

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

UNITED STATES COAST GUARD

Complainant

vs.

ROCKY M. CONTRERAS

Respondent.

Docket Number: CG S&R 07-0173
CG Case No. 2892224

DECISION AND ORDER

Issued: March 17, 2009

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant

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For Respondent

Pro Se
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PRELIMINARY STATEMENT

The United States Coast Guard initiated this administrative action pursuant to 46 U.S.C. § 7703, 33 C.F.R. Part 20, and 46 C.F.R. Part 5 seeking Suspension of Respondent Rocky M. Contreras' (hereinafter "Respondent") Merchant Mariner's Document ("MMD"). The Coast Guard later amended the Complaint adding additional charges and is now seeking Revocation of Respondent's MMD.

On March 29, 2007, the Coast Guard issued its Initial Complaint against Respondent alleging three (3) counts of Misconduct under 46 U.S.C. § 7703 and 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged: Count One (1), on January 30, 2007, while serving as a lookout, Respondent refused to follow orders of the Mate on watch; Count Two (2), on February 14, 2007, Respondent refused to follow orders of the Chief Mate; and, Count Three (3), on February 15, 2007, Respondent refused to follow orders of the Master to report for booking. The Coast Guard proposed a sanction of nine (9) months.

In Respondent's timely Answer of April 16, 2007, he neither admitted nor denied the jurisdictional and factual allegations but instead, alleged a labor dispute, an Equal Employment Opportunity Commission claim, and a California Civil Action case as affirmative defenses and indicated he wished to be heard on the proposed order.¹

On April 18, 2007, the Coast Guard Chief Administrative Law Judge assigned this matter to The Honorable Parlen L. McKenna for adjudication. On April 25, 2007, the Coast Guard at Sector Houston advised Respondent by letter to mark paragraphs one and

¹ The Complaint quotes 33 CFR 20.308 that "the answer must admit or deny each numbered paragraph of the complaint . . . [i]f it [the answer] does not specifically deny a particular numbered paragraph, it admits that paragraph. " The Complaint goes on to say "[i]f you admit the allegations, an Administrative Law Judge (ALJ) will issue an order entering the proposed sanction."

two (jurisdiction and factual allegations) of his Answer and return it. Although the administrative file contains no written request for venue change by Respondent, the Coast Guard stated in its April 25th letter that it had no objection to Respondent's Motion for Change of Venue from Houston to San Diego.

Respondent then submitted an Amended Answer denying all jurisdictional and factual allegations and alleging the same affirmative defense as his initial Answer. On May 23, 2007, Respondent filed his Motion for Change of Venue from Houston to San Diego citing "severe financial, physical, mental, and emotional hardship." He also stated that he intended to submit proof that the Seafarer's International Union (Union) is retaliating against him for reasons associated with Liberty Maritime Corporation and submitted numerous copies of his labor dispute documents.

Labor Disputes

Several motions filed by Respondent detailing his labor disputes and Judge McKenna's Order of July 13, 2007 concerning same are summarized in Attachment A. In his Order of July 13, 2007, Judge McKenna referenced the Coast Guard's policy concerning maritime labor disputes found at Title 46, Code of Federal Regulations Section 5.71, which reads as follows:

Under no circumstances will the Coast Guard exercise its authority for the purpose of favoring any party to a maritime labor controversy. However, if the situation affecting the safety of the vessel or persons on board is presented, the matter shall be thoroughly investigated and when a violation of existing statutes or regulations is indicated, appropriate action will be taken.

46 C.F.R. § 5.71

The Order went on to say “the Coast Guard has alleged that Respondent, on multiple occasions, failed to comply with orders directed to him by his superiors. Such a situation, if true, clearly could affect the safety of vessel or person[s].”

On September 26, 2007, Judge McKenna issued an Order continuing the hearing until December 2007 to give Respondent time to resolve his labor disputes. On December 18, 2007, Judge McKenna issued an Order disposing of several motions and referenced a December 4, 2007 pre-hearing teleconference in which Respondent advised that all labor disputes have been resolved.

The undersigned has reviewed carefully all labor dispute documents that Respondent has submitted and found that none constitutes a valid defense to the charges. The undersigned also found no evidence that the Coast Guard was favoring one party over another in the initiation and prosecution of these proceedings. Respondent has failed to comply with valid orders issued by his superiors. As shown by the Master’s log entry of February 14, 2007 and his testimony at the hearing, “AB Contreras . . . removed from watch due [to] Master’s belief he has been unduly disruptive on bridge watch and is interfering with the safe operation of the vessel.” (IO Ex. 1 at 43; Tr. at 79). Therefore, I further find that the “situation” clearly affects “the safety of the vessel or persons on board.”

Amended Complaint

On August 21, 2007, the Coast Guard issued an Amended Complaint alleging the above three (3) counts plus an additional five (5) counts summarized as follows: Count Four (4), on February 16, 2007, Respondent refused to follow orders of the Master to report for booking; Count Five (5), on February 17, 2007, Respondent refused to follow

orders of the Master to report for booking; Count Six (6), on April 4, 2005 Respondent applied for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement and failed to disclose a 1996 conviction of property damage; Count Seven (7), on or about June 25, 2007, Respondent violated California Penal Code, Title 15, Chapter 1.4 section 631 by willfully recording a telephonic conversation without the consent of the other party (the USCG Investigating Officer); Count Eight (8), on or about June 25, 2007, Respondent violated California Penal Code, Title 15, Chapter 1.4 section 631 by willfully recording a telephonic conversation without the consent of the other party (Judge McKenna). The Coast Guard proposed Revocation. On September 4, 2007, Respondent filed his Answer to the Amended Complaint denying the jurisdictional and factual allegations.

Judge McKenna's Recusal and Case Reassigned to Judge Brudzinski

On December 18, 2007, Judge McKenna recused himself stating "based on the unusual circumstances of this case, the public perception of a fair and impartial judicial system would be enhanced if the Motion for Recusal was granted, and the Amended Complaint was decided by another Judge." Accordingly, the Chief Administrative Law Judge reassigned this case to the undersigned on January 8, 2008. The undersigned subsequently issued an Order that the hearing previously set for the week of February 11, 2008 by Judge McKenna will be set for a later date.

Respondent filed over one hundred (100) motions during the time Judge McKenna was presiding. Attachment B contains brief summaries of those motions and Judge McKenna's dispositive orders.

Respondent's Additional Motions for Continuance

On February 2, 2008, Respondent filed a motion entitled "Motion for a change of venue." Despite the title, Respondent actually requested a continuance stating he is "waiving his right to a speedy trial" and expressed concern that the witnesses will be unable to appear for trial because they are Mariners and travel often. He asked that the hearing be set for June 2008.

On February 12, 2008, the Coast Guard responded to Mr. Contreras' request stating that "Respondent's Motion fails to identify the proposed new location." The response opposed a June 2008 date due to the anticipated absence of the Investigating Officer but was agreeable to a hearing date in May 2008, July 2008, or later.

On February 19, 2008, Respondent filed a "Motion to Amend" his previous motion for change of venue and asked for a hearing in August 2008. He requested the hearing location be changed to Miami, Florida because "justice will be better served if this case was transferred out of the State of California for obvious reasons which will hinder the defense of the Respondent/Attorney therefore interfering with justice from being served"

On February 27, 2008, the Coast Guard filed its response to Respondent's "Motion to Amend" stating it had no objection to the hearing being held in Miami, Florida or the hearing being held in August 2008. On March 20, 2008, the undersigned issued an Order denying Respondent's motion for change of venue from San Diego to Miami for lack of good cause but granted his request for continuance and set August 19, 2008 as the date for the hearing to commence in San Diego.

