

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

UNITED STATES COAST GUARD

Complainant

vs.

GERALD W. STRICKHOUSER

Respondent

Docket Number 2009-0120
Enforcement Activity No. 3430193

DECISION AND ORDER

Issued: September 21, 2009

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

For Complainant

LT Sara M. Ellis-Sanborn, USCG
Marine Safety Unit Cleveland
1055 East Ninth Street
Cleveland, OH 44114

For Respondent

Thomas E. Cafferty, Esquire
Law Office of Thom Cafferty
608 Madison Avenue, Suite 1600
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PRELIMINARY STATEMENT

Pursuant to 46 U.S.C. §§ 7703(2) and 7704, and its underlying regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5, the United States Coast Guard (Coast Guard) initiated this administrative action to suspend Gerald W. Strickhouser's (Respondent) Merchant Mariner's Credential (MMC) for twelve (12) months.¹

The Coast Guard issued its Original Complaint on March 12, 2009, charging Respondent with a "Conviction that would preclude the issuance of MMC" in violation of 46 U.S.C. § 7703(2). Specifically, the Coast Guard alleges that on February 25, 2009, Respondent was convicted of Reckless Operation [of a vessel] by the State of Ohio.

In his timely Answer, Respondent admitted to all jurisdictional and factual allegations but disagreed with the Coast Guard's proposed twelve (12) month sanction.²

The parties and the undersigned conducted a hearing on June 11, 2009 at the Celebrezze Federal Building, 1240 East 9th Street, Courtroom 3013, Cleveland, Ohio 44199. Lieutenant Sara M. Ellis-Sanborn, Senior Investigating Officer, Marine Safety Unit Cleveland, and Gary F. Ball, Esquire, U.S. Coast Guard National Maritime Center, appeared on behalf of the Coast Guard. Thomas E. Cafferty, Esquire, of Toledo, Ohio appeared on behalf of Respondent. The Coast Guard presented the testimony of two (2) witnesses and introduced seven (7) exhibits. Respondent presented the testimony of three (3) witnesses, including testimony on his own behalf, and introduced two (2) exhibits. The undersigned admitted all exhibits. The witness and exhibit lists are contained in **Attachment A**.

On July 27, 2009, Respondent and the Coast Guard submitted post hearing briefs, including proposed findings of fact and conclusions of law, in accordance with 5 U.S.C. § 557(c)

¹ The Coast Guard now refers to a license, certificate of registry, or merchant mariner's document as a merchant mariner credential or (MMC). *See*, 74 Fed. Reg. 11,196 (Mar.16, 2009). Therefore, all references to licenses, certificates of registry, or merchant mariners' documents will be referred to in this Decision and Order as an MMC.

and 33 C.F.R. § 20.710. Those submissions, together with the undersigned's corresponding rulings, are contained in **Attachment B**. On August 11, 2009, the Coast Guard and Respondent submitted reply briefs.

After careful review of the entire record, including the applicable statutes, regulations, and case law, I find the Coast Guard **PROVED** that Respondent's conviction of "reckless or unsafe operation of a vessel, water skis, aquaplane," in violation of Ohio Revised Code 1547.07 is an offense that would preclude the issuance of MMC under 46 U.S.C. § 7703(2).

FINDINGS OF FACT

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

Respondent's Arrest for Operating a Vessel Under the Influence

² Respondent did not admit that his conviction was an offense that would prevent the issuance or renewal of an MMC.

1. At all relevant times Respondent, Gerald W. Strickhouser, was the holder of Coast Guard Merchant Mariner License Number 1097652 (hereinafter referred to as Merchant Mariner Credential (MMC)). (Respondent's Answer; Stipulation; Tr. at 7, 8, and 10).³
2. Respondent has held a Coast Guard issued MMC since April 17, 1990. (Tr. at 118) (Resp. Ex. A).
3. Respondent's current MMC expires in March, 2010. (Tr. at 97).
4. Respondent operates a charter boat, mostly for fishing, out of Lakefront Marina, Port Clinton, Ohio. (Tr. at 119).
5. Respondent and his passengers started fishing on the morning of August 29, 2008. (Tr. at 119).
6. On August 29, 2008, Officer David L. Goodwin of the Ohio Department of Natural Resources, Division of Watercraft, was on patrol in his vessel with Officer J. Beard, also of the Division of Watercraft, and Agent James A. Vasek of the United States Boarder Patrol, Customs and Border Protection. (IO Ex. 2; Tr. at 16).
7. At approximately 9:46 PM, the officers observed Respondent's vessel not displaying any navigation or cabin lights after dark just outside of Put-in-Bay Harbor in Ottawa County, Ohio.
8. Put-in-Bay Harbor is a popular recreational boat harbor which other vessels were transiting at that time. (IO Ex. 1; Tr.13-16).
9. The officers' initial attempts to get Respondent's vessel to stop were met with no acknowledgement despite Officer Beard shining a bright flashlight on the operator, Gerald W. Strickhouser. (IO Ex. 1; Tr. at 17).

