below to fill out an incident report—and thereafter sought out Respondent for him to review and sign the report. When Captain Cunningham found Respondent in the galley, another heated exchange occurred, culminating in Respondent lunging at Captain Cunningham (in an apparent attempt to retrieve the written report) and striking his hand in an attempt to grab the written report. (Tr. 29).

Thereafter, Captain Cunningham again admonished Respondent that his behavior was unacceptable and after another series of angry words between the men, the Captain departed to communicate with his superiors at Global. (CG Ex. 6 – 7; Tr. 30). At approximately 0600 hours on November 3, 2008, and after receiving guidance from his superiors at Global, Captain Cunningham informed Respondent that he was relieved of his duties and that he was confined to his quarters. (Tr. 30).

Respondent remained defiant. As Captain Cunningham testified:

His initial response was, 'I don't think I can do that.' I explained to him, this is not an option, you're confined to quarters, this is where you can go. You're relieved of duty and I will get you off the vessel as soon as I can. He had turned around to go down the stairs and stopped about halfway and made the comment, '[W]ell, you better never cross my path.' So, I asked him, what do you mean? He said, 'I will kill you.' I said, that's nice, Jack. He said, '[W]ell, maybe not on the boat, but if I ever see you on land I will kill you.' And then he left the wheelhouse.
(Tr. 30 – 31).

Captain Cunningham testified that Respondent spoke those words with “hate and malice in his voice.” (Tr. 33). 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. Appeal Decision 2640 (PASSARO) (2003). I find Captain Cunningham’s testimony to be credible.

Some of the events of November 3, 2008 were witnessed by another crew member, Ordinary Seaman Brock Picard, who testified regarding his daily duties aboard the M/V Sea Fox. (Tr. 58). Mr. Picard was in the wheelhouse of the M/V Sea Fox at approximately 0600 hours on November 3, 2008 and witnessed the confrontation between Respondent and Captain Cunningham and testified as follows:

And a few minutes after six Mr. Jack Jory came into the wheelhouse and Captain Jeff proceeded to tell him that he was relieved of all duties, he was confined to quarters and he could go into the galley and smoking area. Mr. Jack then told him he didn't know if he could comply with that and Captain Jeff told him again, '[Y]ou are relieved of all duties, you are confined to quarters, you can go in the galley, you can go in the smoking area and, you know, he can go to bed.' Jack started to walk down the stairs and he looked back and he said, '[Y]ou better never cross me again.' And Captain Jeff said, '[O]h, what are you going to do?' Mr. Jack said, 'I'll kill you.' I mean, he said it pretty serious. To me, I took it seriously. It was shocking. And after that Captain Jeff said, '[O]h, that's just great.' And Mr. Jack walked out of the wheelhouse...To me, I mean, he seemed serious. I took it seriously, as well as Captain Jeff. It didn't sound like a joke to me. It shocked me. He seemed like he was being very straightforward with it.
(Tr. 59 – 60).

Given the opportunity to witness Mr. Picard's testimony first-hand, I find him to be a credible witness.

Following this encounter, there were apparently no other serious confrontations between Captain Cunningham and Respondent. Later, Respondent was removed from the vessel and the matter reported to the Coast Guard.

Following the Coast Guard's case-in-chief, Respondent testified on his own behalf. It is particularly noteworthy that Respondent did not deny the allegations made against him, nor did he refute the testimony of his Captain, Jeff Cunningham. (Tr. 83-89). Neither did he refute the testimony of his crewmate, Ordinary Seaman Brock Picard, who also witnessed Respondent's threat against the Captain's life.

Thus, it is plain: That by threatening his Captain's life, there is probable cause to believe that Respondent is a security risk that poses a threat to the safety or security of a vessel.

Respondent's Rebuttal

Interestingly, Respondent averred that it was his duty to "challenge" his Captain's orders. (Tr. 85 – 86). Respondent testified, essentially, that his "challenge" or questioning of his Captain's orders was justified, despite the fact that his disobedience resulted in several confrontations with Captain Cunningham. While the undersigned perceives Respondent's testimony as sincere and thoughtful, the Respondent is clearly wrong in his belief that he was entitled to "challenge" the authority of his ship's Master.

From time immemorial -- and for reasons rooted in safety -- the authority of a ship's captain while at sea is nearly absolute. Absent a patently illegal order, a crew-member is bound to follow his captain's orders without question. This principle has been enunciated throughout the history of maritime jurisprudence. See The Shawnee McKenna, et al v. The Shawnee, 45 F.

769 (E. D. Wisc.,1891). “The primary and paramount duty of the sailor is implicit obedience to every lawful command. He cannot be permitted to debate the propriety of the master’s orders, and courts of admiralty will not tolerate hesitation in prompt and active obedience.” *Id.* at 771.

