

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

UNITED STATES COAST GUARD

Complainant

vs.

GEORGE P. AUGER

Respondent.

Docket Number: CG S&R 08-0455
CG Case No. 3348136

DECISION AND ORDER

Issued: May 20, 2009

Issued by: Michael J. Devine, Administrative Law Judge

Appearances:

For Complainant

LT Michelle Schopp
And LT Paul Lehmann
United States Coast Guard
Sector Miami
100 MacArthur Causeway
Miami Beach, FL 33139

For Respondent

Farris J. Martin, III, Esq.
119 SE 12th Street
Fort Lauderdale, FL 33316

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of George P. Auger's (Respondent) Merchant Mariner's Document (MMD) number [REDACTED] and Merchant Marine License (MML) number [REDACTED]. This action is brought pursuant to the legal authority contained in 46 U.S.C. 7703 and 7704 and the underlying regulations codified at 46 CFR Part 5.

The Complaint, issued on October 20, 2008, charged Respondent with three (3) violations. Count one (1) alleged Respondent was convicted of a dangerous drug violation within the last ten years, in violation of 46 U.S.C. 7704(b); count two (2) alleged Respondent violated a law or regulation by failing to report a prior voluntary surrender agreement on his April 16, 2008 raise in grade application; and, count three (3) alleged Respondent was convicted of a additional dangerous drug violation within the last ten years, in violation of 46 U.S.C. 7704(b). Respondent, through his attorney, filed an Answer on November 24, 2008 and denied all jurisdictional and factual allegations listed in the Complaint.

On November 28, 2008, this case was assigned to the undersigned judge for adjudication. On December 11, 2008, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed and a hearing date was set.

The hearing took place at Miami Beach, Florida on March 10, 2009. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. 551-59 and Coast Guard procedural regulations located at 33 CFR Part 20. Lieutenant Michelle Schopp and Lieutenant Paul Lehmann represented the Coast Guard at the hearing. Respondent appeared at the hearing and was represented by attorney Farris Martin, III. Two (2) witnesses, including Respondent, testified at the hearing. The Coast Guard offered twenty-three

(23) exhibits, eighteen (18) of these exhibits were admitted into evidence. Respondent offered five (5) exhibits, all of which were admitted into evidence.

On April 30, 2009, the Coast Guard submitted a post hearing brief. This post hearing brief contained enumerated Proposed Findings of Fact and Proposed Conclusions of Law. Rulings on these proposed findings and conclusions are found in Attachment B. Also on April 30, 2009, Respondent filed a post hearing brief. This post hearing brief did not contain enumerated Findings of Fact or Conclusions of Law, therefore, individual rulings on Respondent's Findings of Fact or Conclusions of Law are not made. However, all the facts and issues raised in Respondent's post hearing brief have been addressed throughout the body of this Decision.

After careful review of the facts and applicable law in this case, the undersigned finds the Coast Guard has established, by a preponderance of reliable and credible evidence, the allegations set forth in the Complaint.

FINDINGS OF FACT

The Findings of Fact are based on documentary evidence, witness testimony, and the entire record as a whole.

1. Respondent is the holder of MML number [REDACTED]. (Gov't Ex. 2).
2. Respondent is the holder of MMD number [REDACTED]. (Gov't Ex. 3).
3. Respondent was convicted of one (1) count of attempt to obtain a controlled substance by fraud, in violation of Florida Statute Chapter 893.13(7)(a)(9), on December 7, 2006, by the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida. (Gov't Ex. 7).

4. Respondent was convicted of one (1) count of possession of oxycodone, in violation of Florida Statute Chapter 893.03(2)(a)(1), on April 23, 2007, by the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida. (Gov't Ex. 13).
5. Florida law provides that it is unlawful for any person to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. (Gov't Ex. 21; Tr. 41-44); Fla. Stat. Ch. 893(7)(a)9.
6. Oxycodone is a controlled substance. (Gov't Ex. 22; Tr. 41-44); Fla. Stat. Ch. 893.03(2)(a)(1)(o).
7. Florida law provides that it is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained, such as through a valid prescription. (Gov't Ex. 23; Tr. 41-44); Fla. Stat. Ch. 893.13(6)(a).
8. On August 8, 1996, Respondent voluntarily surrendered his MMD to the Coast Guard in lieu of requesting a hearing concerning allegations that Respondent was a user of dangerous drug. (Gov't Ex. 9).
9. Respondent filled out an MMD raise in grade application and submitted it to the Coast Guard on or about on April 16, 2008. (Gov't Ex. 4). In this Application, Respondent answered "no" to a question asking if he ever had any Coast Guard issued license or document held by him revoked, suspended or voluntarily surrendered. (Id.).

DISCUSSION

Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). When a mariner is engaged in

official matters regarding their mariner credentials, such as applying for upgrades in credentials, the mariner is considered to be acting under authority of their license. 46 CFR 5.57(b). The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner violated a law or regulation while acting under the authority of that license. 46 USC 7703(1)(A).

The Coast Guard also has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner (holder of the credentials) is found to have been convicted of violating a dangerous drug law within the last ten years. 46 U.S.C. 7704(b). The charge conviction for a dangerous drug violation is based on 46 CFR 5.35 and 46 U.S.C. 7704. Where the proceeding is based exclusively on the provisions of 46 U.S.C. 7704, as with the first and third charges of this case, the Complaint must allege jurisdiction as required by 46 U.S.C. 7704. See 46 CFR 5.35. This includes establishing the respondent is a holder of a Merchant Mariner's Coast Guard license or document and that he was convicted of a dangerous drug law of the United States or of a State within the past ten (10) years. Id.