On July 28, 2008, Mr. Contreras filed a “Motion for Continuance” and the Coast Guard responded with no objection. However, on July 31, 2008, the undersigned issued an Order Denying Respondent’s “Motion for Continuance” stating that this matter had been pending since March 2007 and that the August 19, 2008 hearing date was scheduled in March 2008, giving the parties ample time to prepare.

Respondent’s Miscellaneous Motions

On March 24, 2008 and March 31, 2008 respectively, Respondent filed two (2) Motions to Exclude USCG Sector San Diego for being in violation of “various California Penal codes.” In these motions, Respondent claims that the new Investigating Officer, CWO James R. Mints, violated various criminal laws by signing as “Investigating Officer.” Respondent also claimed that the Amended Complaint should be excluded.

On March 27, 2008, the Coast Guard filed its “Response to Respondent’s Motion to Exclude USCG Sector San Diego, et al” requesting that it be denied because CWO Mints assumed the role of primary or lead investigating officer in accordance with 46 C.F.R. § 5.15. Moreover, the Coast Guard argued the Amended Complaint is authorized by 46 C.F.R. § 5.105 and is procedurally in compliance with 33 C.F.R. § 20.307.

Respondent filed five (5) additional motions between May 6, 2008 and May 14, 2008 requesting the Court subpoena evidence relevant to this case. The evidence requested by Respondent included the Voyage Data Recorder from the LIBERTY EAGLE, copies of the original logbook, and other documents to allow him to “critically wound” the testimony of several witnesses. In addition, Respondent requested the undersigned to subpoena no less than 168 previously filed motions.

On June 3, 2008, the undersigned issued an Order denying Respondent's Motion to Exclude the Amended Complaint, denying Respondent's discovery request seeking depositions of potential witnesses, granting Respondent's request for a copy of the December 4, 2007 transcript, and denying Respondent's Motion to Disqualify the ALJ.

Respondent's Motions for Recusal of Judge Brudzinski

Throughout this entire administrative proceeding Respondent has repeatedly requested that the undersigned recuse himself. Judge McKenna recused himself after a telephone conversation between him and Respondent was recorded by Respondent without Judge McKenna's knowledge, thereby making the Judge a witness. Respondent's numerous motions to disqualify the undersigned are fundamentally based on his belief that a Coast Guard Administrative Law Judge will not give him a fair hearing in a Coast Guard case. Due to the voluminous nature of the filings they are summarized and discussed in Attachment C.

The Hearing

The hearing was held in San Diego, California on August 19, 2008. Lieutenant Ann McSpadden and CWO James R. Mints represented the Coast Guard. Respondent, Rocky M. Contreras appeared *pro se*; that is, on his own behalf and not represented by counsel. The Coast Guard presented the testimony of one (1) witness and introduced sixteen (16) exhibits. The undersigned granted the Coast Guard's motion to amend Count Six (6) of the Complaint to reflect that Respondent failed to disclose a 2003 conviction for vandalism vice a 1996 conviction of property damage but denied the Coast Guard's motion to amend Counts Seven (7) and Eight (8) to reflect California Penal Code, Title 15, Chapter 1.4, section 632 (eavesdropping) vice section 631 (wiretapping).

Respondent testified on his own behalf but did not introduce any exhibits because he believed he could not get a fair hearing before the undersigned. “This matter is going to go before U.S. District Court regarding Liberty Maritime. And the people [witnesses] that I didn’t present today because I totally believe that I should have been before an independent non-government judge.” (Tr. at 143). Furthermore, Respondent stated to the undersigned during the hearing “I do not believe I would be able to get a fair hearing out of you . . . And that’s why I didn’t call for witnesses, because I consider this – hearing to be bias.” (Tr. at 29).

On September 11, 2008, the undersigned issued a Scheduling Order requiring post hearing briefs, if any, including proposed findings of fact and conclusions of law, be submitted by October 14, 2008, with reply briefs, if any, due October 29, 2008. The Coast Guard submitted its post hearing brief on October 14, 2008. The brief did not include proposed findings of fact and conclusions of law. Respondent submitted his closing brief on September 14, 2008, but also did not submit proposed findings of fact and conclusions of law.

The record closed on October 29, 2008; however, Respondent continues to send copies of federal court filings related to his civil actions against Liberty Maritime Corporation and various personnel who were onboard LIBERTY EAGLE during the time the allegations of refusal to obey orders arose.

Findings

After careful review of the entire record, including witness testimony, applicable statutes, regulations and case law, I find as follows: Count One (1), that the Respondent committed Misconduct on January 30, 2007 by refusing to follow the orders of the Mate

on watch while serving as lookout onboard the United States flagged vessel LIBERTY EAGLE, **NOT PROVED**; Count Two (2), that Respondent committed Misconduct on February 14, 2007 by refusing to follow orders of the Chief Mate while serving as a lookout during the 0400-0800 watch aboard the United States flagged vessel, LIBERTY EAGLE, **PROVED**; Count Three (3), that Respondent committed Misconduct on February 15, 2007 by refusing to follow orders of the Master to report for booking, **PROVED**; Count Four (4), that Respondent committed Misconduct on February 16, 2007 by refusing to follow orders of the Master to report for booking, **PROVED**; Count Five (5), that Respondent committed Misconduct on February 17, 2007 by refusing to follow orders of the Master to report for booking, **PROVED**; Count Six (6), that Respondent committed Misconduct on April 4, 2005 by failing to disclose a 2003 conviction for vandalism on his application for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement, **PROVED**.

At the hearing, the undersigned dismissed Counts Seven (7) and Eight (8). Even if the Counts were amended to reflect California Penal Code section 632, the facts as alleged do not constitute a violation of California Penal Code section 632 because judicial and administrative proceedings are exempted from the statute's proscriptions, among other things, as discussed below. Accordingly, the allegation in Count Seven (7) that Respondent committed Misconduct on June 25, 2007, by willfully recording a telephonic conversation without consent of the other party (the USCG Investigating Officer), in violation of California Penal Code Title 15, Chapter 1.4 section 631 is **DISMISSED** without prejudice. The allegation in Count Eight (8) that Respondent committed Misconduct on June 25, 2007 by willfully recording a telephonic conversation

without the consent of the other party (Judge McKenna), in violation of California Penal Code, Title 15, Chapter 1.4 section 631 is also **DISMISSED** without prejudice.

FINDINGS OF FACT

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

1. At all relevant times and specifically on the dates alleged in the Complaint, Respondent, Rocky M. Contreras, was the holder of a Merchant Mariner's Document. (Tr. at 25, 27-28; ALJ Ex. 1).²
2. From December 19, 2006, through February 18, 2007, and at all times relevant, Respondent served as an Able Bodied Seaman on the M/V LIBERTY EAGLE, a U.S. flagged merchant vessel. (Tr. at 77-9; IO Ex. 1).
3. On February 14, 2007, Respondent was the Able Bodied Seaman on the 0400-0800 watch. (IO Ex. 5).
4. On February 14, 2007, Respondent refused to follow the orders of the Chief Mate to stand his lookout watch and stop being disruptive by questioning the Chief Mate's handling of the traffic situation and insisting Captain Mahan, the Master of the LIBERTY EAGLE, be called to the bridge. (Tr. at 79-80).
5. Respondent's refusal to follow the orders of the Chief Mate resulted in Captain Mahan removing Respondent from watch duties and confining him to his quarters except for meals and 30 minutes of computer time. (Tr. at 79).
6. Captain Mahan noted on February 15, 2007, in the ship's logbook that "AB Rocky Contreras is relieved from his duties on board this vessel for willful disobedience of a lawful command at sea. During the 0400 to 0800 watch on February 14, he refused to stand his lookout in the manner as ordered by the Chief Officer. For the remainder of the voyage he is to remain in his quarters except when exercising the following privileges: 30 minutes for each meal; 30 minutes daily to use crew's computer; between 0800 and 1700 he may call Captain for permission to use the laundry or the ship's library." (IO Ex. 1 at 43; IO Ex. 5; IO Ex. 11; IO Ex. 12).

² Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at ____). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (IO Ex. ____); Respondent's Exhibits are as follows: Respondent followed by the exhibit number (Resp. Ex. ____); ALJ Exhibits are as follows: ALJ followed by the exhibit number (ALJ Ex. ____).

7. On February 15, 2007, Captain Mahan ordered Respondent to his office for logging and dismissal procedures. (Tr. at 82).
8. Respondent refused to participate in the logging and dismissal procedures and walked out of Captain Mahan's office. (Tr. at 82).
9. Captain Mahan logged the following entry into the logbook on February 15, 2007: "AB Rocky Contreras is logged for continued willful disobedience of a lawful command at sea. When brought before the Master's logging and dismissal procedures in regards to the previous entry in this log, he refused to participate and walked out of the Master's office. He remains confined to his quarters. He forfeits one day's pay." (IO Ex. 1 at 44; IO Ex. 5).
10. On February 16, 2007, the Master, Chief Engineer, and Bosun approached Respondent in his quarters and all ordered him to the Master's office for logging and dismissal procedures. (Tr. at 83; IO Ex. 1 at 44; IO Ex. 5).
11. Respondent refused to participate in the logging and dismissal procedures. (Tr. at 83).
12. Captain Mahan made the following entry in the ship's logbook on February 16, 2007: "AB Rocky Contreras is logged for continued willful disobedience of a command at sea. The Master, Chief Engineer and Bosun went to Contreras' Quarters to tell him he was required to come to the Master's office for logging and dismissal proceedings. He refused to come, insisting the procedures take place in his quarters. He forfeits one day's pay. He remains confined to his quarters." (IO Ex. 1 at 44; IO Ex. 5).
13. Respondent was again ordered on February 17, 2007 to appear before the Master for logging and dismissal proceedings. (Tr. at 83).
14. Respondent again refused to participate in the proceedings. (Tr. at 83).
15. Captain Mahan logged the following entry into the logbook on February 17, 2007: "AB Contreras is logged for continued willful disobedience of a lawful command at sea. The Master, with the Chief Engineer and Bosun as witnesses, went to Contreras' quarters to tell him he was required to come for dismissal logging proceedings. He refused to come. He forfeits one day's pay and is confined to quarters." (IO Ex. 1 at 44; IO Ex. 5).
16. Respondent's statement on his April 4, 2005, application for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement listed a 1988 conviction for burglary, a 1989 conviction for dangerous weapon, and a 2003 conviction for battery, but no 2003 conviction for vandalism. (IO Ex. 9).

17. The Superior Court of California, County of San Diego, issued Criminal Complaint No. M-881636DV against Respondent on March 26, 2003 charging him with one count of spousal abuse, one count of assault, three counts of vandalism, and one count of battery. (IO Ex. 10).
18. On April 8, 2003, Respondent pled guilty to the one count of battery and one of the counts of vandalism listed in the March 26, 2003 Criminal Complaint. (IO Ex. 10).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701. For acts of misconduct found proved at a hearing, an Administrative Law Judge (ALJ) may revoke or suspend a merchant mariner's license, certificate of registry, or document. 46 U.S.C. § 7703; 46 C.F.R. § 5.19. To prove misconduct, it must be shown that a respondent was acting under the authority of his or her Coast Guard credential. 46 U.S.C. § 7703(1)(B).

Acting Under the Authority of License, Certificate or Document

“A person employed in the service of a vessel is considered to be acting under authority of a license, certificate or document when the holding of such a license, certificate or document is: 1) Required by law or regulation; or 2) Required by an employer as a condition of employment.” 46 C.F.R. § 5.57 (a); Appeal Decision 2620 (COX)(2001). “A person is [also] 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 . . . appearing at a hearing under this part.” 46 C.F.R. § 5.57 (b).

Respondent is the holder of a Merchant Mariners Document (MMD). (Tr. at 25, 27-28; ALJ Ex. 1). Respondent served aboard the M/V LIBERTY EAGLE as an Able Bodied Seaman with STCW endorsement from December 19, 2006, through February 18,

2007. (Tr. at 77-9; IO Ex. 1). The Master's log entries also reflect AB Rocky Contreras or AB Contreras. Title 46 C.F.R. § 12.05-1 prescribes that every person employed as Able Seaman shall present his or her Merchant Mariner's Document to the Master. Since Respondent was serving as an Able Bodied Seaman onboard the M/V LIBERTY EAGLE, he was required by law or regulation to possess an MMD. Therefore, Respondent was acting under the authority of his MMD at all times relevant to this case.

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-559 *et seq.*, applies to Coast Guard Suspension and Revocation trial-type 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 that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. 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)

(brackets in original)). Therefore, the Investigating Officers (IOs) must show that the existence of a fact is more probable than its nonexistence.

Logbook Entries as Evidence

Title 33 C.F.R. § 20.1305 provides “(a) Any entry in any official logbook of a vessel concerning an offense enumerated in 46 U.S.C. § 11501, made in substantial compliance with the procedural requirements of 46 U.S.C. § 11502, is admissible in evidence and constitutes prima facie evidence of the facts recited. (b) Any entry in any such logbook made in substantial compliance with the procedural requirements of 46 U.S.C. § 11502 may receive added weight from the ALJ.” The LIBERTY EAGLE logbook entries properly identified in the findings of fact were filled out in substantial accordance with 46 U.S.C. §§ 11501 and 11502.

Title 46 U.S.C. § 11501 provides specific punishment for specific offenses, in pertinent part, as follows: “(4) For willful disobedience to a lawful command at sea, the seaman, at the discretion of the master, may be confined until the disobedience ends, and on arrival in port forfeits from the seaman's wages not more than 4 days' pay or, at the discretion of the court, may be imprisoned for not more than one month.”

Title 46 U.S.C. § 11502 provides:

- a) When an offense listed in section 11501 of this title is committed, an entry shall be made in the vessel's official logbook--
 - (1) on the day of the offense;
 - (2) stating the details;
 - (3) signed by the master; and
 - (4) signed by the chief mate or another seaman.
- (b) Before arrival in port if the offense was committed at sea, or before departure if the offense was committed in port and the offender is still on the vessel--
 - (1) the entry shall be read to the offender;
 - (2) the offender shall be given a copy; and

- (3) the offender shall be given the opportunity to reply.
- (c) After subsection (b) of this section has been complied with, an entry shall be made in the official logbook--
 - (1) stating that the entry about the offense was read and a copy provided to the offender;
 - (2) stating the offender's reply;
 - (3) signed by the master; and
 - (4) signed by the chief mate or another seaman.
- (d) In a subsequent legal proceeding, if the entries required by this section are not produced or proved, the court may refuse to receive evidence of the offense.

Respondent's offenses were the proper subject matter to be logged in the LIBERTY EAGLE's logbook. Respondent's refusal to cooperate with the logging procedural requirements does not negate the Master's substantial compliance with the regulations. Therefore, the logbook entries constitute prima facie evidence of the facts recited and receive added weight in accordance with 33 C.F.R. § 20.1305.

Misconduct

Misconduct is defined as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 C.F.R. § 5.27. The Coast Guard has established by a preponderance of reliable, probative, and credible evidence that Respondent committed four (4) acts of Misconduct for failing to follow orders of the Master and the Chief Mate.

The logbook entries show that Respondent first failed to follow orders of the Chief Mate while on the bridge. (IO Ex. 1). Specifically, Respondent refused to stand as lookout and was being disruptive by questioning the Chief Mate's handling of the traffic situation. Id. When the incident was recorded in the logbook and Respondent was called to the Master's office for logging and dismissal procedures, Respondent refused to

comply with that order. (IO Ex. 1; Tr. at 79-84). In fact, Respondent refused to comply with the Master's orders on three (3) separate occasions over three (3) separate days. Id.