In more recent times, the Commandant of the Coast Guard restated the same time-honored rule. In Appeal Decision 2616 (Byrnes) (2000), the principle was restated: “The orders of the Master of a vessel are given special recognition and protection by the laws of not only the U.S. but of the international community. The Master has a great responsibility in ensuring the safety of his vessel and crew. It is general maritime law’s long recognition of the Master’s responsibility for the safety of the ship that serves as the basis for the authority of the Master to order an individual [to comply with his orders.]” See also, Norris, Martin J., The Law of Seamen, Lawyers Co-Operative Publishing Co., 1970, Vol 1, 3rd ed., at 609.

Here, Respondent was plainly wrong in his failure to obey his Captain’s lawful orders and, sadly, even more greatly at fault for threatening his Captain’s life.

In his post-hearing written submission, Respondent makes reference to an out-of-court communication he had with a naval architect. Since that communication was not part of the evidence submitted at the hearing and because, even if true, it is irrelevant to the instant charges—the undersigned gave no weight or credibility to that “evidence.”

Respondent’s post-hearing submission raises the question of whether 46 U.S.C. §7701, *et seq.* intends to define “security risk” as inclusive of seamen aboard a marine vessel. He cites portions of the legislative history for the proposition that the term “security risk” means a post-9/11 external terrorist threat, and not a seaman situated similarly to Respondent. While no appellate case law construes the phrase, I am confident that the term “security risk” broadly encompasses a wide variety of contingencies defined by the Coast Guard, tradition and law of the sea and by the Master’s own judgment, *supra*.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7704, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. At all relevant times mentioned herein and specifically on November 3, 2008, Respondent, Jack Anthony Jory, was the holder of merchant mariner's license and merchant mariner's document number.
3. At all relevant times mentioned herein, and specifically on November 3, 2008, Respondent performed a safety sensitive function aboard the M/V Sea Fox.
4. On or about November 3, 2008, Respondent did assault his ship's Master, Captain Jeff Cunningham by lunging at him while trying to grab a paper out of Captain Cunningham's hand and thus striking his Captain's hand.
5. On or about November 3, 2008, Respondent did threaten the life of the ship's Master, Captain Jeff Cunningham, while underway aboard the M/V Sea Fox.
6. Respondent poses a security risk and a threat to the safety of a marine vessel.

CONCLUSION

After careful consideration of the testimony and documentary evidence offered at the hearing, and of the entire record, I find that the Coast Guard's case against Respondent is **PROVED.**

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to Jack Anthony

Jory are REVOKED, per the requirements of 46 U.S.C. § 7704, commencing on the date they were in the possession of the Coast Guard.

IT IS FURTHER ORDERED THAT Jack Anthony Jory is to tender any other valid Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credential issued by the Coast Guard in his possession immediately to the nearest Coast Guard Marine Safety Office or mail those credentials to the following office: United States Coast Guard Sector Mobile, Investigations Department, Bldg 101, Brookley Complex, South Broad Street, Mobile, Alabama, 36615-1390.

IT IS FURTHER ORDERED THAT Jack Anthony Jory 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.

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

Done and Dated on this 5th day of December, 2008
New Orleans, LA

Honorable Bruce Tucker Smith
Administrative Law Judge
United States Coast Guard

ATTACHMENT A

EXHIBIT LIST

Coast Guard Witnesses

1. Jack Cunningham, Captain of Sea Fox
2. Brock Picard, Ordinary Seaman
3. Jeffery Delay, Global Industries Security Officer

Coast Guard Exhibits

1. U.S. Coast Guard License and Merchant Mariner's Document issued to Jack Anthony Jory
2. Certificate of Inspection for Offshore Supply Vessel named Sea Fox
3. U.S. Coast Guard License and Merchant Mariner's Document issued to Jeffrey Lee Cunningham
4. Global Industries, Ltd., Daily Vessel Log Book entry for the Sea Fox dated November 3, 2008
5. Global Industries certified copies of:
 - Safety Representative Expectations
 - Time Card for 11/02/08- 11/04/08
 - Letter dated 11/13/2008 from Human Resources Manager
6. E-mail from Caption of the Sea dated 11/3/08 at 5:17 a.m. regarding Jack Jory Discipline Report
7. Company Vessel/Facility Security Investigative Report regarding Jack Jory Threats to Captain dated 11/3/08
8. Affidavit of Jeffery Daley, Company Security Officer dated November 17, 2008

Respondent Witnesses

1. Jack Anthony Jory, Respondent

Respondent Exhibits

- A. Contact Information for Global's Safety Officer