Therefore, if Respondent is found to have violated a law or regulation while applying for upgrades in his mariner credentials or is found to have been convicted of a dangerous drug law violation within the last ten years while holding merchant mariner credentials, the Coast Guard has jurisdiction to revoke or suspend Respondent's credentials. While in his Answer Respondent denied the jurisdictional allegations, during the hearing Respondent, through counsel, stipulated to the fact that there is jurisdiction for the Coast Guard to undertake these proceedings against Respondent's merchant mariner credentials. (Tr. at 112-13).

Coast Guard's Case-in-Chief

Burden of Proof

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. 7701. To assist in this goal, Coast Guard Administrative Law Judges (ALJs) have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. 7703-7704. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 CFR 20.701-702; see also Appeal Decision 2485 (YATES) (1989). In this case, the Coast Guard seeks to prove, by a preponderance of the evidence, that Respondent has been convicted of two (2) dangerous drug law violations within the last ten years (Charges I and III) and committed one (1) act of violation of law or regulation by making a false statement in failing to report a prior voluntary surrender agreement on his April 16, 2008 raise in grade application (Charge II).

Charges I & III – Conviction of a Dangerous Drug Law

In Charges I and III, the Coast Guard alleged Respondent was convicted of violating a dangerous drug law within the last ten years, in violation of 46 U.S.C. 7704(b). In order to prove the violations alleged in Charges I and III (conviction of dangerous drug law), the minimum elements set forth in 46 U.S.C. 7704(b) require the Coast Guard prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was convicted of a dangerous drug law violation of the United States or of a State; and
- (3) that the conviction for a dangerous drug law violation was within ten (10) years prior to the beginning of the proceedings.

The Coast Guard presented sufficient evidence to establish a violation of 46 U.S.C.

7704(b) under Charge I. First, the Coast Guard established that Respondent is a holder of a Merchant Marine License and Document. (Gov't Ex. 2, 3; Tr. at 112-13). Second, the Coast Guard presented evidence that showed Respondent was convicted on December 7, 2006, of one (1) count of Attempt to Obtain a Controlled Substance (oxycodone) by Fraud in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida (Palm Beach County). (Gov't Ex. 7, 21, 22, 23). Respondent admitted to the facts of the conviction for the dangerous drug violation. (Tr. at 143-44). Respondent did not dispute the fact that his conviction for an attempt to obtain a controlled substance by fraud, is a dangerous drug¹ conviction but he did argue for a lesser sanction than revocation based on his rehabilitation efforts. (Tr. at 163-64). Third, these proceedings against Respondent were initiated by the Complaint filed on October 20, 2008, with a hearing held on March 10, 2009. Respondent's December 7, 2006 conviction is therefore within ten (10) years from the initiation of these proceeding. I find the Coast Guard proved the violation alleged in Count I.

The Coast Guard also presented sufficient evidence to establish a violation of 46 U.S.C. 7704(b) under Charge III. First, the Coast Guard established that Respondent is a holder of a Merchant Marine License and Document. (Gov't Ex. 2, 3; Tr. at 112-13). Second, the Coast Guard presented evidence showing Respondent was convicted on April 23, 2007, of one (1) count of possession of oxycodone in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida (Broward County). (Gov't Ex. 13, 21, 22, 23). Respondent admitted to the facts of the conviction for the dangerous drug violation. (Tr. at 143-

¹ The term "dangerous drug" in 46 U.S.C. 7704 is defined at 46 U.S.C. 2101(8a) as a narcotic drug or a controlled substance. "Controlled substance" is defined under the Comprehensive Drug Abuse Prevention and Control Act at 21 U.S.C. 802(6) as a drug or other substance included under Schedule I through V of Part B of that subchapter. Under Florida law oxycodone is a Schedule II Controlled Substance as defined in Florida Statute Title 46, Chapter 893.03(2)(a)(1)(o). (Gov't Ex. 22).

44). As noted above, Respondent did not dispute the fact of the conviction for possession of oxycodone, a dangerous drug conviction, but argued for a lesser sanction than revocation. (Tr. at 163-64). Third, these proceedings against Respondent were initiated by the Complaint filed on October 20, 2008, with a hearing held on March 10, 2009. Respondent's April 23, 2007 conviction is therefore within ten (10) years from the initiation these proceeding. I find the Coast Guard proved the violation alleged in Count III.

During the hearing and in Respondent's Post-Hearing Brief, Respondent did not dispute the underlying facts of the convictions alleged in Counts I and III which were documented by certified court records. Instead, Respondent's arguments concerning Counts I and III focus on his efforts in rehabilitation and that they should be considered in mitigation for the appropriate penalty. Issues relating to mitigation and an appropriate sanction are addressed in the Sanction Section of this Decision.

Charge II – Violation of Law or Regulation

In Charge II, the Coast Guard alleged Respondent committed a Violation of Law by making a false statement on his April 16, 2008 Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document (Application). In order to prove the violation alleged in Charges II, the minimum elements set forth under 46 CFR 5.33 and 46 U.S.C. 7703(1)(A) requires the Coast Guard prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was acting under the authority of his license when the charged violation occurred (April 16, 2008);
- (3) that Respondent violated a law or regulation of the United States or of a State (here the law in question is 18 U.S.C. 1001).

