UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

MURRAY RANDALL ROGERS

Respondent

Docket Number: 04-0537
CG Case No. 2126028

Decision and Order

Issued: January 21, 2009

Appearances:

For Complainant:

LT Angel Flood
USCG MSU Morgan City

For Respondent:

James P. Doherty, III, *Esq*.

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking suspension and probation of Murray Randall Rogers' (Respondent) Merchant Mariner's License Number: 1048441. This action was brought pursuant to the authority contained in 46 U.S.C. § 7703 and its underlying regulations codified at 46 C.F.R. Part 5.

The procedural history of this case dates from October 7, 2004, when the Coast Guard Marine Safety Office, Morgan City, Louisiana, filed a complaint against Respondent alleging misconduct and a violation of law or regulation. On October 28, 2004, Respondent filed his Answer to the Complaint.

On October 29, 2004, Respondent filed a "Motion to Dismiss" with the ALJ Docketing Center. Thereafter, the discovery process commenced, with a prior Administrative Law Judge (ALJ) presiding. A dispute concerning discovery resulted in the filing of an appeal to the Vice Commandant. On April 30, 2008, the Vice Commandant resolved the underlying discovery issue and remanded this case for adjudication. On August 7, 2008, this case was assigned to the undersigned ALJ.

The Complaint alleges violations of 46 U.S.C. § 7703(1)(A); 46 C.F.R. § 5.33 (Violation of Law or Regulation) and 46 U.S.C. § 7703(1)(B); 46 C.F.R. § 5.27 (Misconduct). The Coast Guard generally alleges that between June 20 - 22, 2004, Respondent, while serving as Master of the MV Bailey Ann (560994), wrongfully absented himself from the wheelhouse of the vessel and engaged an unlicensed individual to direct and control the vessel in violation of 46 C.F.R. § 15.401. Apparently, the Coast

Guard drafted and made various uses of several prior, but slightly different Complaints, prior to the Complaint at bar. See generally, Resp's. Ex. C, D, E, F, and H p. 12, et. seq.

The Coast Guard seeks an outright suspension of Respondent's license for three (3) months; followed by probationary suspension of three (3) months; followed by a twenty-four (24) month probationary period, under the aegis of 46 § U.S.C. 7703.

In his October 28, 2004 Answer, Respondent admitted all of the jurisdictional allegations contained in the Complaint. In his October 29, 2004 Motion to Dismiss, Respondent tacitly admitted the factual allegations contained in the Complaint, but also raised an affirmative defense. Following discovery and a series of prehearing motions and conferences, this matter was heard in Houma, Louisiana on December 2, 2008 and concluded on December 3, 2008.

At the conclusion of the evidence, the undersigned asked the parties to provide post-hearing briefs and written closing arguments. On January 9, 2009, after receipt of both parties' post-hearing submissions, the undersigned closed the administrative record and began deliberations regarding the outcome of these proceedings.

II. FINDINGS OF FACT

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

1. Between June 20, 2004 and June 22, 2004, Respondent served as the Master of the MV Bailey Ann (560994). (Tr. at 21-22).
2. On June 22, 2004, LT Matthew Spolarich, a Coast Guard safety investigator, boarded the MV Bailey Ann as part of an investigation that began with the Coast

Guard's receipt of an anonymous phone call alleging the vessel was "sailing short." (Tr. at 19-22).

3. LT Spolarich made no handwritten notes of this investigation. (Tr. at 77, 87-89, 157).
4. At the time LT Spolarich boarded the MV Bailey Ann, LT Spolarich was a relatively new and inexperienced investigator. (Tr. at 18-19, 49-51).
5. After LT Spolarich boarded the vessel, he made his way to the wheelhouse where he met and conferred with Respondent, who was in control of the vessel. (Tr. at 22, 30).
6. LT Spolarich told Respondent why he was aboard the vessel and related that the Coast Guard had received an anonymous complaint that the vessel was sailing with unlicensed personnel manning positions where a Coast Guard-issued license was required. (Tr. at 30).
7. During his investigation, LT Spolarich sought out a Mr. Bryan Hebert for an interview. (Tr. at 86-87).
8. Mr. Hebert was the unlicensed mariner whom LT Spolarich believed had illegally operated the vessel with Respondent's permission. (Tr. at 23-24, 89).
9. Mr. Hebert wrote a statement concerning his account of some of the events charged in the Complaint. (CG Ex. 3).
10. Mr. Hebert was not a licensed mariner. (Tr. at 23; CG Ex. 5, 7).
11. Between June 20, 2004 and June 22, 2004, Murray Randall Rogers, while serving as Master of the MV Bailey Ann (560994), did, on diverse occasions, and for various periods of time, (up to six (6) to ten (10) hours), absent himself from the

wheelhouse of the vessel and did engage an unlicensed individual, Bryan Hebert, to navigate, direct and control the MV Bailey Ann, in violation of 46 C.F.R. §15.401.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