Since all logbook entries constitute prima facie evidence of the facts contained in the logbook, the Coast Guard has met its burden of proof. Respondent did not present any evidence at the hearing to contradict the Coast Guard's evidence but instead claimed that the Master and others aboard the LIBERTY EAGLE were lying because of a labor dispute. I find Captain Mahan to be a very credible witness, and, along with the evidence contained in the logbook, I find Counts 2, 3, 4 and 5 of Misconduct for failing to obey orders **PROVED**.

Failure to Disclose Conviction

The STCW Certificate application states "Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation?" The application defines conviction as "found guilty by judgment or by plea and includes cases of deferred adjudication (no contest, adjudication withheld, etc.) . . . Expunged convictions must be reported unless the expungement was based upon a showing that the court's earlier conviction was in error." Respondent signed the application stating he had "full understanding that a false statement is grounds for denial of the application" Furthermore, intent and errors in judgment are not factors an ALJ uses in determining whether a Respondent has committed an act of Misconduct for failing to disclose a conviction. See Appeal Decision 2613 (SLACK)(1999).

The Coast Guard had previously issued a letter of warning in lieu of suspension and revocation proceedings to Respondent for failing to disclose prior convictions on a previous application dated July 22, 2004. This letter of warning put Respondent on

notice that he had to disclose all convictions on his applications. Respondent disclosed a 1988 conviction for burglary, a 1989 conviction for dangerous weapons, and a 2003 conviction for battery on his application for a Seafarer's Training Certification and Watchkeeping (STCW). (IO Ex. 9). However, on April 8, 2003, Respondent pled guilty to March 22, 2003 charges of battery and vandalism, and failed to list the vandalism conviction on his STCW application. (IO Ex. 10).

As discussed during the hearing at Tr. at 13-15, I granted the Coast Guard's motion to amend this Count because Respondent was on notice that he had failed to list all of his convictions on his application for an STCW. The Investigating Officer previously forwarded to Respondent during discovery copies of all of this documentation showing his filled out application, the criminal complaint, and the court records. An examination of those documents revealed his 2003 convictions for battery and vandalism (counts 5 and 6 of the criminal complaint) and that the conviction for vandalism was not included on the application form. Accordingly, I find that the allegation in Count Six (6) that Respondent committed an act of Misconduct by failing to disclose a conviction on his application **PROVED**.

Count 1 - Refusing to Follow the Orders of the Third Mate

The Coast Guard charged Respondent with refusing to follow orders of the Third Mate while serving as a lookout on January 30, 2007. The Coast Guard entered a statement from the mate, James Lipinski, along with a recording of the incident in question. The recording was inaudible and therefore not reliable as evidence to prove the charge alleged. Furthermore, since Mr. Lipinski did not testify at the hearing, I find his

statement alone, absent an opportunity for Respondent to cross-examine, insufficient to prove the charge alleged. Accordingly, I find the Count One (1) **NOT PROVED**.

Had there been a showing and finding that Mr. Lipinski was unavailable and that his statement was given under oath with an opportunity for Respondent to cross examine, then his statement could have been used as “former testimony.” See Fed. R. Evid. 804(a) and 804(b)(1).

Counts 7 and 8 -Willfully Recording Telephonic Conversations Without Consent of the Other Party

At the start of the hearing, the Coast Guard motioned to amend Counts Seven (7) and Eight (8), “Willfully Recording Telephonic Conversations Without Consent of the Other Party” to reflect that the conduct alleged violated California Penal Code section 632 vice 631. Section 631 proscribes unauthorized wiretapping and apparently was a typographical error. Motions to amend are usually granted and if the amendment materially changes the allegation, then Respondent is given additional time to prepare if necessary.

In this case, I denied the Coast Guard’s motion to amend. The motion was denied for two reasons. First, the amendment was a material change from the wiretapping statute that Respondent was already on notice to prepare for and defend. Second, and more importantly, if I granted the motion, the factual scenario if offered and accepted as true, could not support a finding of proved in either Count.

California Penal Code § 632 states in pertinent part as follows:

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on

among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year

* * *

(c) The term “confidential communication” includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

* * *

Cal. Penal Code title 15, Chapter 1.5, § 632 (Thompson Reuters/West, WESTLAW through 2008).

Respondent made two (2) telephone calls on or about June 27, 2007. He called the former Investigating Officer, LT Omar Vasquez, at Sector San Diego, to schedule a time for Respondent, LT Vasquez, and Judge McKenna to speak. Respondent stated he was going to request a copy of the taped conversations between Respondent and Third Mate Lipinski.³ LT Vasquez advised Respondent that he still did not have the tape and when he receives it from Liberty Maritime he intends to listen to it. LT Vasquez stated that after he listens to it he might “withdraw the complaint.” LT Vasquez went on to say that after he listens to the tape he will call Respondent and “discuss just like we kind of did that last time.” LT Vasquez further advised that the Judge does not get involved in

³ The conversations between Mr. Lipinski and Respondent formed the basis of the allegation in Count One (1).

listening to and discussing the evidence prior to the hearing and that he and Respondent can both listen to the tape and discuss the evidence.

Respondent subsequently called Judge McKenna and asked him “if there’s any questions pertaining to this matter that’s going to be going before you, sir, say . . . if I feel that it’s warranted to call a meeting between you and Lieutenant Vasquez and myself to talk on the phone, do I have the right to do so?” Judge McKenna replied, “You have the right to ask to have a conference call. This is what you’re doing right not I presume?” Judge McKenna went on to say, “What you need to do is call Lieutenant Vasquez and get him on the line and then call, then have him join me on the line . . . You get a hold of Lieutenant Vasquez and tell him that you requested to make a motion for a telephone pre-hearing conference, and I granted it, and that [inaudible] have him call me and we’ll set up a time we’re going to do it.” See TAB 20 of the Administrative File for the complete transcript.

Respondent initiated both telephone conversations in an effort to request a pre-hearing teleconference during the course of representing himself in a suspension and revocation proceeding. Suspension and revocation proceedings are open to the public and pre-hearing teleconferences are part of the administrative suspension and revocation process. To a certain extent the public may not be able to witness pre-hearing teleconferences. However, motions, discussions, and rulings concerning the pre-hearing teleconference are part of the administrative record which is available to the public. There is no evidence in the record showing that the parties had a reasonable expectation that the content of the conversations would be kept private. Therefore, the undersigned

DISMISSED Counts Seven (7) and Eight (8) without prejudice because the above factual scenario cannot support a finding of proved under California Penal Code § 632 (c).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Rocky M. Contreras 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. § 7703, 46 CFR Part 5, and 33 CFR Part 20.
2. At all relevant times, Respondent was acting under the authority of his Merchant Mariner's Document.
3. On February 14, 2007, Respondent committed Misconduct by refusing to follow orders of the Chief Mate while serving as a lookout during the 0400-0800 watch onboard the United States flagged vessel, LIBERTY EAGLE.
4. On February 15, 2007, Respondent committed Misconduct by refusing to follow orders of the Master to report for booking.
5. On February 16, 2007 Respondent committed Misconduct by refusing to follow orders of the Master to report for booking.
6. On February 17, 2007 Respondent committed Misconduct by refusing to follow orders of the Master to report for booking.
7. On April 4, 2005, Respondent committed Misconduct by failing to disclose a 2003 conviction for vandalism on his application for a Seafarer's Training Certification and Watchkeeping (STCW) endorsement.
8. The logbook entries by Captain Stephen Mahan February 15-17, 2007, enumerating Respondent's offenses under 46 U.S.C. § 11501 were made in substantial compliance with the procedural requirements of 46 U.S.C. § 11502 and constitute prima facie evidence of the facts recited. Therefore, they receive added weight in accordance with 33 C.F.R. § 20.1305.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984); 46 C.F.R. § 5.567. Title 46 C.F.R. § 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various

offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. 46 C.F.R. § 5.569(d); Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174. According to the Table, the recommended sanction for one (1) count of misconduct for failure to obey master's/ship officer's order is a one (1) to three (3) months suspension. The recommended sanction for failure to disclose a conviction is Revocation. See Appeal Decision 2613 (SLACK) (1999). Section 5.569 goes on to say that "mitigating and aggravating factors may make an order greater or less than the given range appropriate." Further, "orders for repeat offenders will ordinarily be greater than those specified." 46 C.F.R. § 5.569(d). Respondent committed four (4) separate and separately logged acts of misconduct for failing to obey master's/ship officer's orders, February 14, 15, 16, and 17, 2007. He also committed another separate and distinct act of misconduct for failing to disclose a prior conviction on April 4, 2005 when completing a Coast Guard application for an STCW Certificate.