The Coast Guard alleged Respondent submitted a false statement on his April 16, 2008,

Application. Specifically, the Coast Guard introduced evidence which established Respondent voluntarily surrendered his MMD to the Coast Guard in 1996. (Gov't Ex. 9). At that time, Respondent was under investigation by the Coast Guard for use of dangerous drugs. (Id.). Respondent elected to voluntarily surrender his MMD instead of requesting a hearing. (Id.). However, in Section III of the April 16, 2008 Application, Respondent answered "no" to the question of "[h]ave you ever had any Coast Guard license or document held by you revoked, suspended or voluntarily surrendered? (*If yes, attach statement*)." (Gov't Ex. 4 – emphasis in original). At the end of Section III the applicant is required to sign the application and acknowledge that a false statement is grounds for denial of the application as well as criminal prosecution and financial penalty. (Id.). Section VI of the Application contained a specific warning against making false statements on the Application and notified Respondent that any false statement is a violation of U.S. Criminal Code at 18 U.S.C. 1001. (Id.). Respondent signed the Application and acknowledged he understood that any false statement on the Application was a violation of the U.S. Criminal Code. (Id.).

The Coast Guard presented sufficient evidence to establish a violation of 46 CFR 5.33 under Charge II. First, the Coast Guard established that Respondent is a holder of a Merchant Marine License and Document. (Gov't Ex. 2, 3). Second, Respondent was acting under the authority of his credentials on April 16, 2008 when he submitted his application for an upgrade. When a mariner is engaged in official matters regarding their mariner credentials, such as applying for upgrades in credentials, the mariner is considered to be acting under authority of their license. 46 CFR 5.57(b). Furthermore, during the hearing, Respondent, through counsel, stipulated to the existence of jurisdiction on all charges. (Tr. at 112-13). Third, Official Notice was taken of 18 U.S.C. 1001 which is referenced in Section VI, the certification section of a

merchant mariner application (form CG -719B). (Gov't Ex. 4); Tr. at 112. Both Section III and Section VI warn applicants regarding the consequences of false statements and requires their signature certifying that the information on the application is true and correct. Id. Respondent failed to disclose on the Application that he previously voluntarily surrendered his MMD to the Coast Guard. (Gov't Ex. 4; Tr. at 102). By making a false statement on the Application Respondent violated 18 U.S.C. 1001 of the U.S. Criminal Code. The Coast Guard presented sufficient evidence to establish a prima facie case that Respondent committed a violation of law or regulation by making a false statement on his Application, in violation of 46 CFR 5.33.

Respondent's Rebuttal

Respondent did not contest the violations alleged in Counts I and III. Instead, Respondent argued for mitigation of these charges; the arguments for mitigation are addressed in the Sanction section. Respondent's rebuttal of the Coast Guard's case focused on the violation alleged in Count II. As laid out in his Post Hearing Brief, Respondent contested Count II on the following grounds: (1) Respondent alleged he misunderstood the question at issue, (2) Respondent disclosed the events regarding his convictions elsewhere on the Application, and (3) Respondent discussed his problems with the law with Ms. Zona Mingo, a Coast Guard license evaluator. (Resp't PHB at p. 2). As discussed below, Respondent's testimony with regard to his lack of understanding the voluntary surrender question is not credible and the matters presented in rebuttal are not persuasive.

Respondent testified he signed the voluntary surrender document in 1996 and that later, in 2001, he received his Captain's license. (Tr. at 127-28). Since the voluntary surrender document was for his MMD, Respondent asserted he did not think it had any affiliation to an application for his Captain's license. (Id.) In response to questioning by his counsel,

Respondent claimed he did not know what a “voluntary surrender” was when asked about it on the Application, but did know that he had signed a “settlement deal” with the Coast Guard. (Id.). Again in response to a question from counsel, Respondent indicated he misunderstood the question in Section III of his 2008 Application. (Tr. at 128). Respondent argues this misunderstanding is grounds to dismiss Count II.

The Application (form CG -719B) is clear on its face and Respondent, who had successfully obtained a mariner’s document and a Captain’s license, is clearly not illiterate. The title of the form is “Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner’s Document.” (Gov’t Ex. 4). Likewise, in Section III, the question that is the subject of Charge II is: “[h]ave you ever had any Coast Guard license or document held by you revoked, suspended or voluntarily surrendered? (*If yes attach statement*).” (Id.). This document is clear on its face. On August 8, 1996, Respondent signed a document entitled “Voluntary Surrender Agreement.” (Gov’t Ex. 9). In the Voluntary Surrender Agreement Respondent acknowledged he was fully aware of the effects of the voluntary surrender and that he was permanently relinquishing interest in his MMD. (Id.). The regulations provide that a voluntary surrender is not to be accepted unless the investigating officer is convinced the holder fully realizes the effect of the surrender. 46 CFR 5.203(c); See Appeal Decision 2673 (Mikan) (2008). Respondent admitted he knew he had entered into a settlement agreement with the Coast Guard in 1996. (Tr. at 128). Respondent’s alleged confusion is not credible. Respondent was able to read that the Application required disclosure of all past voluntary surrender agreements. It is incumbent on merchant mariners to diligently and truthfully fill out applications for mariner credentials. If Respondent had questions concerning the Voluntary Surrender Agreement he could have answered “yes” to having voluntarily surrendered his credentials and used the attached

sheet in the Application to explain his “yes” answer. (See Gov’t Ex. 4). I do not find Respondent’s assertion credible that he misunderstood the question or misunderstood what a voluntary surrender agreement was.