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1. Murray Randall Rogers holds a Coast Guard issued Merchant Mariner's License (1048441) and Merchant Mariner's Document.
2. At all times pertinent to this case, Murray Randall Rogers was acting under the authority of his Coast Guard credentials when operating the MV Bailey Ann and when participating in and giving statements in connection to an ongoing Coast Guard investigation.
3. Between June 20, 2004 and June 22, 2004, Murray Randall Rogers served aboard MV Bailey Ann (560994) as the Master of that vessel.
4. Between June 20, 2004 and June 22, 2004, Murray Randall Rogers, while serving as Master of the MV Bailey Ann (560994), did, on diverse occasions, and for various periods of time (up to six (6) to ten (10) hours), absent himself from the wheelhouse of the vessel and did engage an unlicensed individual, Bryan Hebert, to navigate, direct and control the MV Bailey Ann in violation of 46 C.F.R. §15.401.
5. That Murray Randall Rogers' absences from the wheelhouse of the MV Bailey Ann, during which time Bryan Hebert controlled the vessel, constituted more than mere temporary absences.

6. That Bryan Hebert's high navigational competence was not proven.

7. At no time between June 20, 2004 and June 22, 2004 or thereafter, did Murray Randall Rogers file a "Report of Sailing Short" with any appropriate agency, per the dictates of 46 C.F.R. §15.725.

IV. 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 C.F.R. § 5.5. The Commandant has delegated to ALJ's 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 C.F.R. § 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 C.F.R. § 20.701-02. Appeal Decision Nos. 2468 (LEWIN) (1988); 2477 (TOMBARI) (1988); See also, Dept. of Labor v. Greenwich

Colleries, 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 regulation or 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 C.F.R. § 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).

This proceeding is conducted under the provisions in 33 C.F.R. Part 20, 46 C.F.R. Part 5, and the Administrative Procedure Act, 5 U.S.C. §551 *et. seq*.

Here, the Coast Guard alleges that the charged "misconduct" is defined by 46 C.F.R. § 15.401, which reads:

> A person may not employ or engage an individual, and an individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, or merchant mariner's document, unless the individual holds a valid license, certificate of registry, or merchant mariner's document, as appropriate, authorizing service in the capacity in which the individual is engaged or employed and the individual serves within any restrictions placed on the license, certificate of registry, or merchant mariner's document.

Essentially, the Coast Guard alleges Respondent allowed or directed an unlicensed mariner to steer, operate, control or direct a vessel, the MV Bailey Ann.

Query, however, the following: Whether it is a violation of 46 C.F.R. § 15.401 for an unlicensed mariner to steer or operate a vessel if the ship's Master is in the

wheelhouse with him, directing his movement and actions? Or whether it is a violation of 46 C.F.R. § 15.401 if an unlicensed mariner "helps" the Master or pilot steer the vessel? Or whether an unlicensed mariner may steer the vessel while the properly-licensed Master or pilot is temporarily absent? Moreover, what constitutes a "temporary absence?"

The cited regulation is silent on those points. In its post-hearing brief, the Coast Guard (without providing any citation to legal authority) concedes that an unlicensed person can stand at the wheel of a vessel. Respondent's post-hearing brief only cites one appellate decision, *Hitt,* infra.

The Commandant has previously held that a licensed operator's temporary absence from the wheelhouse of a towing vessel is not, in every case, an absolute violation. Appeal Decision 2566 (WILLIAMS) (1995). The mere absence of the licensed operator might not constitute relinquishment of "actual direction and control" over the vessel. Id.; Appeal Decision 2058 (SEARS) (1976).

> If the circumstances are such that an unlicensed crew member can temporarily steer the vessel, without any appreciable increase in risk to its safe navigation then the licensed operator may momentarily leave the wheel house (after giving appropriate instructions to the crewman) and still maintain 'actual direction and control.' Thus, where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the proven navigational competence of the crewmember is high, the licensed operator might briefly leave the wheelhouse and still maintain actual control of the vessel.
>
> Id.; See also Appeal Decision 2312 (HITT) (1983).