Counts Not Multiplicious for Sanction Purposes

In considering an appropriate sanction, we look first to see whether the four (4) separate acts of misconduct for failing to obey master's/ship officer's orders could be considered multiplicious for sanction purposes. See Appeal Decision 2496 (MCGRATH) (April 8, 1990); Appeal Decision 2503 (MOULDS) (August 20, 1990). In looking for evidence that some or all of the four (4) acts are multiplicious for sanction purposes, we look at the Master's entries in the ship's log, as noted in the findings of facts.

Respondent's first act of Misconduct was disobeying the Chief Mate's order on February 14, 2007. His next three (3) acts of Misconduct consist of disobeying the Master's lawful commands at sea to report for logging and dismissal proceedings. In

Appeal Decision McGRATH, cited above, the Commandant found that charges of negligence and misconduct based on the same course of conduct are not multiplicitious for findings purposes because they require different elements of proof but they are multiplicitious for sanction purposes. Likewise, in Appeal Decision MOULDS, the Commandant found that the charge of negligence for failure to adequately control a vessel and failing to proceed at a safe speed are not multiplicitious for findings purposes because they require different elements of proof; but they are multiplicitious for sanction purposes because they emanate from the same course of conduct.

In Respondent's case, he disobeyed three (3) separate lawful commands at sea issued by the Master on three separate days. Not only does each charge require proof of a different element – the date, but also three (3) separate and distinct orders and acts. Therefore, the Misconduct charges for violating the Master's orders on three (3) separate occasions are not multiplicitious for findings purposes. Furthermore, these acts do not constitute the same course of conduct. Each act was specific and distinct from the others, in terms of date and the underlying circumstances. Therefore, I find the charges of Misconduct for failing to obey the Master's order not multiplicitious for sanction purposes. Likewise, Respondent's refusal to obey orders of the Chief Mate is a separate and distinct course of conduct, and thus, also not multiplicitious for sanction purposes. Finally, failing to disclose a prior conviction is unrelated in time and conduct with the other charges, and therefore not multiplicitious for findings or sanction purposes.

Matters in Aggravation

“The purpose of suspension and revocation proceedings is to promote safety at sea.” 46 U.S.C. § 7701(a). On February 14, 2007, Captain Mahan made the following log entry: “AB Contreras confined to room except for meals & 30 minute computer privileges daily and removed from watch due Master’s belief he has been unduly disruptive on bridge watch and is interfering with the safe operation of the vessel.” (IO Ex. 1 at 43; Tr. at 79). The above log entry demonstrates Respondent exhibited a course of conduct during the voyage of the LIBERTY EAGLE which was inconsistent with the safe operation of the vessel. Respondent has repeatedly demonstrated an unwillingness or inability to accept authority and follow orders. This is further demonstrated by not only the three (3) additional log entries illustrating his refusal to follow orders but by his April 4, 2005 failure to disclose a conviction on his application for an STCW certificate. This failure to disclose occurred after Respondent received a letter of warning in lieu of suspension and revocation proceedings for previously failing to disclose prior convictions on an earlier application dated July 22, 2004.

“Administrative actions against a . . . document are remedial and not penal in nature . . . and are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea” 46 C.F.R. § 5.5. Captain Mahan’s February 14, 2007 log entry succinctly describing Respondent as “interfering with the safe operation of the vessel” best summarizes Respondent’s actions as “a threat to the safety of life or property, or detrimental to good discipline.” 46 C.F.R. § 5.61(b); IO Ex. 12; IO Ex 14; IO Ex. 15). In a broader sense, Respondent’s actions, from failing to disclose prior criminal convictions to his disruptive, defiant conduct onboard the LIBERTY EAGLE, to

his conduct during these suspension and revocation proceedings, seriously call into question whether remediation is possible. Therefore, I find that the only appropriate sanction is **REVOCAION**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Rocky M. Contreras' Merchant Mariner's Document and all other credentials issued by the Coast Guard to Respondent are **REVOKED**. Respondent is to turn over his Document and all other credentials issued by the Coast Guard to the Investigating Officer at Coast Guard Sector San Diego, California immediately.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (**Attachment D**).

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

Done and dated March 17, 2009
New York, New York

ATTACHMENT A – LABOR DISPUTE ISSUES

Respondent has alleged several issues concerning labor disputes and unfair treatment resulting from labor disputes. Respondent also cites the case numbers in his initial Answer dated April 16, 2007 claiming the dispute constitutes an affirmative defense.

In his May 23, 2007 Motion for Change of Venue, Respondent stated he intends to submit proof that the Seafarer's International Union (Union) is retaliating against him for reasons associated with Liberty Maritime Corporation. He further claims that a "Labor Charge . . . through the National Labor Relations Board, Case #37-CB-1885 has been filed against the Union" and alleges that the Union has taken "drastic measures to exhaust my finances and to hinder my employment opportunities by preventing me from obtaining B-Book Status." He also claims that "the Union has already taken it upon themselves to punish me and or hinder me for reasons that I believe that are associated with Liberty Maritime." He enclosed copies of the NLRB Charge against Seafarers International of North America together with Affidavits detailing his dispute with the Union over obtaining his B Book status. The Affidavit explains that the Union dispatches employees for work using a seniority system from most senior to least senior, or from A Book to B Book to C Book status.

On June 4, 2007, Respondent filed a "Motion to Dismiss on the Grounds that the Defendant [Respondent] is being Retaliated Against by Liberty Maritime Corporation Via through Seafarers International Union." In this motion, Respondent claims that an individual from the NLRB settled with the Union to give him his B Book status. He attached a letter dated April 18, 2007 from the Seafarers Appeals Board stating that a

hearing committee sustained charges against him by Liberty Maritime Corporation. That hearing committee also permanently revoked Respondent's shipping and registration rights. Respondent also attached a subsequently filed NLRB Charge filled out by Respondent on June 1, 2007 alleging that the Seafarers International Union violated the "Act" by revoking his shipping privileges in retaliation for his filing federal charges with the NLRB and the EEOC against the Seafarers International Union and Liberty Maritime.