Respondent also argued that his “no” answer regarding the prior voluntary surrender agreement was an innocent mistake that had no impact on the COAST GUARD’S investigation.” (Resp’t PHB at p. 4). Respondent asserted that a “yes” answer would not have changed the Coast Guard’s investigation because Respondent already answered “yes” to the questions concerning prior convictions. (Id.). However, a voluntary surrender of a Merchant Mariner document is an administrative action and is not a criminal conviction. As shown on the face of the application form, there is a separate question for administrative actions. While the evidence shows Respondent did disclose information regarding arrests and convictions in the April 16, 2008 application, it does not eliminate the fact he did not answer all questions truthfully. Ms. Constance Russell, Chief Licensing Officer for the Coast Guard Regional Examination Center, testified if Respondent had answered the question concerning past voluntary surrender agreements “yes,” his application would have received heightened scrutiny to include the examination center requesting a copy of the voluntary surrender agreement. (Tr. at 102-06). Ms. Russell also stated that the Regional Examination Center did not have computer access to search for past settlement agreements. (Tr. at 108-09). The Regional Exam Center in Miami processes a high volume applications averaging 50 to 100 applications per day. (Tr. at 55-56). Minimizing his past problems would be to Respondent’s benefit. Respondent did disclose his past criminal convictions in the Application; however, this action was doing no more than what was required and a failure to list criminal convictions would have been reflected in a criminal history record check as shown in Gov’t Exhibit 8. (Tr. at 63). While it is unknown whether Respondent knew

the Coast Guard was unable to cross-check for administrative actions taken against his credentials, Respondent had no valid explanation for failing to answer “yes” with regard to the voluntary surrender of his mariner’s document.

In this matter, the Coast Guard has charged him with making a false statement. Respondent’s assertion of not connecting his license with the previous MMD is not a logical or valid distinction. It is clear from the evidence including the voluntary surrender document (Gov’t Ex. 9); the requirement of 46 CFR 5.203(c) that a voluntary surrender not be accepted unless the investigating officer is convinced the holder fully realizes the effect of the surrender; the 2008 application form (Gov’t Ex. 4); and Respondent’s admission that he had entered a settlement with the Coast Guard with regard to his previous MMD that Respondent knew or clearly should have known that his answer was false. See Appeal Decision 2223 (Hewitt) (1980). Had Respondent answered the question truthfully, the Coast Guard would have reviewed his Application with heightened scrutiny; it is unknown specifically what outcome would have occurred of this heightened scrutiny. (Tr. at 103-04). Being truthful on one part of the Application does not excuse untruthful answers on another part of the Application.

During the hearing, Respondent testified he had several conversations with Ms. Zona Mingo, a Coast Guard license evaluator, concerning his 2008 Application. (Tr. at 126). Respondent testified he had frank discussions with Ms. Mingo concerning his past problems with the law. (Tr. at 126-27). When asked if he recalled whether she ever inquired about his prior license and settlement agreement he said “vaguely” and indicated that he “would have” told her about the settlement agreement. (Tr. at 127-29). Respondent’s vague recollections do not rebut the fact he failed to accurately fill out his Application. The CG 719B form only requires an explanation for “yes” answers in Section III. (Gov’t Ex. 4). Since Respondent checked “no”

with regard to voluntary surrender there is no support of the concept that there “would have” been a discussion with Ms. Mingo on a part of his 2008 Application where he answered “no.”

Neither party called Ms. Mingo as a witness. Respondent presented argument that the Coast Guard’s failure to call Ms. Mingo as a witness somehow “casts serious doubts on the merits of Count II” (Resp’t PHB at p. 4) is not persuasive. However, if there was a benefit to Respondent that could have been provided by her testimony, nothing prevented Respondent from calling Ms. Mingo in support of his case. The Coast Guard bears the burden of proof in this matter at all times but was under no obligation to call Ms. Mingo as a witness. Either party may have various tactical reasons to determine whether a witness would be unnecessary or will provide sufficient benefit to their presentation. Both sides had ample time to prepare for the case, the decision of whether to call Ms. Mingo as a witness is no less of a tactical decision by the Government than it was for Respondent’s defense. Both sides were aware of her availability and neither side chose to call her as a witness. (Tr. at 122, 150, 152). Additionally, the Coast Guard unsuccessfully tried to admit as evidence written statements (Gov’t Ex. 18 & 19) of Ms. Mingo and Ms. Russell. (Tr. at 49-52, 113-17). Respondent’s Counsel stated this was somehow troubling, overreaching, or improper.² Inexperience or lack of knowledge or expertise in presenting evidence or witnesses by the Coast Guard’s investigating officer does not warrant characterization by Respondent’s Counsel that the Coast Guard’s actions were improper. Government Exhibits 6 and 12 were rejected because they were cover letters and not relevant. Other exhibits were rejected due to failure to present them properly in keeping with procedural

² Respondent implied that the Coast Guard was acting in bad faith and tried to admit in false evidence. (Resp’t PHB at p. 3-4). These accusations are unfounded. The Coast Guard should have offered that Exhibit 19 be entered into evidence while Ms. Russell was on the witness stand to authenticate the document. Respondent then could have cross-examined Ms. Russell about her statements. Because the Coast Guard did not do this, Exhibit 19 was not admitted into evidence and the information it contains has not been considered by the undersigned. The Coast Guard investigators lack of training as attorneys and lack of courtroom experience are not bad faith. Their failure to effectively present the matters that were excluded from evidence results in a risk of not meeting the burden of proof.

rules. Respondent's objections were sustained and the statements were not received in evidence. The Government retained the risk of not meeting its burden of proof at all times.