Taken together Sears, Williams and Hitt, suggest that it is incumbent upon the Coast Guard to prove more than the mere absence of a licensed operator from the

wheelhouse. The Coast Guard must also prove the circumstances attendant to that absence in order to prove a violation contemplated by 46 C.F.R. § 15.401.

C. Discussion of the Evidence

1. Multiplication of Charges

In this case, the Coast Guard alleges "misconduct" as the basis for the proposed sanction. 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 C.F.R. §5.27.

As indicated, the gravamen of the charge(s) is that Respondent allegedly allowed or directed an unlicensed mariner to direct or control the MV Bailey Ann at such times and under such circumstances when the Respondent was not in the wheelhouse or in direct supervision of the unlicensed mariner.[1]

The undersigned notes that the two separate factual allegations in the Complaint are multiplicious.[2] Recognition of this issue is important, here, because if proved, two

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[1] The allegation of "violation of law or regulation" essentially reads that between June 20 and June 22, 2004, the Respondent did, on occasion, allow an unlicensed person to direct and control the MV Bailey Ann.

[2]Although not controlling, a case from recent federal military jurisprudence; United States. v. Pauling, 60 M.J. 91 (C.A.A.F. 2004) persuasively outlines several considerations in determining whether the government unreasonably multiplied charges. The analysis asks:

> (1) Whether each charge is aimed at distinctly separate acts?
>
> (2) Does the number of charges misrepresent or exaggerate the Respondent's actions?
>
> (3) Does the number of charges unreasonably increase the Respondent's punitive exposure?
>
> (4) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Pauling, 60 M.J. at 95.

separate and distinct factual allegations could result in the imposition of a more severe sanction than if only one factual allegation was proved.

The Complaint contains two separate and distinct factual allegations ─ one for "misconduct" and another for "violation of law or regulation." The "misconduct" charge alleges that on June 22, 2004, Respondent absented himself from the wheelhouse of the MV Bailey Ann for approximately two (2) hours and left the responsibility of the vessel's navigation to an unlicensed deckhand. The "violation of law or regulation" charge is more expansive. It alleges that from June 20, 2004 through June 22, 2004, Respondent allowed an individual to direct and control the vessel without supervision.

Because the two factual allegations describe essentially the same conduct, I regard them as only one allegation for purposes of both proof and imposition of a sanction. Thus, for the purposes of this case, the undersigned regards the factual allegations to read: "That between June 20, 2004 and June 22, 2004, Respondent, while serving as Master of the MV Bailey Ann (560994), did, on occasion and for various periods of time, absent himself from the wheelhouse of the vessel and engage an unlicensed individual to navigate, direct or control the MV Bailey Ann in violation of 46 C.F.R. § 15.401."

2. Coast Guard Case-in-Chief

The Coast Guard called only one (1) witness and offered only three (3) items of documentary evidence in support of the factual allegations levied against Respondent.

Here, the alleged "misconduct" described in the first allegation is fairly subsumed within the second allegation of "violation of law or regulation." Both allegations describe the same act in the same time frame. Proof of the first factual allegation necessarily proves the second factual allegation, and vice versa. In other words, the Coast Guard alleged the same infraction twice and, thus, potentially enhanced the potential sanction against Respondent.

I note, initially, that the Coast Guard offered no affirmative proof of the elements contained in 46 C.F.R. § 15.401, i.e., that the person directing or controlling the MV Bailey Ann, here Respondent, was in a position which an individual is required by law or regulation to hold a license, certificate of registry, or merchant mariner's document. I presume, however, that because Respondent was a licensed mariner, he was such a person; else the instant action would not have been instituted.

The Coast Guard's case was based almost entirely upon the testimony of LT Matthew Spolarich, a safety investigator who boarded the MV Bailey Ann. LT Spolarich, who made no handwritten notes of his investigation, testified almost exclusively from memory. (Tr. at 77, 87-89, 157).

At the time he boarded the MV Bailey Ann, LT Spolarich was a relatively new and inexperienced investigator. (Tr. at 18-19, 49-51). He testified that on June 22, 2004, he boarded the Respondent's vessel as part of an investigation that began, apparently, with the Coast Guard's receipt of an anonymous phone call alleging the vessel was "sailing short." (Tr. at 19-22). "Sailing short" is generally regarded as a term describing a ship's compliment that fails to include an appropriate number of licensed mariners who are authorized to steer, navigate, or control the vessel.