On June 6, 2007, Respondent filed a "Follow-up Motion to Dismiss, Along with Extra Attachments/Evidence on the Grounds that the Defendant is being Retaliated Against by Liberty Maritime Corporation via through Seafarers International Union." In his motion, Respondent claims that the Union's retaliation is "interfering with due process being that of which is the Defendants Right of being Represented by an Attorney of his or her choosing I would never have made a settlement with the Seafarers International Union in regards to my B-Book if I would have known that the Union was planning to permanently revoke my shipping and registration rights." Respondent further claims that the letter of April 18, 2007 to Liberty Maritime Corporation is proof that the Union had already made the decision to revoke his shipping and registration rights and that the Union took action against him on behalf of Liberty Maritime Corporation. He further claims that "the Union settled case #37-CB-1885 with me, only and solely to avoid being found guilty for unfair labor practices via through the National Labor Relations Board." Respondent asserts other things and includes his letter of June 6, 2007 to the Seafarers Appeals Board appealing the Board's decision of April 18, 2007 revoking his shipping and registration rights. In his June 6, 2007 letter he claims that the Board's decision was taken prior to the Coast Guard hearing and that the Board's actions

against him interferes with his right to due process and as a result, he has filed an NLRB action against the Seafarers Appeals Board. Respondent further stated “again, let it be noted for the record, that you were warned, that if you attempt to bring any retaliatory action against me in behalf of Liberty Maritime Corporation, that I will take action against you through any and all Federal and/or State office for retaliation while and or during an investigation.”

On July 13, 2007, Judge McKenna issued an order addressing Respondent’s claim that the circumstances surrounding each allegation of refusal to follow orders involved a dispute with his union. Judge McKenna referenced the Coast Guard’s policy concerning maritime labor disputes. That policy reads as follows:

Under no circumstances will the Coast Guard exercise its authority for the purpose of favoring any party to a maritime labor controversy. However, if the situation affecting the safety of the vessel or persons on board is presented, the matter shall be thoroughly investigated and when a violation of existing statutes or regulations is indicated, appropriate action will be taken.

46 C.F.R. § 5.71

The Order went on to say that “the Coast Guard has alleged that Respondent, on multiple occasions, failed to comply with orders directed to him by his superiors. Such a situation, if true, clearly could affect the safety of vessel or person[s].”

The undersigned reviewed all of the labor dispute information submitted by Respondent and found that none constituted a valid defense to the charges.

ATTACHMENT B – JUDGE McKENNA’S ORDERS

Prior to his recusal, Judge McKenna issued several Orders in response to the many Motions filed by Respondent. This attachment summarized the those major Motions and Orders

On July 7, 2007, Respondent filed his “Motion to dismiss due to Prejudice based on the untenable evidence against Investigating officer, LT Omar Vasquez.” Respondent states that “this officer was recorded in his attempt to interfere and/or coerce me and in doing so violated my Constitutional Right to due process being pre trial conference hearings with the Administrative Law Judge being present.” He states further that “if this recorded untenable evidence against LT Omar Vasquez is suppressed and the court chooses not to dismiss this case and take action against LT Omar Vasquez due to his unprofessional, unlawful behavior and dishonorable tactics which go against the courts (sic) guidelines, then it would appear to be as if there was a hidden agenda against the defendant, therefore, violating U.S. District Court Local Rule, meaning of due process in regard to justice.”

On July 13, 2007, Judge McKenna issued several orders. One Order granted Respondent’s Motion for change of venue from Houston to San Diego; another Order denied Respondent’s June 4, 2007 Motion to Dismiss and his June 6th supplement to his Motion to Dismiss raising the labor dispute defense.

In another Order of July 13, 2007 Judge McKenna denied Respondent’s Motion that the Coast Guard be ordered to file charges against the third mate on watch whose

orders Respondent is alleged to have disobeyed because the ALJ has no jurisdiction to do so.

Judge McKenna denied a Motion to Dismiss in an Order dated July 13, 2007 based on Respondent's allegations that LT Omar Vasquez attempted to interfere with and/or coerce him by not allowing him to have a pre-hearing conference with the Judge. In support of this assertion, Respondent transmitted a recording of the telephone conversation between him and LT Vasquez. Judge McKenna stated that "while the undersigned has granted Respondent broad latitude to defend himself in this proceeding, his pro se status is not a license to abuse the process. Any further frivolous motions will result in sanctions." Judge McKenna then referred to the California Penal Code section which proscribes the tape recording of a telephone conversation where the other party is not aware that the telephone call is being recorded. The Judge stated that while listening to the tape recorded conversation with LT Vasquez, he "discovered that Respondent had tape recorded a conversation between himself and this Judge. The tape recording was unauthorized. Since Respondent was acting under the authority of his Coast Guard issued merchant mariners papers, his actions could result in additional charges being filed."

On July 13, 2007, Respondent filed his Motion for a civil jury trial and requested that "military and/or US Coast Guard personnel not be allowed to be in and/or part of the jury that I am requesting . . . note for the record that the defendant is requesting that a transcript of the CD as is reported in the motion to dismiss, dated July 7, 2007, will be submitted immediately as soon as I am able to have it transcribed as is mentioned in the last paragraph of the motion to dismiss letter dated July 7, 2007."

On July 23, 2007, Respondent filed another Motion to Dismiss based on the contents of his recorded telephone conversation with LT Vasquez claiming that LT Vasquez violated his Constitutional rights. He followed that Motion with another Motion on July 24, 2007 petitioning Judge McKenna to recuse himself because of his involvement in the taped telephone conversation and “gross wrongdoing.” The Respondent stated that he will file federal civil rights charges against “the United States Coast Guard Sector San Diego and/or its LT Omar Vasquez and also the Administrative Law Judge”

On July 24, 2007, Judge McKenna issued an Order denying Respondent’s motions to dismiss and on July 26, 2007 Judge McKenna issued an Order denying Respondent’s Motion for a Civil Jury Trial noting that the Seventh Amendment guarantee of a right to a jury trial does not apply to administrative proceedings.

On August 6, 2007, the Respondent filed a Motion entitled “Right of the Accused to confront and cross-examine witnesses as is afforded me in the Sixth Amendment.” In this Motion he asks that witnesses be ordered to appear for the hearing. On August 7, 2004, Respondent filed his “Motion to be informed of the nature and cause of the accusation to be confronted with the witnesses against the accused as is afforded me in the Sixth Amendment.”

On September 4, 2007, Respondent filed a “Motion that the original recording taped evidence from the Vessel LIBERTY EAGLE, Voyage data recorder JRC, JCY 1000 be sent to Homeland Security, U.S. Coast Guard Sector San Diego for inspection by a Homeland Security expert and/or licensed trained professional.” Respondent states that it is his “belief that Liberty Maritime Corporation has edited the recording and in doing

so is attempting to coerce the trial . . . that Liberty Maritime Corporation has and/or is tampering with the evidence regarding this case.”

On September 5, 2007, Respondent filed his “Motion that the original ship’s logbook for the LIBERTY EAGLE be sent to Homeland Security Sector San Diego for Inspection to investigate if there were any other incidents between the Third Mate James Lipinski and any other Able Seaman/Watch Standers while out at sea.”

On September 10, 2007, Respondent filed a “Motion that US Coast Guard charges and/or counts 1 through 5 be held for trial/hearing dated December 13, 2007 and charges and/or counts 6 through 8 be held for trial/hearing dated December 14, 2007.” Also on September 10, 2007 Respondent filed a “Motion to Subpoena video/audio footage of the confinement and allegations which are other wise noted as charges/counts 3 through 5, which was alleged to have transpired aboard the Vessel LIBERTY EAGLE during Voyage #013. In this motion, Respondent provided the names of three (3) National Labor Relations Board employees.

On September 12, 2007, Respondent filed a Motion in the nature of a motion for the ALJ’s disqualification because of the conflict of interest stemming for his personal involvement with the new charges concerning the tape recording. Again, on September 12, 2007, Respondent filed a motion to subpoena LT Omar Vasquez claiming that LT Vasquez violated his right to due process and that “the issues that transpired against me while out a sea did and has caused mental and emotional distress.”

On September 25, 2007, Respondent filed a Motion for the ALJ to order Sector San Diego to send a copy of the transcript of the Voyage Data Recorder which was mailed to him on August 24, 2007. Respondent claims that he needs this in his defense so

that he can “bring to light mental and emotional abuses of power against unlicensed Able Seaman/Watch while out a sea by a Third Mate-Lipinski, and a cover-up of officers related to the charges/counts 1 through 5 which are alleged against me.”