In addition to the above issues, Respondent presented other arguments in his Post Hearing Brief. Respondent alleged the Coast Guard failed to produce complete copies of all of Respondent's past merchant mariner applications. He specifically argued that the copies of the 2001 and 2002 Applications (Gov't Ex. 11 & 14) did not have attached handwritten statements. (Resp't PHB at p. 5). Respondent did not object to the admission of those applications as long as they did not result in raising any new charges. (Tr. at 39, 45, 47, 48). Ms. Russell testified in response to cross examination that Respondent "may" have submitted a written statement with those applications, she did not know whether the Respondent submitted a written statement with those applications. (Tr. 82-85). Any objection that Government Exhibits 11 and 14 were not complete copies of the existing Government records was waived. Respondent does not explain why this collateral matter is of any benefit in determining if Respondent correctly filled out his 2008 Application. (Gov't Exhibit 4). While Respondent stated he submitted explanations regarding his criminal convictions in the 2001 and 2002 Applications, there is no corroborating proof that such materials were actually submitted. Even if it is assumed as fact that such materials were submitted, that does not rebut the fact he provided a false statement when he answered "no" to the voluntary surrender question in the 2008 Application. The prior applications admitted into evidence show Respondent has answered "no" to the voluntary surrender application previously. (Gov't Exhibits 11, 14, 15 and 16). In Government Exhibit 15 (application for duplicate), Respondent indicated a "yes" answer to the question of whether he had ever been a user of or addicted to dangerous drugs; while he answered "no" to that question in other applications. (Tr. at 99-100). These matters are considered only with regard to

credibility. As noted previously, Respondent has only been charged with making a false statement on the 2008 application. Even if it is assumed that Respondent had completely and correctly filled out all previous Applications, Respondent was still under an obligation to completely and correctly fill out the 2008 Application. While in his Answer Respondent asserted the Coast Guard should be estopped from filing this action, no valid legal basis has been presented in support of this contention. If a Mariner is issued a renewal license based on incomplete information or an incorrect assessment the Coast Guard is not prevented from taking appropriate action. See Appeal Decision 2610 (BENNET) (1999). There is no legal basis or theory presented in this matter that would support applying any estoppel or related doctrine to prevent the Coast Guard from undertaking suspension and revocation proceedings in this matter. See generally, Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise Chap. 13 (3d ed. 1994).

Respondent's evidence presented in rebuttal to the Coast Guard's case is not persuasive. I find that Respondent violated a law or regulation by making a false statement in failing to report a prior voluntary surrender of his MMD on his April 16, 2008 Application.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. §§ 7703-7704, 46 CFR Part 5, and 33 CFR Part 20.
2. Respondent was convicted of one (1) count of attempt to obtain a controlled substance by fraud, in violation of Florida Statute 893.13(7)(a)(9), on December 7, 2006, by the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida.

3. Respondent was convicted of one (1) count of possession of oxycodone, in violation of Florida Statute 893.03(2)(a)(1), on April 23, 2007, by the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida.
4. A conviction for possession of oxycodone (a controlled substance) is a dangerous drug conviction.
5. Respondent make a false statement by indicating “no” in response to the question of whether he had ever had any Coast Guard license or document held by you revoked, suspended or voluntarily surrendered in his April 16, 2008, MMD raise in grade application.
6. Respondent’s December 7, 2006 conviction under Florida Statute 893.13(7)(a)(9) for attempting to obtain a controlled substance by fraud, constitutes a conviction of a dangerous drug law violation within ten (10) years of the beginning of these proceedings under 46 U.S.C. 7704(b). Therefore the allegations in Count I against Respondent are found **PROVED** by a preponderance of the reliable and credible evidence including Government Exhibit 7 and testimony in the record considered as a whole.
7. Respondent knew that he had voluntarily surrendered his merchant mariner’s document in 1996 in preference to appearing at a hearing.
8. Respondent’s answer of “no” to the question of whether any Coast Guard license or document held by him had ever been revoked, suspended or voluntarily surrendered made in the application he signed on April 16, 2008 was false. Therefore, the allegations in Count II, “**Violation of law or regulation,**” against Respondent are found **PROVED** by a preponderance of the reliable and credible evidence including Government Exhibits 4 and 9 and testimony in the record considered as a whole.

9. Respondent's April 23, 2007 conviction under Florida Statute 893.03(2)(a)(1) for possession of oxycodone, a schedule II controlled substance, constitutes a conviction of a dangerous drug law violation within ten (10) years of the beginning of these proceedings under 46 U.S.C. 7704(b). Therefore the allegations in Count III against Respondent are found **PROVED** by a preponderance of the reliable and credible evidence including Government Exhibit 13 and testimony in the record considered as a whole.