LT Spolarich testified that after he boarded the vessel, he made his way to the wheelhouse where he met and conferred with Respondent, who was in control of the vessel. (Tr. at 22, 30). LT Spolarich told Respondent why he was aboard the vessel and related that the Coast Guard had received an anonymous complaint that the vessel was sailing with unlicensed personnel manning positions where a Coast Guard-issued license was required. (Tr. at 30).

During his investigation, LT Spolarich sought out a Mr. Bryan Hebert for an interview. (Tr. at 86-87). Mr. Hebert was the unlicensed mariner whom LT Spolarich believed had operated the vessel with Respondent's permission. (Tr. at 23-24, 89). LT Spolarich did not remember how long he interviewed Mr. Hebert. (Tr. at 162).

It is noteworthy that Mr. Hebert did not testify in this hearing.

After LT Spolarich concluded his interview with Mr. Hebert, LT Spolarich asked Mr. Hebert to make a written witness statement. (CG Ex. 3).

CG Ex. 3, is a "U.S. Coast Guard Witness Statement," and appears to bear Mr. Hebert's account of some of the events charged in the Complaint. However, CG Ex. 3 is somewhat inconsistent with what LT Spolarich testified Mr. Hebert told him orally. CG Ex. 3 reads in pertinent part:

> I helped Mr. Murry steer vessel on the dates of 6-20-04 through 6-22-04, no rotation just held wheel when Mr. Murry was tired the longest at wheel was 6 to 10 hrs. [sic]

But LT Spolarich's memory of his conversation with Mr. Hebert differs in certain respects from what is written on CG Ex. 3. LT Spolarich testified that Mr. Hebert specifically told him Respondent had given him control of the vessel and that Respondent left the wheelhouse. (Tr. at 163-164). LT Spolarich further testified that Mr. Hebert told him he had been given control of the wheel during "periods that Captain Rogers was sleeping and/or resting." (Tr. at 23, 158-159). Yet CG Ex. 3 makes no reference to those specific, but important details. LT Spolarich testified that as a result of his investigation he was unable to determine specifically what hours or days Respondent allowed Mr. Hebert to control the vessel. (Tr. at 148).

Respondent's counsel's objected to LT Spolarich's testimony and to the failure of the Coast Guard to provide adequate discovery for documents referenced by LT Spolarich.[3] In view of the discrepancies between LT Spolarich's testimony and the written statement, and due to the inadequate discovery response, I sustain counsel's objection and, as a remedy, hereby discount LT Spolarich's testimony regarding his interview with Mr. Hebert.

Thus, our knowledge of Mr. Hebert's account of the relevant events is confined to the contents of CG Ex. 3. On its face, CG Ex. 3 is problematic because, standing alone, it isn't date specific, it doesn't directly prove an offense, and it seems to differ from LT Spolarich's account of his interview with Mr. Hebert.

Title 46 C.F.R. §15.401 and the prior Commandant's Decisions, *supra*, are read to prohibit a ship's master from allowing an unlicensed or an improperly licensed mariner from controlling or directing the vessel. Here, the Coast Guard essentially alleges Respondent allowed or directed an unlicensed mariner to direct or control the MV Bailey Ann at such times and under such circumstances when the Respondent was not in the wheelhouse or in direct supervision of the unlicensed mariner. But CG Ex. 3 makes no reference to Respondent's whereabouts at the time Mr. Hebert steered the vessel. In fact,

[3] At trial, Respondent's counsel moved that LT Spolarich's testimony be stricken, or, in the alternative, that it be discounted because of the Coast Guard's failure to fully respond to Respondent's discovery Request for Production #1. That request sought tapes, transcripts or notes of in-person interviews conducted by Coast Guard personnel of any member of the MV Bailey Ann during June 2004. (Respt's Ex. I). During the hearing, LT Spolarich testified that written witness statement(s) may have been taken from one or more persons aboard the MV Bailey Ann. Respt's. Ex. H, p 11, also reveals that a subsequent investigator, LCDR Patrick also obtained written witness statements from MV Bailey Ann crew members. Those written statements are now apparently, contained in the Coast Guard "MISLE" computer program as part of the Respondent's case file but were not, apparently, produced to Respondent's counsel. Respondent's counsel objected to the Coast Guard's failure to comply with discovery. (Tr. at 250–57). At that time, the undersigned reserved ruling on Respondent's objection. Now, however, I sustain that objection and as a remedy, discount LT Spolarich's oral testimony regarding his interview with Mr. Hebert.