On September 26, 2007, Judge McKenna issued an Order noting that in his previous Order of July 13, 2007, he granted Respondent’s request to stay the proceedings until December 2007 to allow Respondent sufficient time to resolve any cases arising out of labor disputes. The Order further stated that since that time, Respondent has filed 12 Motions. Judge McKenna ruled that he will defer further Orders resolving Respondent’s Motions until after a December 4, 2007 conference call to determine the status of Respondent’s labor disputes.

On October 3, 2007, Judge McKenna issued an Order deferring rulings on two (2) additional Motions that Respondent filed. On October 11, 2007, the Coast Guard filed its objection to Respondent’s Motion to call LT Omar Vasquez as a witness in the pending hearing citing 33 C.F.R. § 20.102 and Appeal Decision 2309 (CONEN) which held that the purpose of the Suspension and Revocation process is to evaluate the relevant and material facts surrounding the Complaint and not the conduct of the Investigating Officer in the performance of his duty.

On October 31, 2007, Respondent filed twenty-six (26) motions arguing essentially that the suspension and revocation charges were brought with malice and intent to harm Respondent and again on November 14, 2007, Respondent filed fifty (50) separate motions accusing his employers of various criminal offenses that he wants investigated. On November 20, 2007, Respondent filed another twenty-six (26) motions alleging various criminal acts on the part of all personnel having any connection with the

suspension and revocation allegations. On November 30, 2007, Respondent followed up with ten (10) additional motions alleging criminal acts on the part of personnel associated with the allegations in the Complaint. On December 8, 2007, Respondent filed another ten (10) motions. These motions ask for Judge McKenna to recuse himself.

On December 18, 2007, Judge McKenna issued an Order referencing the 100 plus motions filed by Respondent. He categorized those motions as Motions for recusal, discovery motions, and other motions and noted that the majority of Respondent's motions were frivolous, repetitive, and baseless. The Order states that there was a pre-hearing teleconference on December 4, 2007, with the Respondent, Judge McKenna, LT Vasquez, and the new Investigating Officer, CWO James Mintz, participating. During the pre-hearing conference, Respondent advised that all of the labor disputes have been resolved. Judge McKenna noted that the stay was lifted and the matter was now set for hearing during the week of February 11, 2008. In addition, Respondent's Motion to bifurcate the hearing was denied. The Order referenced an earlier Order of July 13, 2007 discussing the circumstances surrounding Respondent's recording of the telephone conversations with LT Vasquez and Judge McKenna. As a result of those recordings, the Order states, Respondent filed a Motion for Judge's McKenna's recusal alleging that the Judge is biased and that the biasness stems from Respondent's tape recording of the telephone conversation between himself and the Judge. Respondent argues that because of the tape recording, Judge McKenna, now the alleged victim, cannot provide Respondent a fair hearing. Judge McKenna noted that during the pre-hearing conference on December 4, 2007, he denied Respondent's motion for recusal "based on black letter law which holds a party may not create the ground upon which disqualification of a judge

is sought.” McKenna Order of December 18, 2007 at 4, citations omitted. The Order also recites additional “black letter law” standing for the proposition that a Judge is not subject to disqualification merely because a party sues or threatens suits or files a complaint of judicial misconduct or try to force recusal by making baseless ethical attacks on the judge or intimidating the judge through frivolous complaints. Id. at 4 and 5, citations omitted. The Order then reconsidered and granted Respondent’s ten (10) earlier Motions for the Judge’s recusal of December 8, 2007. Among the reasons stated in the Order is that “if the Judge possesses ‘personal knowledge of disputed evidentiary facts concerning the proceeding,’ recusal is warranted.” Id. at 5, citations omitted. The Order cited the July 13, 2007 Order in which Judge McKenna stated “since Respondent was acting under the authority of his Coast Guard issued merchant mariner papers, his actions could result in additional misconduct charges being filed.” The Order concluded that “based on the unusual circumstances of this cases, the public perception of a fair and impartial judicial system would be enhanced if the motion for Recusal was granted, and the Amended Complaint was decided by another Judge.”

This is a summary of the majority of the orders issued by Judge McKenna. All of the filings and orders are contained in the complete case record.

ATTACHMENT C – RECUSAL MOTIONS

Respondent filed numerous motions requesting the recusal of the Administrative Law Judge. The undersigned addressed each of these motions throughout this administrative action and each is summarized below.

On May 21, 2007, Respondent petitioned for “a ‘transcribed’ pre-trial deposition to be held at its earliest convenience to and/or for all parties. Sir, the main topic of discussion for and/or from the Respondent/Attorney will be for your Recusal in accordance with Liljebery v. Health Services Acquisition Corp., 486 U.S. 847 (1988)” Respondent went on to state that he will be making a motion for an independent judge not a part of the Coast Guard and/or a grand jury hearing if applicable.

On May 26, 2007, Respondent filed a “Motion for your Recusal.” In his motion, Respondent argues, among other things, that the undersigned should be recused because he is affiliated with the Coast Guard as is Judge McKenna and Sector San Diego.

On June 3, 2008, the undersigned issued an Order Denying Discovery Request and Motion for Recusal.

On June 5, 2008, Respondent filed a follow-up Motion for Recusal reiterating his original reasons – that Judge McKenna and the undersigned are both judges for the Coast Guard and public perception of a fair and impartial judicial system would be enhanced if the motions for recusal were granted and the amended Complaint was decided by another Judge, among other things. In general, Respondent takes exception to the denial of his motions to recuse.

On June 25, 2005, the undersigned issued another Order Denying Motion for Recusal. The Order states, among other things, that Respondent’s motion fails to comply

with the requirements set forth in the governing regulations and that Respondent has merely posed a list of voir dire questions deliberately designed to preliminarily examine the ALJ. The Order further noted that if the Respondent has actual evidence of personal bias or other valid reasons why the ALJ should be disqualified, an affidavit in support of these facts must be filed before his motion for recusal will be considered. Moreover, the Order stated that a party cannot create the ground upon which disqualification of a judge is sought. “A judge is not subject to disqualification merely because a party sues or threatens suits.” Order of June 25, 2008 at 5, citations omitted.

On July 7, 2008, Respondent filed another “Motion for Your Recusal” referring to it as his third motion for recusal. In this latest motion, Respondent generally takes issue with the June 25, 2008 Order Denying his Motion for Recusal. He states “that the Respondent/Attorney will not only Appeal your decision through homeland security appeals process but will pursue you via threw, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA and/or to the U.S. SUPREME COURT if need be.” Respondent states that his third motion is in accordance with “the Judicial Improvements Act of 2002 . . . requiring the court’s issuance of rules for the filing of complaints of judicial misconduct . . .” Respondent also refers to 28 U.S.C. 455 as well as several cases. The motion further states that the undersigned “unlawfully attempted to cover up and/or Alter the record of Communication between the Court and the defendant, during an official judicial proceeding, this violation is material to this case . . .” (Underlining in original). He goes on to accuse the undersigned “also Judge, Walter Brudzinski, refusal to answer questions in the respondents motion for change of venue filed on February 2, 2008, this failure and the Judge’s reasoning toward and/or against the

Respondent/Attorney, is material to this case” [Underlining in original]. Respondent goes on to aver that the undersigned “and Judge McKenna are both employed and/or Financed by the same Entity, which makes room for retaliation against the Respondent/Attorney, which is material to this case furthermore, a 7 million dollar, federal complaint is being constructed, and will be launched against (LT) Omar Vasquez in the near future for preventing me from participating in the pre-trial process, which is a violation of my VI Amendment Right.” Respondent concludes by stating the he “is very interested in participating in a trial/hearing that is in compliance with Title 28>Part II>Chapter 40>Sub Section 593” and “Note: Sir, Judge Brudzinski, if you should choose to recuse yourself, the Respondent/Attorney will in turn STOP the Federal Complaint against you.”