SANCTION

It is the nature of suspension and revocation proceeding to "promote, foster, and maintain the safety of life and property at sea." Appeal Decision 2294 (TITTONIS) (1983); 46 U.S.C. 7701(a). In this case, the Coast Guard provided documentary proof that Respondent had been convicted of two separate dangerous drug violations. Respondent did not dispute these convictions. Additionally, as noted above, the preponderance of evidence in the record supports the finding that Respondent violated a law or regulation by making a false statement in failing to report a prior voluntary surrender agreement on his April 16, 2008 Application. The sanction to be imposed for these violations are remedial, not penal in nature, and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." See 46 CFR 5.5.

Prior to 2004, the law and regulations, including 46 CFR 5.59(b), required revocation of a merchant mariner's license and/or document when it was shown that the mariner was convicted of a dangerous drug law within ten (10) years before the beginning of the proceedings. However, in 2004, 46 U.S.C. 7704(b) was amended to allow suspension as an available option. Subsequent to that change in the law, the Commandant held that although 46 CFR 5.59

mandated revocation as a sanction, the 2004 amendment to the statute superseded the regulation and allows suspension as an alternative to revocation. Appeal Decision 2678 (SAVOIE) (2008). The undersigned ALJ specifically informed the parties of the SAVOIE decision during the pre-hearing telephone conference in this case and directed the parties to be prepared to apply that decision in this matter. In keeping with SAVOIE, an ALJ is statutorily authorized to consider a lesser sanction of suspension rather than revocation. Likewise, a merchant mariner's license and document may be suspended or revoked upon proof of a violation of law or regulation under 46 U.S.C. 7703(3). See 46 CFR 5.59(b).

In Respondent's Post Hearing Brief, Respondent cited to SAVOIE and correctly asserted that the undersigned has the power to enter a penalty less than revocation. In its Post Hearing Brief, the Coast Guard referenced 46 CFR 5.59 which has not been updated and on its face would require revocation; however, immediately after that reference the Coast Guard also specifically cited and discussed the SAVOIE decision and its effect as precedent that the undersigned can consider a penalty less than revocation. The Coast Guard presented argument in support of its position that revocation is still authorized and should be appropriate in this case instead of suspension. (Gov't PHB at p. 11-12). Respondent Counsel's assertion that the Coast Guard made a "blatant incorrect statement of the law" ignores the rest of the Investigating Officer's argument including specific reference to SAVOIE and mischaracterizes the Investigating Officer's position. Vigorous advocacy and maintaining civility with the opposing party are not mutually exclusive.

Respondent submitted several documents in support of the argument for mitigation of any proposed sanction. Respondent submitted documentation showing: (1) that his probation terminated on November 28, 2007; (2) a certificate showing the State of Florida restored his civil

rights, otherwise unavailable for persons with felony convictions except that the right to possess or own a firearm was not restored; and (3) submitted a letter from Ronnie Rhoades of Weeks Marine attesting to Respondent's professionalism. (Resp't Ex. C, D, E). Respondent also submitted information establishing that the Transportation Security Administration (TSA) granted Respondent a waiver to allow him to have a Transportation Worker Identification Credential (TWIC). (Resp't Ex. A, B). Respondent argues that TSA's issuance of a TWIC establishes Respondent is "worthy of returning to the maritime workplace." (Resp't PHB at final paragraph).

Respondent was initially denied a TWIC but was able to obtain a waiver for his convictions from the Transportation Security Administration (TSA). (Respondent Ex. B; Tr. 130-33). The TWIC is a separate credential from Merchant Mariner's documents. The purpose of the TWIC program is to ensure that only authorized personnel who have successfully completed a security threat assessment have unescorted access to secure areas of maritime facilities and vessels. 72 Fed.Reg. 3492-3604. The TWIC program is managed by TSA, a separate Federal agency, and the TWIC regulations³ and process do not address the purpose of Coast Guard Suspension and Revocation proceedings, which is to promote safety at sea, as stated in 46 U.S.C. 7701(a). Certain criminal offenses may result in TSA classifying individuals as a potential security threat and in turn resulting in a denial of a TWIC. If an individual is determined to be a security threat, the person may seek a waiver under 49 CFR 1572 in order to receive their TWIC. It is an entirely separate issue (both statutorily and in purpose) to determine if a person is a security threat that warrants a denial of a TWIC or whether a person should hold a license or document as a merchant mariner. While mariners must not be a security threat, the interests of maritime safety, particularly for an individual entrusted with the operation of a

vessel, create higher standards. Merchant Mariners are held to additional standards of conduct and requirements for qualifications under Title 46 U.S.C. 7701 in the interests of maritime safety.

Respondent requested he receive a sanction no greater than a four (4) months suspension, the same penalty found within SAVOIE. An appropriate sanction should be developed on the record and facts in each individual case. Here, within a period of four (4) months, Respondent was convicted of two (2) dangerous drug law violations. The most recent conviction having occurred in April 2007. One of Respondent's convictions involved fraud in an attempt to obtain a controlled substance. In addition to convictions showing an association with dangerous drugs, Respondent has also shown additional poor judgment by failing to truthfully fill out his 2008 Application. In view of the record as a whole, including all of the testimony and the exhibits admitted at the hearing, the evidence establishes that in keeping with the interests of maritime safety, the appropriate sanction in this matter is that Respondent's mariner credentials shall be **REVOKED**.