CG Ex. 3 somewhat ambiguously suggests that Mr. Hebert may have simply "helped…no rotation just held wheel" while Respondent steered the vessel.

It is true that CG Ex. 3 makes reference to "the longest at the wheel was 6 to 10 hrs." Certainly, that phrase is subject to a variety of interpretations. For instance, the statement doesn't indicate whether Respondent was present in the wheelhouse for the six to ten hours Mr. Hebert was at the wheel or whether Respondent and Mr. Hebert took turns steering the vessel during the six to ten hours or whether Mr. Hebert was unsupervised and alone at the wheel for six to ten hours. Neither does the written statement indicate the date(s) of the six to ten hour period. Nor does it indicate whether the six to ten hours is a cumulative amount spread over the length of the several-day voyage or whether the six to ten hours was during one uninterrupted stretch of time.

As discussed, *supra*, the Commandant has ruled that a licensed operator's temporary absence from the wheelhouse of a towing vessel is not an absolute violation in every case. Moreover, the mere absence of a licensed operator might not constitute relinquishment of "actual direction and control" over the vessel. The Coast Guard must affirmatively prove the circumstances under which that relinquishment occurred.

Standing alone, CG Ex. 3 would not prove the charged allegations. However, when read in conjunction with two other documents created by Respondent, the vitality of CG Ex. 3 is bolstered and restored. Indeed, the <u>strongest</u> proof offered by the Coast Guard in this case is the pair of documents written by Respondent: Coast Guard Ex. 5 and 7.

Read together, CG Ex. 5, 7 and CG Ex. 3 proves Respondent did allow Mr. Hebert to steer or control the vessel for a period(s) of six to ten hours, while unsupervised.

CG Ex. 5 is dated August 25, 2004, and is styled as a "Motion to Dismiss;" a pleading which was filed with the ALJ Docketing Center pursuant to 33 C.F.R. Part 20 and containing citations to legal authority. CG Ex. 7 is a November 15, 2004 letter written by Respondent and addressed to the then-acting Commander of the 8th USCG District.[4]

Respondent's Motion to Dismiss was filed as a pleading in response to the Coast Guard's Complaint, and is taken as Respondent's tacit agreement that the allegations in

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[4] During both a prehearing conference and at trial Respondent argued that CG Ex. 5 and 7 should be suppressed as "admissions" as that term is used in both of 33 C.F.R. § 20.1311 and 46 C.F.R. § 5.101(b). Respondent's counsel argues, correctly, that if either or both were "admissions" made by his client "during an investigation," then no use of those statements may be made, save for purposes of impeachment. An admission, of course, is a voluntary acknowledgment made by a party of the existence of certain facts which are inconsistent with his or her innocence or the position that he or she is attempting to establish in the case and, therefore, amounts to proof against such party. An admission has also been defined as a statement, oral or written, or conduct of a party or his or her representative, suggesting any inference as to any fact in issue, or which is relevant or is deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. See 29A Am. Jur. 2d Evidence § 767 (2008).

Both CG Ex. 5 and 7 contain "admissions" as that term is defined, *supra*. However, neither are of the type contemplated by the exclusionary rules contained in 33 C.F.R. § 20.1311 and 46 C.F.R. § 5.101(b). CG Ex. 5 is clearly a pleading: it is plainly labeled a "Motion to Dismiss" and was styled and served in accordance with 33 C.F.R. Subpart C. As such, it automatically becomes part of the court record.

Further, while it may be true that both CG Ex. 5 and 7 contain "admissions," neither were created or provided "during an investigation" as that phrase is used in either of the cited regulations. Fairly read, both 33 C.F.R. § 20.1311 and 46 C.F.R. § 5.101(b) contemplate admissions made by a respondent to a Coast Guard or other investigator in response to a formal inquiry or investigative techniques employed by that investigator. Although both CG Ex. 5 and 7 may have been made during the pendency of an investigation, neither was apparently made in direct response to an investigator's questioning or investigation techniques. Indeed, both appear to be entirely voluntary statements made by Respondent outside of the course of an investigation and to persons other than Coast Guard investigators. Hence, the exclusionary rules set forth in 33 C.F.R. § 20.1311 and 46 C.F.R. § 5.101(b) are inapplicable to both CG Ex. 5 and 7.

In an abundance of caution, CG Ex. 4 and 6–both putative "admissions"– were not admitted into evidence.