³ Citations referencing the transcript are depicted as follows: (Tr. at __). Citations referring to Investigation Officer exhibits are depicted as followed: (IO Ex. __). Respondent's Exhibits are depicted as follows: (Resp. Ex. __).

10. As the officers' vessel approached Respondent's vessel, they observed the passengers in Respondent's vessel making furtive movements, "hiding stuff and shuffling around the cabin." (*Id.*).
 11. As the officers' vessel drew closer to Respondent's vessel and after repeated attempts to get the attention of Respondent who was operating his vessel, Respondent eventually turned around, acknowledged the officers' and slowed down. (*Id.*).
 12. The officers then conducted a side by side boarding with their starboard side secured to Respondent's port side. (*Id.*).
 13. There were six (6) passengers in Respondent's 28 foot, inboard, Bertram cabin cruiser. (IO Ex. 1; Tr. 17, 39).
 14. Respondent stood up, turned, and stumbled out of the captain's chair, catching himself on the back of his seat. (Tr. at 18; IO Ex. 1).
 15. Concerned for Respondent's safety, Officer Goodwin then decided to side-tow Respondent's vessel back to Put-in-Bay Harbor. (*Id.*; IO Ex 1).
 16. Officer Goodwin radioed for backup due to the disorderly nature of the passengers; subsequently, law enforcement personnel from the Ottawa County Sheriff's Office and Customs and Border Protection Marine Interdiction responded. (*Id.*; IO Ex. 1).
 17. After securing the vessels to the dock, Officer Goodwin conducted a safety inspection of Respondent's vessel and subsequently escorted Respondent to the concrete dock to interview him about the events of the evening and his sobriety. (*Id.*).
 18. The officers did not establish whether the six (6) passengers had hired Respondent to take them out on his vessel. (Tr. at 40).
 19. Officer Goodwin smelled a strong and distinct odor of alcoholic beverage on Respondent's breath; that Respondent's eyes were watery and bloodshot; that his
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- speech was mumbled, slurred, and confused; that his face was flushed red; and that he appeared sleepy, tired, and indifferent, but was otherwise cooperative. (Tr. at 19, 32, 33; IO Ex. 1).
20. In response to Officer Goodwin's request to produce identification, Respondent looked through his wallet for approximately one (1) minute; Officer Goodwin then spotted the drivers' license in the wallet and pointed it out to Respondent. (*Id.*).
21. Officer Goodwin had Respondent perform field sobriety tests which include the alphabet test, the backwards count from 25 down to 1, and the finger count test. (*Id.*; IO Ex. 1).
22. Respondent performed poorly on his field sobriety tests and towards the end of the tests, he was dancing to the music being played nearby. (Tr. at 23, 32-33; IO Ex. 1).
23. Based on the results of field sobriety battery of tests, the horizontal gaze nystagmus test, and the totality of Respondent's actions, Officer Goodwin believed that Respondent was impaired. (Tr. at 35-36; IO Ex. 1).
24. Respondent refused to provide a blood, breath, or urine sample for analysis. (Tr. at 23, 34, 37).
25. At approximately 10:30 PM on August 29, 2008, Officer Goodwin arrested Respondent for "Operating Under the Influence" and read him the standard Miranda warnings. (*Id.*; IO Ex. 1).

Faulty Equipment

26. Officer Goodwin found no vessel registration or documentation paperwork on Respondent's boat. (Tr. at 26).
27. Officer Goodwin observed that the "throwable" personal flotation device was not serviceable. (Tr. at 27, 41; IO Ex. 7).