In addition to the Respondent's Appeal rights which are contained in Attachment C. Respondent may also seek relief through 33 CFR 20.904(f), which allows a respondent, within three (3) years or less after his Coast Guard issued license or document is revoked, to file a written motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety of lives and property at sea. Respondent's efforts at rehabilitation may also be considered in an application for a new license under 46 CFR 5.901.

³ TWIC requirements and waiver matters are covered by regulations in 49 CFR Parts 1515 and 1572.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to George P. Auger are REVOKED.

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

Done and dated May 20, 2009
At Norfolk, VA

**MICHAEL J. DEVINE
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD WITNESS

Gov't Witness 1 Constance Russell

RESPONDENT WITNESS

Resp't Witness 1 George P. Auger

EXHIBIT LIST

COAST GUARD EXHIBITS

Gov't Ex. 1 Respondent's Answer to the Complaint

Gov't Ex. 2 Copy of Respondent's Merchant Marine Officer License, issue number 2, issued July 5, 2007.

Gov't Ex. 3 Copy of Respondent's Merchant Marine Officer License issued July 5, 2007.

Gov't Ex. 4 Copy of Respondent's April 16, 2008, Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document.

Gov't Ex. 5 Copy of Regional Exam Center Miami's denial letter to Respondent in reply to his April 16, 2008 Application.

Gov't Ex. 6 Not Admitted.

Gov't Ex. 7 Copy of Palm Beach County case number 06-3649-CF, Conviction of Dangerous Drug Law Violation, December 7, 2006.

Gov't Ex. 8 Copy of completed investigation results from Coast Guard National Maritime Center dated April 24, 2008, recommending denial for conviction.

Gov't Ex. 9 Copy of Voluntary Surrender Agreement and Affidavit of loss of MMD

- dated August 8, 1996, signed by Respondent.
- Gov't Ex. 10 Not Admitted.
- Gov't Ex. 11 Copy of Respondent's application for original license.
- Gov't Ex. 12 Not Admitted.
- Gov't Ex. 13 Copy of Broward County case number 06-14652CF10A, Conviction of Dangerous Drug law Violation, April 23, 2007.
- Gov't Ex. 14 Copy of Respondent's application for raise in grade and endorsement on MML, dated January 16, 2002.
- Gov't Ex. 15 Copy of Respondent's application for duplicate of MML, dated September 27, 2002.
- Gov't Ex. 16 Copy of Respondent's application for renewal of MML and MMD, dated June 1, 2006.
- Gov't Ex. 17 Copy of Respondent's correspondence to REC Miami regarding disposition of court cases dated May 31, 2007.
- Gov't Ex. 18 Not Admitted.
- Gov't Ex. 19 Not Admitted.
- Gov't Ex. 20 Appeal Decision 2678 (SAVOIE) (2008)
- Gov't Ex. 21 Fla. Stat. Ch. 893.13 (2006)
- Gov't Ex. 22 Fla. Stat. Ch. 893.03 (2007)
- Gov't Ex. 23 Fla. Stat. Ch. 893.13 (2007)

RESPONDENT EXHIBITS

- Resp't Ex. A Copy of Respondent's TWIC.
- Resp't Ex. B TSA decision granting Respondent a request for TWIC wavier.
- Resp't Ex. C Order dated November 7, 2007, from Broward County Court granting termination of probation.

Resp't Ex. D Certificate dated September 15, 2008, from the Office of Executive Clemency of Tallahassee, Florida restoring Respondent's civil rights.

Resp't Ex. E Letter of recommendation for Respondent, dated December 8, 2008, from Ronnie Rhoades of Weeks Marine, Inc.

ATTACHMENT B

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COAST GUARD PROPOSED FINDINGS OF FACT:

1. The Respondent, George P. Auger, voluntarily surrendered his U.S. Coast Guard Merchant Mariners Document No. [number redacted] on or about August 8, 1996 in lieu of appearing at a hearing, as a result of being investigated by the U.S. Coast Guard for use of a dangerous drug. CG Ex. 9, Tr. at 37, 144.

ACCEPTED AND INCORPORATED

2. Respondent applied for, and was subsequently issued an original U.S. Coast Guard License No. 945603 and an original U.S. Coast Guard Merchant Mariners Document No. [REDACTED] on or about July 11, 2001. CG Ex. 11, Tr. at 40.

ACCEPTED AND INCORPORATED

3. Respondent was arrested on or about March 17, 2006 by the Palm Beach Gardens Police Department in Palm Beach, Florida for Attempt to Obtain a Prescription by Fraud, in violation of Florida Statute Title 46, Chapter 893.13(7)(a)(9).⁴ CG Ex. 7, 8, 21, Tr. at 32, 65, 143.

ACCEPTED AND INCORPORATED

4. Respondent was arrested on or about August 21, 2006 by the Broward County Sheriff's Office in Broward County, Florida for Possession of Controlled Substance, in violation of Florida Statute Title 46, Chapter 893.03(2)(a)(1)(o);⁵ and in violation of Florida Statute Title 46, Chapter 893.13(6)(a).⁶ CG Ex. 8, 13, 22, 23, Tr. at 65, 45, 43, 44, 143, 144

⁴ "It is unlawful for any person to acquire or obtain, or attempt to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." Florida Statute Title 46, Chapter 893.13(7)(a)(9).