Had this case been brought as a civil action in federal district court, CG Ex. 7 might be objectionable on the basis that it contains information exchanged during settlement negotiations and might be inadmissible per

the Complaint were generally true—but that certain mitigating factors applied as well. In his Motion, Respondent wrote:

> I am requesting a consideration of my actions, as being of an isolated nature, with no intention…to…repeat, prolong or promote the sailing condition I found myself in on he vessel Bailey Ann. I persist that no vessel was threatened as a result of any action on my part….I believe my actions to have been reasonable in my circumstance at the time… [sic]

Coast Guard Ex. 7 is, likewise, an admission by Respondent of his violation of 46 C.F.R. § 15.725. Respondent wrote:

> The individual piloting the vessel was more than qualified, having been a captain previously for many years, and having worked for the owner's father in such capacity in years past. Under the regulation of 'sailing short' – 46CFR15.725, I felt it was not unreasonable to proceed myself until proper manning could be restored. This was awkward and concerning to me, but I did not see it as unsafe, having seen the man maneuver the tow. [sic]

Coast Guard Ex. 7 is given even more clarity and context when read in light of Respondent's own Exhibit G, a November 8, 2004 letter from the then-acting Commander of the 8th USCG District which apparently prompted Respondent's November 15, 2004 written response, contained in CG Ex. 7.

Coast Guard Ex 3, 5, and 7 are read collectively as Respondent's acknowledgement of his responsibility for his actions as alleged in the Complaint.

Thus, taken as a whole, a preponderance of the written evidence created by Respondent proves that between June 20, 2004 and June 22, 2004, Respondent, while serving as Master of the MV Bailey Ann (560994), did, on occasion and for various periods of time (up to six to ten hours), absent himself from the wheelhouse of the vessel

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of F.R.E. 408(a)(2). However, a review of 33 C.F.R. Subpart H reveals no such exclusionary rule of evidence in Coast Guard administrative practice.

and engaged an unlicensed individual to navigate, direct and control the MV Bailey Ann in violation of 46 C.F.R. §15.401.

The allegations against Respondent are therefore, PROVED.

3. Respondent's Affirmative Defenses

a. Extenuating Circumstances

In his original Answer, dated October 28, 2004, Respondent denied the factual allegations contained in the Complaint and affirmatively plead as a defense: "extenuating circumstances, as previously noted." This defense is also reflected in Respondent's original "Motion to Dismiss." (CG Ex. 5).

"Extenuating circumstances" do not constitute an affirmative defense; rather, they are matters to be considered in mitigation of a proved violation. See, e.g., "Military Justice" § 591, 57 C.J.S. 777. At trial, Respondent presented no evidence in support of the affirmatively-plead defense of "extenuating circumstances." Thus, Respondent's affirmative defense of "extenuating circumstances" was not proved. Neither did Respondent provide any evidence in support of the kindred affirmative defense of "justification." See "Justification or Excuse" § 56, et seq., 22 C.J.S 90.

b. Sailing Short

In his October 29, 2004 Motion to Dismiss (CG Ex. 5), Respondent cited 46 U.S.C. § 8101 and 46 C.F.R. § 15.725, essentially, as an affirmative defense to the Complaint. A predecessor Administrative Law Judge reviewed that Motion and on

November 8, 2004, denied the same, noting, *inter alia*, "**most of what is contained in the Motion is more along the lines of affirmative defense information**…."

At the hearing, however, Respondent made no offer of proof, nor did he introduce any evidence or testimony in support of his affirmative defense. In his Motion (CG Ex. 5), Respondent apparently asked for an inference or presumption that if, indeed, he was "sailing short" – he did so lawfully under the purview of 46 U.S.C. § 8101 and 46 C.F.R. § 15.725, the latter of which provides:

> Whenever a vessel is deprived of the service of a member of its complement, and the master or person in charge is unable to find appropriate licensed or documented personnel to man the vessel, the master or person in charge may proceed on the voyage, having determined the vessel is sufficiently manned for the voyage. A report of sailing short must be filed in writing with the Officer in Charge, Marine Inspection (OCMI) having cognizance for inspection in the area in which the vessel is operating, or the OCMI within whose jurisdiction the voyage is completed. The report must explain the cause of each deficiency and be submitted within twelve hours after arrival at the next port. The actions of the master or person in charge in such instances are subject to review and it must be shown the vacancy was not due to the consent, fault or collusion of the master or other individuals specified in 46 U.S.C. 8101(e). A civil penalty may be assessed against the master or person in charge for failure to submit the report. (emphasis added)