28. Respondent's vessel is required to have at least two (2) B-1 fire extinguishers in good and serviceable condition, Officer Goodwin found one B-2 fire extinguisher not in serviceable condition, and that Respondent's vessel had no B-1 fire extinguishers aboard. (Tr. at 27, 41).
29. Officer Goodwin also found no sound producing device on Respondent's vessel although Respondent was required to have one. (Tr. at 27-28).
30. Officer Goodwin found no lights were operating on Respondent's vessel. (*Id.*).
31. Respondent claimed he had no navigational lights because a "fuse blew." (Tr. at 119).
32. Respondent claimed that he did not use any flashlights or other means of light to signal his location because "it might have been hard to find the flashlights. I thought it was better to get back to the dock." (Tr. at 129).
33. Respondent admitted he was "operating recklessly that night." (Tr. at 131).
34. Respondent also received citations for operating a vessel without navigational lights and for having an unserviceable type 4 PFD. (IO Ex. 1).

Respondent's Refusal to Submit to Breath or Blood Test

35. Respondent gave no physical or medical reason for his refusal to submit to any chemical test of breath, blood, or urine. (IO Ex. 2; Tr. at 37-38).
36. Because Respondent refused to submit to a chemical test and gave no physical or medical reason, Officer Goodwin "impounded" the registration decals of Respondent's vessel by removing its state decals, thereby invalidating its registration, which meant that the vessel could not be used for one year, and would have to be removed from the water the following day. (Tr. at 37-38; IO Ex. 1, 2).
37. Officer Goodwin believed Respondent was a threat to his passengers and the other boaters in the area because of Respondent's poor judgment in operating his vessel

without navigational lights well after sunset, his impaired state, and because several of the passengers were found in possession of drugs. (Tr. at 43-44).

38. There was an abundant amount of beer, empty beer cans and bottles on board. (IO Exhibits 4, 5, and 6).

Respondent's Conviction of Reckless or Unsafe Operation of a Vessel

39. On February 25, 2009, in Ottawa County Municipal Court, Ottawa County, Ohio, Respondent withdrew his previous plea of "Not Guilty" to "Operating Under the Influence" and pled "No Contest" to the amended charge of "Reckless or unsafe operation of vessel, water skis, aquaplane" in violation of Section 1547.07, Ohio Revised Code. (IO Ex. 2).

40. Pursuant to his plea, the Court found Respondent Guilty of "Reckless or unsafe operation of a vessel, water skis, aquaplane" in violation of Ohio Revised Code 1547.07. (IO Ex. 2).

41. The Court sentenced Respondent to ten (10) days in the Ottawa County Detention Facility but suspended that sentence on condition that Respondent commit no similar offense within the next year, and attend, complete, and pay for a First Offender program in lieu of the required 72 hours in jail. The Court also ordered Respondent to pay a \$250 fine plus costs. (Tr. 59-61, 99; IO Ex. 2).

42. In addition to imposing limited driving privileges on Respondent's operator's license, the Court also ordered the Division of Watercraft to return Respondent's vessel registration documents solely for purpose of work privileges and permitted Respondent to renew his vessel Registration in March 2009. (Tr. at 126; IO Ex. 2).

Respondent's Character and Prior Record

43. Everett Bryan Azbell testified that, in his opinion, Respondent is a reliable and capable boat operator. (Tr. at 105).

44. William Dale Karlovetz testified that he does not believe Respondent has sobriety issues and is unaware Respondent has had any marine casualties, including groundings, oil spills, collisions, or passenger injuries. (Tr. at 111).
45. Mr. Karlovetz also testified on cross examination that intoxicated recreational vessel operators are a hazard to boating safety. (Tr. at 114).
46. Respondent has no prior disciplinary record with the Coast Guard. (Tr. at 116, 118; Resp. Ex. A).
47. Respondent's "Abstract Driver Record" for the State of Ohio shows an accident dated February 9, 2007, a conviction for speeding, and seat belt violation on October 30, 2007. (Tr. at 117; Resp. Ex. B).
48. The Ottawa County Municipal Motion and Order to amend the charge to Reckless Operation reflect Respondent has "no priors." (IO Ex. 2).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). Title 46 C.F.R. § 5.19 gives Administrative Law Judges authority to suspend or revoke merchant mariner credentials for violations arising under 46 U.S.C. §§ 7703 and 7704. If a merchant mariner credential holder is convicted of an offense that would prevent the issuance or renewal of an MMC his or her MMC may be suspended or revoked. 46 U.S.C. § 7703(2).

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, 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 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 regulations, the burden of proof is on the Investigating Officer to prove 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, Investigating Officers must prove by credible, reliable, probative and substantial evidence that a respondent more likely than not committed the violation charged.

Conviction of an Offense that Would Prevent Renewal of Respondent's License

Title 46 United States Code section 7703(2) provides that a merchant mariner's credential (MMC) may be suspended or revoked if the "holder is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document."