On July 10, 2008, Respondent filed his self described “4th Motion for your Recusal.” In this motion, Respondent states, among other things, “that the Respondent/Attorney will not only Appeal your decision threw the homeland security appeals process, but will pursue you via threw, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA and/or all the way to Our Nations U.S. SUPREME COURT if this is what it will take, to make you understand that the recusal statutes cited apply to you.” Respondent goes on to say, “as a general rule, the standard for recusal of federal judges codified in 28 U.S.C. 455 do not apply in federal administrative proceedings [citations omitted] . . . however, based on a reading of Administrative Law Judges Internal Practices and Procedures (ALJIPP 1672.13 (1987), the national Transportation Safety Board (NTSB) has held that the standards established in 28 U.S.C. 455 apply to Coast Guard Administrative Law Judges. Dresser, NTSB Order

EM-195.” Respondent also states: “Note: You and Judge Parlen McKenna both have separate 3.5 million dollar law suits pending against you both, from the defendant in this case, in the Higher Court, this fact creates motive for retaliation against the Respondent/Attorney . . . you and Judge Parlen McKenna are both one of the same being that you both are employed and/or Financed by the same Entity, this fact, creates room for retaliation against the Respondent/Attorney . . . you have both taken the same oath under and/or for the same Entity, Sir, You cant be trusted to preside over this case, in a fair manner”

On July 15, 2008, Respondent filed a “Motion to Inform” advising that he is taking action against Judge McKenna in the U.S. District Court, Southern District of California, case name: Contreras v. McKenna, Docket No. 08CV0044 BEN (WMC). The motion further states that “the same action will be taken against you in the near future, for your failure to recuse yourself.” Respondent attached a copy of a money order in the amount of \$350.00 payable to the court.

On July 16, 2008, respondent filed another motion to inform stating that he “has know [sic] other choice, but to flex his V Amendment right to the upcoming trial/hearing which you are president over. Sir, your failure to adhere to any of the (4) motions for your recusal, prior to this motion to inform, did and/or has put a strain on the integrity of a fair and/or just trial, which is material to this case, and is material to the complaint in the higher Court which is pending against you in accordance to 38 U.S.C. Section 7105 (c) and 38 U.S.C. Section 5108 . . . your refusal to recuse yourself is a gross miscarriage of justice”

On July 21, 2008, Respondent filed another motion to inform and recusal. In this motion, he advised that he was still pursuing the civil action against LT Vasquez as well as Liberty Maritime Corporation for their “original false allegations and altered evidence.” Respondent continues with assertions that he is innocent and that closes with a plea, “sir, please recuse yourself” and asks for a “non-government independent Judge, in accordance to Rule 40.3; and 28 U.S.C. Section 455” Respondent enclosed a letter dated July 21, 2008 addressed to the Clerk of the U.S. District Court informing him that “Contreras v. Brudzinski, Docket Number: 08CV1154 JLS POR, will be receiving the necessary funds, for filing, and for U.S. Marshals service shortly.” He also advised that of the two related cases against Judge McKenna and LT Vasquez.

On August 11, 2008, the undersigned once again issued an Order Denying Respondent’s several Motions for Recusal filed since the last Orders Denying Respondent’s Motions for Recusal were issued on June 3, and June 25, 2008. The Order discussed Respondent’s history of filing dilatory, repetitive, and frivolous motions and denied the most recent group under 33 C.F.R. § 20.309(f).

During the hearing, Respondent once again motioned for the undersigned’s recusal and once again the undersigned denied his Motion.

ATTACHMENT D – WITNESS AND EXHIBIT LIST

Witness List

Coast Guard

1. Captain Stephen Mahan, Master, LIBERTY EAGLE

Respondent

1. Rocky M. Contreras, Respondent

Exhibit List

Coast Guard

1. “Merchant Marine of the United States Logbook,” LIBERTY EAGLE, 21 December 2006 to 18 February 2007, fifty-six (56) pages.
2. James M. Lipinski letter of 3 January 2007 describing incident on the bridge with Respondent, one (1) page.
3. Master S. Mahan’s Report of Investigation of allegations by crewmember of discrimination due to a disability dated 02/10/07, one (1) page.
4. Chief Mate Charles Lulley letter concerning Respondent dated January 31, 2007, one (1) page.
5. Master Stephen Mahan’s letter of 17 February 2007 to Respondent informing him that he is dismissed from his duties for continued willful disobedience of a lawful command at sea, together with references to incidents of February 14, 15, 16, and 17 February 2007 and Respondent’s handwritten reply, two (2) pages.
6. LIBERTY EAGLE document on “Safe Practices” and “Duties of the Watchstander,” one (1) page.

7. Photocopy of Respondent's Merchant Mariner's Document (MMD), front and back, with expiration date of 01/22/2007, one (1) page.
8. Coast Guard "Good Faith Deposit" and receipt for MMD with expiration date of 03/16/2010, two (2) pages.
9. Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document dated 4/4/05, five (5) pages.
10. Criminal Complaint no. M-881636DV, Superior Court of California, County of San Diego, showing six (6) counts, [two pages], and a "Plea of Guilty/No Contest – Misdemeanor DV" form consisting of four pages, including the Attorney's Statement, showing that Respondent pled Guilty to Counts 5 and 6, Battery and Vandalism on 4/8/03.
11. Master Stephen Mahan letter of 15 February 2007 showing that Respondent is dismissed from his duties aboard the LIBERTY EAGLE for willful disobedience of a lawful command at sea. The letter also contains a handwritten note by Captain Mahan describing Respondent's conduct during the booking process, one (1) page.
12. Master Stephen Mahan letter of February 14, 2007 describing the events surrounding the incident on the bridge with Chief Mate Lulley, two (2) pages.
13. LIBERTY EAGLE voyage data CD recording of incident on the bridge with Third Mate James M. Lipinski, largely inaudible.
14. LIBERTY EAGLE Third Mate James M. Lipinski undated letter detailing events concerning the Respondent during voyage 013, one (1) page.

15. Master S. Mahan Incident Report dated 12/24/06 detailing a 12/23/06 incident involving Respondent and another crew member, one (1) page.
16. Letter of Warning to Respondent from Commanding Officer, Marine Safety Office dated September 23, 2004 concerning Respondent's failure to disclose several criminal convictions on his application for merchant mariner's document of July 22, 2004, one (1) page.

Respondent's Exhibits:

None.

Administrative Law Judge Exhibits:

1. Stipulations, showing that the parties agreed on stipulation number 1, which states that Respondent holds a Merchant Mariner's Document; and stipulation number 16, which states that on August 11, 2008 Mr. Contreras requested his MMD be returned to him and that on August 11, 2008, USCG Sector San Diego honored his request and both parties signed a receipt. The remaining 15 proposed stipulations were not agreed to.

ATTACHMENT E – NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

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

33 CFR 20.1002 Records on appeal.

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

33 CFR 20.1003 Procedures for appeal.

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

- (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *DECISION AND ORDER* was sent by the methods indicated to the following parties and entities:

Commander
U.S. Coast Guard Sector San Diego, CA
Attn: LT Ann McSpadden, USCG
CWO James R. Mints, USCG
2716 North Harbor Drive
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Telephone: (619) 278-7255
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(Via Federal Express)

Rocky M. Contreras
[REDACTED]
(Via First Class Mail)

ALJ Docketing Center
Hearing Docket Clerk
40 S. Gay Street, Room 412
Baltimore, MD 21202
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Done and dated March 17, 2009
New York, New York

Regina V. Maye
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Administrative Law Judge
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