Yet, Respondent offered no proof of any written "report of sailing short" as would be incumbent upon him to do, in order to perfect his alleged affirmative defense. Nor did he offer any proof of any concern he might have raised prior to or at the time of the dates alleged in the Complaint. Further, I note that both the cited statute and the regulation pertain to "inspected" vessels—which the MV Bailey Ann was not. Hence, Respondent has not met his obligation to prove the affirmative defense he pled.

c. **Williams, Sears and Hitt**

The trio of cases cited, *supra*, together with CG Ex. 5 and 7 suggest that another affirmative defense might have been available to Respondent in this case. The evidence and case law suggest Respondent might have proven that Mr. Hebert lawfully and temporarily steered the MV Bailey Ann upon a showing that he did so without any appreciable increase in risk to safe navigation. The cases suggest that a licensed operator may temporarily leave the wheelhouse, after giving appropriate instructions to the crewman, and still maintain actual direction and control of the vessel. The case law further suggests that upon proof that the steered course was straight, the visibility good, the traffic sparse and the unlicensed crewmember was competent, a respondent (such as Captain Rogers) might avoid imposition of sanction. See Hitt, *supra*, at 5. Here, that affirmative defense was raised by the facts, pleadings and Respondent's post-hearing brief. However, there was no proof offered concerning these circumstances beyond mere speculation and conjecture. Hence, an available defense was left unproven by Respondent.

V. SANCTION

The selection of an appropriate sanction is the responsibility of the ALJ, per 46 C.F.R. § 5.569(a). As discussed above, Respondent committed Misconduct while acting under the authority of his document, by allowing an unlicensed person, Mr. Bryan Hebert, a mariner without sufficient credentials, to direct or control the MV Bailey Ann while Respondent was absent from the wheelhouse. Title 46 C.F.R. §§ 5.567 and 5.569 (and its attendant table) provide that if a charge is proved, the ALJ may impose a range of

sanctions, including an admonition, suspension with or without probation, or even revocation.

The Amended Complaint seeks outright suspension of the Respondent's Mariner's License and Documents for three (3) months, plus probationary suspension for three (3) months, plus probation for twenty-four (24) months 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)

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action brought against a mariner for misconduct, the NTSB disapproved 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 C.F.R. 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 C.F.R. § 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, no sanction is mandatory for Misconduct. Allen v. Shae, NTSB Order No. EM-204 (2008). In determining an 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 C.F.R. § 5.569(b)(1)-(3).

Remedial Action**:** Respondent did not provide any direct evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. § 5.569(b)(1). However, CG Ex. 5 and 7 reflect Respondent's insights regarding his violation. Both documents reflect a mariner who clearly did not display a dangerous, cavalier, or scofflaw attitude. Quite the contrary: Respondent appears to be a thoughtful, conscientious, and able mariner who almost immediately accepted personal responsibility for his actions.

Respondent's Prior Records: The undersigned does note Respondent did lawfully have a mariner's license which had never been the subject of previous disciplinary action. Nor did the Coast Guard present any evidence to suggest Respondent's has been the subject of any other disciplinary action before or since the onset of this case. See 33 C.F.R. § 5.569(b)(2).

Mitigation or Aggravation: Respondent offered no direct evidence in mitigation. However, it appears that despite the filing of several sets of increasingly severe charges against him, he remained honest, reflective, and insightful about the real-world economic

conditions that forced him to "sail short" on the dates alleged. In that regard, CG Ex. 5 and 7 are just as probative of mitigating circumstances as they are of a violation.

In his post-hearing brief, Respondent correctly points to the frailties in LT Spolarich's testimony and highlights the Coast Guard's failure to provide any evidence in aggravation.[5] For instance, LT Spolarich could not recall pertinent details of the circumstances surrounding the events up to an including June 22, 2004. Specifically, LT Spolarich was unable to recall the vessel's point of origin, destination, or manning. (Tr. at 96-97). Neither did LT Spolarich know the prevailing weather conditions on the waterway during the dates alleged in the Complaint (Tr. at 148); nor could he recall the specific terrain and topography of the waterway (Tr. at 149); neither could he recall the prevailing traffic conditions extant at the relevant times (Tr. at 151); nor could he recall the dimensions or configuration of the MV Bailey Ann and her barges. (Tr. at 152). Finally, LT Spolarich admitted that he did not examine the vessel's log books. (Tr. at 95).