Due to the innumerable types of statutory crimes, there is no exhaustive list of specific offenses that would prevent the Coast Guard from issuing or renewing an MMC. Instead, the table at 46 C.F.R. § 10.211(g) contains broad, non-exclusive categories of offenses. Coast Guard officials then apply the criteria listed § 10.211 to evaluate applicants' criminal convictions, determine the appropriate minimum and maximum assessment periods, and eventually decide whether to issue or renew the MMC.

To determine the safety and suitability of an applicant for an MMC, 46 C.F.R. § 10.211(a) prescribes that an applicant must provide written disclosure of all convictions not previously disclosed to the Coast Guard. If the applicant's criminal record leads the Coast Guard to determine an applicant is not a safe and suitable person or cannot be entrusted with the duties and responsibilities of the MMC, the application may be denied. 46 CFR § 10.211(d).

The Coast Guard uses Table 10.211(g) to evaluate applicants with criminal convictions. That table lists the major categories of crimes and is not to be considered an all-inclusive list. As explained by Mr. Crouse, if an applicant is convicted of an offense that does not appear on the list, the Coast Guard will make an analogous comparison to determine an appropriate assessment period by using the table as a guide. Once the Coast Guard establishes the minimum and maximum evaluation periods, paragraph (i) of 46 C.F.R. § 10.211 prescribes the evaluation procedure as follows:

If a person with a criminal conviction applies before the minimum assessment period shown in table 10.211(g) or established by the Coast Guard under paragraph (g) of this section has elapsed, then

the applicant must provide, as part of the application package, evidence of suitability for service in the merchant marine The Coast Guard will consider the applicant's evidence . . . and may issue the MMC If an application filed before the minimum assessment period has elapsed does not include evidence of suitability for service in the merchant marine, the application will be considered incomplete and will not be processed by the Coast Guard.

Paragraph (j) provides that the Coast Guard will normally grant the application if it is submitted between the minimum and maximum assessment periods unless there are offsetting factors. This is consistent with Mr. Crouse's testimony. Paragraph (k) provides the Coast Guard will normally grant the applicant an MMC if the applicant applies after the maximum assessment period unless the Coast Guard considers the applicant to be unsuitable. Paragraph (l) provides guidelines for alcohol or dangerous drug related convictions or National Driver Register convictions. If an application is disapproved, the Coast Guard notifies the applicant in writing the reason for disapproval. 46 CFR § 10.211(e). After requesting reconsideration, the applicant may appeal. See 46 CFR § 1.103.

On February 25, 2009, Respondent was convicted of "Reckless or unsafe operation of vessel, water skis, aquaplane" in violation of Section 1547.07, Ohio Revised Code. "Reckless or unsafe operation of a vessel, water skis, aquaplane" is not listed in the Table. 46 CFR § 10.211(g).

Prior to hearing, Respondent's counsel objected to the Coast Guard's use of evidence concerning Respondent's behavior and events surrounding his arrest and conviction, arguing that 46 U.S.C. § 7703(2) requires only the judgment of conviction and other evidence that the conviction would preclude the issuance or renewal of an MMC. The undersigned denied that motion. Clearly, a conviction of an offense entitled "Reckless or unsafe operation of vessel, water skis, aquaplane" is an offense that is analogous to "reckless driving" and would prevent the issue or renewal of an MMC because it is relevant to whether an applicant is a safe and suitable

person to be entrusted with the duties and responsibilities of the MMC. Examining Respondent's behavior and events surrounding his arrest and conviction are also relevant in suspension and revocation proceedings to determine appropriate remedial measures to help maintain standards for competence and conduct essential to the promotion of safety at sea.

Respondent's counsel also motioned to exclude Mr. Crouse's testimony in the following areas: the circumstances leading to Respondent's conviction; Coast Guard guidelines concerning the evaluation of probation; Coast Guard guidelines concerning evaluation of unacceptable character traits or habits of life which would prevent the issuance of an MMC; and, Coast Guard guidelines concerning assessment periods after applicants are released from prison on relevancy grounds. Further, Respondent's counsel asked that Mr. Crouse's testimony not include his opinions on whether a certain conviction not described in the 10.211(g) Table is analogous to Respondent's conviction and whether Respondent would be issued an MMC if he were to apply today. The undersigned denied that motion as well. The Coast Guard's interpretation and application of its own regulations are legitimate factors to be considered in deciding whether Respondent's conviction would prevent the issuance or renewal of his MMC and whether the proposed sanction meets appropriate statutory and regulatory objectives.