⁵ "The substances enumerated in this section are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, or trade name designated... SCHEDULE II.--A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II: Unless specifically excepted or unless listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis: Opium and any salt, compound, derivative, or preparation of opium, except nalmefene or isoquinoline alkaloids of opium, including, but not limited to the following: Oxycodone." Florida Statute Title 46, Chapter 893.03(2)(a)(1)(o).

⁶ "It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession

ACCEPTED AND INCORPORATED

5. On or about August 28, 2006, Respondent was convicted, pursuant to his pleas, in Palm Beach County Circuit Court of Attempt to Obtain a Prescription by Fraud. For this offense he was placed on a deferment program with a required payment of \$473 in fines and costs. CG Ex. 7, 8, Tr. at 32, 65.

ACCEPTED AND INCORPORATED

6. On or about December 5, 2006, Respondent was arrested for Probation Violation by the Department of Corrections-Probation and Parole Service in Fort Myers, Florida. This charge was turned over to the Palm Beach Gardens Police Department in Palm Beach, Florida. CG Ex. 8, Tr. at 65.

ACCEPTED AND INCORPORATED

7. On or about December 7, 2006, Respondent was removed from the deferment program given at the August 28, 2006 sentencing, and outright convicted in Palm Beach County Circuit Court of Attempt to Obtain a Controlled Substance by Fraud. For this offense he was sentenced to 30 days incarceration, required payment of outstanding fines and costs in the amount of \$473, and his probation was revoked. CG Ex. 7, 8, Tr. at 32, 65, 143.

ACCEPTED AND INCORPORATED

8. On or about April 23, 2007, Respondent was convicted in Broward County Circuit Court of Possession of Oxycodone. For this offense he was sentenced to 12 months probation with required payment of \$507 in fines and costs. CG Ex. 8, 13, Tr. at 65, 45, 143, 144.

ACCEPTED AND INCORPORATED

9. As conditions of the aforementioned probation, Respondent was required to submit to random drug and alcohol testing, and recommended for a 2 year Driver's License Suspension. CG Ex. 13, Tr. at 45.

ACCEPTED AND INCORPORATED

10. Respondent filed a renewal application for Merchant Mariner License No. 945603 and Merchant Mariner's Document No. [REDACTED] on or about June 1, 2006, with the Coast Guard's Regional Exam Center Miami, FL. CG Ex. 16, Tr. at 48.

ACCEPTED AND INCORPORATED

of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." Florida Statute Title 46, Chapter 893.13(6)(a).

11. Respondent was issued U.S. Coast Guard License No. [REDACTED] and U.S. Coast Guard Merchant Mariners Document No. [REDACTED] on or about July 5, 2007; which both expire by their terms on July 5, 2012. CG Ex. 2, 3, Tr. at 25-26.

ACCEPTED AND INCORPORATED

12. Respondent filed a raise in grade application for Merchant Mariners Document No. [REDACTED] on or about April 16, 2008, with the Coast Guard's Regional Exam Center Miami, FL. CG Ex. 4, Tr. at 27.

ACCEPTED AND INCORPORATED

13. On this raise in grade application Respondent failed to disclose his August 8, 1996 voluntary surrender. CG Ex. 4, 9, Tr. at 27, 37.

ACCEPTED AND INCORPORATED

14. As part of his raise in grade application Respondent provided an attachment which stated his previous convictions: "Possession of Oxycodone, Broward County, 1 year ago; Attempting to obtain controlled substance by fraud 1 ½ year ago, Palm Beach County, 1 ½ years ago; DUI, Miami, 1998." CG Ex. 4, Tr. at 27.

ACCEPTED AND INCORPORATED

15. The Coast Guard's Regional Exam Center Miami, FL denied Respondent's raise in grade application on or about July 28, 2008. CG Ex. 5, Tr. at 28.

ACCEPTED AND INCORPORATED

COAST GUARD PROPOSED CONCLUSIONS OF LAW:

1. At all times relevant, Respondent was a holder of the Coast Guard issued U.S. Merchant Marine Officer license, No. [REDACTED], and U.S. Merchant Mariners Document, No. [REDACTED].

ACCEPTED AND INCORPORATED

2. Respondent acted under the authority of that U.S. Merchant Mariners Document, as defined in 46 C.F.R. 5.57, when applying for a raise in grade.

ACCEPTED AND INCORPORATED

3. The Coast Guard retains jurisdiction over Respondent's credentials for these 46 C.F.R. Part 5 proceedings.

ACCEPTED AND INCORPORATED

4. Respondent was twice convicted of a dangerous drug law of the United States, as contemplated in 46 U.S.C. § 7704, for a charge of attempt to obtain a controlled substance by fraud, in violation of Florida Statute Title 46, Chapter 893.13(7)(a)(9), and for a charge of possession of a controlled substance, in violation of Florida Statute Title 46, Chapter 893.03(2)(a)(1)(o) and in violation of Florida Statute Title 46, Chapter 893.13(6)(a).

ACCEPTED AND INCORPORATED

5. Respondent committed an act of misconduct, as contemplated in 46 U.S.C. § 7703(1)(b); when he made a false statement on his application for a raise in grade, in violation of 18 U.S.C. 1001.

REJECTED IN PART – as addressed in the Decision, Respondent has been found to have committed a violation of law or regulation for the false statement on his 2008 application. It was not charged or considered as an act of misconduct.