It is incumbent upon the Coast Guard to prove matters in aggravation in support of its proposed sanction. Here, the Coast Guard did not present any matters in aggravation that would support the requested sanctions. 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 might have provided evidence regarding the threat Respondent's actions may have actually posed to the safety of life or property on the waterways, given

[5] Respondent's post-hearing brief, at 4, improperly and inappropriately describes LT Spolarich's testimony as "perjured." To accuse one of perjury is to accuse one of a crime punishable under 18 U.S.C.§ 1621. Absent proof of actual perjury or a judicial determination thereof, a bombastic accusation such as that has no place in these proceedings and will not be tolerated.

the then weather, traffic, or waterway conditions, but it did not. See 33 C.F.R. § 5.569(b)(3).

The Coast Guard only proved that between June 20, 2004 and June 22, 2004, Respondent did, while serving as Master of the MV Bailey Ann (560994), on occasion and or various periods of time, absent himself from the wheelhouse of the vessel and engaged an unlicensed individual to navigate, direct, and control the MV Bailey Ann in violation of 46 C.F.R. § 15.401 . . . and little else.

Proof of the underlying infraction does not constitute proof of aggravation. They are separate and distinct burdens borne by the Coast Guard. See 46 C.F.R. § 5.569

Intuitively, the charge found proved relates directly to safety on the waterways. A distinct societal and maritime interest is served by a sanction for this misconduct. Here, Respondent allowed an unlicensed person to serve in a critical position aboard the vessel, although he was unqualified to do so. If it were not for a fortuitous, anonymous phone call to the Coast Guard, it is likely that Respondent would have allowed Mr. Bryan Hebert to continue steering or operating the MV Bailey Ann; thus potentially risking safety on the waterways. At the same time, it is apparent that Respondent was caught in an unfortunate set of circumstances, probably occasioned by his employer. His response to the Coast Guard's investigation appears, from the admitted evidence, to have been forthright, reasonable and cooperative.

Absent proof of independent aggravating factors offered by the Coast Guard, and in the face of some evidence in mitigation, I turn to 46 C.F.R. §§ 5.567, 5.569 and prior Commandant's decisions for guidance.

In Appeal Decision 809 (MARGUES)(1955), the Commandant modified an ALJ's decision from a revocation to an admonition. There, in a case involving the passage of some years between the charges of respondent's misconduct and the imposition of a sanction, the Commandant opted against revocation in favor of a lesser sanction, stating, "…consequently, it would serve no purpose, in the interest of protecting safety of lives and property at sea, to deprive Appellant of the use of his license at this late date." Such is the case, here.

It has now been more than four (4) years since Respondent's infraction. The Coast Guard offered no proof of aggravating circumstances which would justify the penalty it seeks. Moreover, there is no proof Respondent has committed any other infractions since the time since he was originally charged. Further, I note that a prior investigating officer in this case, LCDR Patrick, testified that the Coast Guard agreed a letter of warning was an appropriate sanction in this case. (Resp's. Ex. H, 24-25).

Given all of the circumstances presented to me and noting an absence of any factors in aggravation, an admonition is the appropriate sanction, here. The effect of an admonition is that it becomes a part of the Respondent's official/public record.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED THAT all elements of the Complaint filed against Respondent Murray Randall Rogers are found **PROVED**.

IT IS FURTHER ORDERED that, in accordance with 46 C.F.R. § 5.19(b), the undersigned notifies Respondent that he is admonished to hereafter observe the requirements of 46 C.F.R. § 15.401. This admonition will be made a matter of official record.

PLEASE TAKE NOTICE 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 this 21st of January, 2009, at New Orleans, LA

_____
Honorable Bruce T. Smith
Administrative Law Judge

ATTACHMENT A

EXHIBIT LIST

Respondent Exhibits

A. MISLE Screen Shots
B. Activity Summary Report
C. First handwritten Complaint
D. Second handwritten Complaint
E. Amended typewritten Complaint
F. Final Complaint
G. Captain Stark letter
H. Deposition of LCDR Patrick
I. Response for request for production

Coast Guard Exhibits

1. Not offered
2. Not offered
3. Bryan Hebert's June 22, 2004 written statement
4. Offered, but not admitted
5. Motion to Dismiss
6. Offered, but not admitted
7. Roger's November 15, 2004 letter to MSU Commanding Officer Garrity