During Mr. Crouse's testimony, counsel for Respondent argued that looking beyond the bare conviction is contrary to Coast Guard policy. In support of his argument, counsel cites the Coast Guard Marine Safety Manual at Volume III, Chapter 3, page 35, paragraph (d) which states:

the following guidelines should be provided by evaluating applicants with criminal convictions: When evaluating a criminal conviction's record, remember they had their day in court defended by legal counsel. Do not allow yourself to be placed in the position of retrying the evidence that led to the conviction. The applicant will generally try to minimize the outcome of the convictions by introducing their perception of why they were convicted. This view is self-serving. Convictions should be taken at face value. (Tr. at 78-79).

Mr. Crouse's response to Respondent's counsel was that the above section is contrary only to the sentence, "convictions should be taken at face value." The undersigned agrees.

When making an analogous comparison of an applicant's criminal conviction to the categories listed in the 10.211(g) Table, it is necessary to look into the underlying facts surrounding the offense. If an applicant's judgment of conviction is clear on its face and fits easily into one of the categories listed in the 10.211(g) Table, the applicant's further characterization of the evidence previously heard by the Court is inappropriate. For example, an applicant with a "rape" conviction is a good example. "Rape" clearly fits into the category of Sexual Assault (rape, child molestation) listed in the 10.211(g) Table. To prove "rape," the prosecution must prove that the victim did not consent. Therefore, an applicant representing to the Coast Guard that the victim in his rape conviction "consented" would be self-serving and inappropriate.

However, the above referenced guidelines in the Marine Safety Manual do not preclude an evaluator from obtaining further information to perform an analogous comparison of a conviction that is not listed in the 10.211(g) Table to determine the minimum and maximum assessment periods. Further, the applicable guidelines in the Marine Safety Manual do not preclude the Administrative Law Judge from determining whether the conviction is an offense that would prevent the issue or renewal of an MMC, and, if so, an appropriate sanction in the interest of promoting safety at sea.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(2); 46 U.S.C. § 7704(b); 46 CFR Parts 5 and 16; 33 CFR Part 20; and the APA codified at 5 U.S.C. 551-59.

2. The Coast Guard **PROVED** by the preponderance of reliable, probative, and credible evidence that “Reckless or unsafe operation of vessel, water skis, aquaplane” in violation of Section 1547.07, Ohio Revised Code, is analogous to “Reckless Driving” which is listed under “Vehicular Crimes” in the 10.211(g) Table.
3. “Reckless Driving” is an offense that would prevent the issue or renewal of an MMC.
4. The Coast Guard **PROVED** by the preponderance of reliable, probative, and credible evidence that Respondent’s conviction of “Reckless or unsafe operation of vessel, water skis, aquaplane” in violation of Section 1547.07, Ohio Revised Code is an offense that would prevent the issue or renewal of an MMC.
5. Respondent has no prior Coast Guard disciplinary record.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 U.S.C § 7703 allows suspension or revocation of a mariner’s MMC for conviction of an offense that would prevent the issue or renewal of an MMC. Title 46 C.F.R. § 5.567(a) provides for admonition, suspension with or without probation, or revocation.

The table at 46 C.F.R § 10.211(g) prescribes minimum and maximum assessment periods of one (1) year to two (2) years for convictions of Reckless Driving. Although it is one of many factors that may be taken into consideration, the assessment period is not used by the ALJ to determine the sanction in suspension and revocation cases. As explained above, the Coast Guard applies the assessment periods to determine whether and when to issue or renew merchant mariner’s credentials of applicants with criminal convictions.

The Suggested Range of Appropriate Orders Table at 46 C.F.R. § 5.569 (Table) lists sanctions for offenses committed while a respondent was acting under the authority of his or her MMC. While the instant offense is not listed in that Table, the listed offenses that resemble

Respondent's conduct can be used as a framework to fashion an appropriate sanction in this case. For example, suspension of 1 to 4 months for possession of intoxicating liquor; 2 to 5 months for improper performance of duties related to vessel safety; 3 to 6 months for failure to perform duties related to vessel safety; 2 to 6 months for negligently performing duties related to vessel navigation; and 3 to 6 months for neglect of vessel navigation duties. The table also suggests 12 to 24 months for refusal to take a chemical test.

Aggravating Factors

The facts show Respondent's conviction of Reckless Operation of a Vessel involved alcohol, not only its possession, but also its use to the extent that Respondent was impaired. By piloting a vessel with six (6) passengers, he placed himself, his passengers, and other boaters at risk. Respondent elevated that risk because his navigational lights were inoperative. He further elevated that risk by having no additional lights or a warning device to alert other vessels in the area. Moreover, Respondent deliberately chose to disregard a law designed to promote safety on Ohio's waterways by refusing to take a required chemical test for blood alcohol. This refusal exacerbated his previous display of poor judgment which he could have mitigated somewhat by his compliance. In short, his refusal to test was conduct not "compatible with the requirement of good discipline and safety at sea." 46 U.S.C. § 7701(c)(1).

Mitigating Factors

Fellow MMC holders testified that although intoxicated recreational vessel operators are a hazard to boating safety, Respondent is a reliable and capable boat operator with no known sobriety issues, no prior marine casualties; and no prior disciplinary record with the Coast Guard.

These administrative actions against Respondent's MMC 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. Although Respondent's conduct was

inconsistent with conduct necessary for good discipline and safety at sea, there is no evidence that he has a history of such conduct which would call into question his fitness to hold an MMC.

The record shows Respondent's vessel registration was suspended until March of 2009. From March of 2009 to the present, Respondent could have operated his vessel, either carrying passengers for hire or for recreational purposes. Suspending his MMC will not keep him from operating his vessel for recreational purposes, even with other people on board, but it will prevent him from carrying passengers for hire. Any suspension period at this point will necessarily encompass winter months during which operating under the authority of his MMC would be minimal, if at all. Therefore, the suspension period must be long enough to prevent Respondent from operating under the authority of his MMC during those times in which it will best promote safety at sea. In consideration of the foregoing, a sanction of ten (10) months outright suspension is appropriate.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Gerald W. Strickhouser's MMC and all other documents and certificates held by Respondent are **SUSPENDED** outright for a period of ten (10) months. Respondent is to surrender his MMC to the Coast Guard 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 C).

Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: September 21, 2009

ATTACHMENT A – EXHIBIT LIST

COAST GUARD EXHIBITS

1. Investigation and Report of Arrest
2. Audio Recording of Respondent's Field Sobriety Tests
3. Judgment of Conviction
4. Photograph of alcoholic beverages on board Respondent's vessel
5. Photograph of alcoholic beverages on board Respondent's vessel
6. Photograph of alcoholic beverages on board Respondent's vessel
7. Photograph of unserviceable flotation device.

RESPONDENT EXHIBITS

- A. Respondent's previous applications for MMC renewal
- B. Respondent's Abstract of Driving Record, one page

OFFICIAL NOTICE AT THE REQUEST OF THE COAST GUARD

1. Title 46 CFR 10.211 as amended by 74 Fed. Reg. 11,196, 11,216, Mar. 16, 2009.
2. Ohio Revised Code Section 4511.20
3. Ohio Revised Code Section 1547.70

ATTACHMENT B

Coast Guard's Proposed Findings⁴

1. On August 29, 2008, the Respondent, Gerald W. Strickhouser, was cited for operating his vessel without navigation lights, for having onboard four unserviceable type-4 Personal floatation Devices, and for operating his vessel while under the influence. CG Ex. 01, Tr. at 24-39, 64.

ACCEPTED IN PART AND INCORPORATED. Officer Goodwin cited Respondent for having “one” unserviceable Type 4 PFD onboard. (Tr. at 26-27; IO Ex. 1).

2. On February 25, 2009, the Respondent, Gerald W. Strickhouser, was convicted of violating Ohio Revised Code 1547.07, Reckless or unsafe operation of vessel, waterskis, aquaplane. CG Ex. 03, Tr. 50-51, 59-61, 99-100.

ACCEPTED AND INCORPORATED.

Coast Guard's 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. 1097652.

ACCEPTED AND INCORPORATED.

2. Respondent was convicted of Reckless or Unsafe Operation of a Vessel, in violation of Ohio Revised code 1547.07.

ACCEPTED AND INCORPORATED.

3. A conviction for Reckless or Unsafe Operation of a Vessel, clearly represents a hazard to marine safety and, as such, shall be viewed as meeting the basis for a Conviction to Prevent Issuance or Renewal of a License, Certificate of Registry, or Merchant Mariner's Document, as contemplated in 46 U.S.C. 7703(2).

ACCEPTED AND INCORPORATED. “Reckless or unsafe operation of a vessel” is analogous to “Reckless Driving,” listed under “Vehicular Crimes” in table 10.211 (g). Respondent's course of conduct during the evening of his arrest is highly relevant on his fitness and suitability for an MMC.

4. A conviction for Reckless or Unsafe Operation of a Vessel is analogous to the conviction for Reckless Driving, as outlined in 46 C.F.R. Table 10.201(h). As such, a similar

⁴ ALJ's rulings on proposed findings of fact and conclusions of law are made in accordance with 5 U.S.C. § 557(b)(3).

assessment period shall be applied to an applicant possessing a conviction for Reckless or Unsafe Operation of a Vessel.

ACCEPTED AND INCORPORATED as noted in # 3, above.

Respondent's Proposed Findings of Fact

1. At all relevant times mentioned herein, Respondent is the holder of a Coast Guard issued license, which was renewed on or about March 23, 2005. (Tr. at 95:23 -96:6).

ACCEPTED AND INCORPORATED.

2. Respondent has held a Coast Guard issued license since April 17, 1990. (Tr. at 118:8) (Resp. Ex. A).

ACCEPTED AND INCORPORATED.

3. Respondent has no prior Coast Guard disciplinary record. (Tr. at 118:18-21) (Resp. Ex A).

ACCEPTED AND INCORPORATED.

4. Witness E.B. Azbell has had professional contacts with the Respondent on commercial vessel operations out of Port Clinton, Ohio, and attested to Respondent's capability, reliability and sobriety. (Tr. at 104:23-106:2).

ACCEPTED AND INCORPORATED.

5. Witness W. D. Karlovetz is a charter boat captain who is personally familiar with the through his work as a charter boat captain in Port Clinton, Ohio. Mr. Karlovetz is not aware that Respondent has caused any marine casualties, whether Respondent has received any passenger complaints, or whether Respondent has any issues with sobriety. (Tr. at 111: 6-25).

ACCEPTED AND INCORPORATED.

6. Other than minor traffic offenses, Respondent has no prior motor vehicle convictions in the State of Ohio. (Tr. at 111: 6-25).

ACCEPTED IN PART to the extent that Respondent's "Abstract Driver Record" for the State of Ohio shows an accident dated February 9, 2007 as well as a conviction for speeding and seat belt violation on October 30, 2007.

7. On or about February 25, 2009, Respondent was convicted of Reckless Operation of a Boat, a violation of Ohio Revised Code (R.C.) § 1547.07, in the Ottawa County Municipal Court. (CG Ex. 3).

ACCEPTED AND INCORPORATED.

8. Respondent properly answered the Coast Guard's complaint and did not admit that he was convicted of an offense that would preclude the issuance of an MMC (pleadings).

ACCEPTED AND INCORPORATED. Respondent's Answer in paragraph #1 states, I admit to jurisdictional allegations and that I was convicted of a reckless operation on February 25, 2009." The Coast Guard **PROVED** that "reckless operation" is an offense that would preclude the issuance of an MMC.

9. When reviewing an applicant's criminal record for renewal of an MMC, and it is discovered that the applicant is convicted of an offense that does not appear in Table 10.211(g), the Coast Guard uses the table as a guide to determine whether there should be an assessment period prior to renewing the MMC. (Tr. at 61:4-11).

ACCEPTED AND INCORPORATED to the extent that the evaluation process looks for an analogous offense in the table.

10. During the course of a mariner criminal background investigation, conducted for the purpose of determining whether an applicant's MMC should be renewed, the Coast Guard considers many factors, including the mariner's Coast Guard disciplinary record, character references and employment history. (Tr. at 83:2-6, 87:22, 88:4) (46 C.F.R. § 10.211 (i), 10.211 (l)).

ACCEPTED AND INCORPORATED.

11. Coast Guard witness J. Crouse has no training or experience in the evaluation of an application for issuance or renewal of an MMC. (Tr. at 68:7-12).

REJECTED. The regulations at 46 C.F.R. § 10.211 provide that the Coast Guard conduct a criminal record review to determine the safety and suitability of an applicant. The process allows for reconsideration and appeal. The training, experience, and expertise of all personnel who evaluate an applicant's criminal record are matters of agency policy and discretion. Further, Mr. Crouse has overseen approximately 50 to 60 thousand evaluations of merchant mariner applications. Of these evaluations, he has personally handled approximately 2 thousand.

12. Coast Guard witness J. Crouse does not have the authority to issue or renew an MMC. (Tr. at 71:22, 72:2).

REJECTED. MMCs are issued or renewed under the authority of the appropriate Coast Guard official. As Chief of the Safety and Suitability Evaluation Branch of the National Maritime Center, Mr. Crouse has been delegated the authority to carry out marine safety functions listed in 46 C.F.R. § 1.01-15 (c), including credentialing.

13. Prior to testifying, Coast Guard witness J. Crouse did not review Respondent's Coast Guard disciplinary record, character references and employment history. (Tr. at 83: 7-11, 88:9-12).

REJECTED. Mr. Crouse's testimony was helpful to the ALJ to determine whether "Reckless Operation of a Vessel" would be analogous to the offenses listed in Table 10.211 (g) which would trigger an assessment period. He also testified that despite Respondent's clean record, an assessment period for a criminal conviction would not be automatically eliminated.

14. Prior to testifying, Coast Guard witness J. Crouse did not review the statutory elements of the Ohio State offenses of "Reckless Driving" or "Reckless Operation of a Boat" (Tr. at 73:23, 74:3).

REJECTED. Mr. Crouse's analysis of the two offenses as analogous was reasonable and sufficient to fulfill the requirements of a criminal record review under 46 C.F.R. § 10.211. Respondent's course of conduct on the evening of his arrest is highly relevant on his fitness and suitability for an MMC.

15. Prior to testifying, Coast Guard witness J. Crouse did not conduct an evaluation of Respondent's record. (Tr. at 89:4-7).

REJECTED. Respondent's record is not relevant on the narrow legal issue of whether his conviction of "Reckless Operation of a Vessel" constitutes an offense that would prevent the issuance or renewal of an MMC. Mr. Crouse testified that despite Respondent's clean record, an assessment period for a criminal conviction would not be automatically eliminated.

16. Coast Guard policy guidance to evaluation personnel states that convictions must be taken at face value. (Tr. at 78:20, 79:7).

REJECTED. As explained in the Decision and Order, if an applicant's judgment of conviction is clear on its face and fits easily into one of the categories listed in table 10.211 (g), the applicant's further characterization of the evidence previously heard by the Court is inappropriate. This does not obviate the necessity to look further into the facts and circumstances surrounding the conviction if necessary to conduct a full evaluation of an applicant's criminal record in order to determine suitability for an MMC.

17. There is no Coast Guard policy or regulation that states that evaluation personnel should consider the circumstances surrounding an arrest, including the conduct of the person arrested, when evaluating an applicant's criminal conviction record to determine whether an MMC should be renewed. (Tr. at 78:20, 79:7).

REJECTED. It is inconceivable that Coast Guard policy on evaluating criminal convictions is to intentionally overlook circumstances surrounding an arrest, including the conduct of the person arrested. The conduct surrounding Respondent's arrest for Reckless Operation of a Vessel is conduct displayed on the vessel that Respondent uses to carry passengers for hire. Respondent's course of conduct on the evening of his arrest is highly relevant on his fitness for an MMC.

18. The Ohio offense of Reckless Operation of a Boat (R.C. § 1547.07) is not specifically described in Table 10.211 (g). (Tr. at 61:1-3); (46 CFR § 101211 (g)).

ACCEPTED. Its absence from 10.211(g) Table does not mean that the Coast Guard will overlook the offense when examining an applicant's criminal record to determine the safety and suitability of an applicant for an MMC. As stated in footnote 2 to 10.211 (g) Table, "[o]ther crimes will be reviewed by the Coast Guard to determine the minimum and maximum assessment periods depending on the nature of the crime."

19. Respondent's Coast Guard disciplinary record was offered for admission into evidence without objection.

ACCEPTED AND INCORPORATED. The disciplinary record's relevance is independent of the narrow legal issue of whether Respondent's conviction constitutes conviction of an offense that would prevent the issuance or renewal of an MMC.

Respondent's Proposed Conclusions of Law

1. The intent and act elements of Ohio R.C. §§ 1547.07 and 4511.20 are not the same.

REJECTED. There is no statutory, regulatory, or policy requirement that the elements or precise acts must be the same as the crimes listed in 10.211(g) Table. "The table lists major categories of criminal activity and is not to be construed as an all-inclusive list. If an applicant is convicted of an offense that does not appear on the list, the Coast Guard will establish an appropriate assessment period using the list as a guide." 46 C.F.R. § 10.211(g).

2. For the purpose of 46 CFR § 10.211 (g), the Ohio offenses of Reckless Driving (Ohio R.C. § 4511.20) and Reckless Operation of a Boat (Ohio R.C. § 1547.07) are not analogous.

REJECTED, for the reasons stated in the comments to Respondent's Proposed Conclusion of Law above. Both offenses involve operating a vehicle, either an automobile or a vessel. How an applicant operates vehicles, especially a vessel with six (6) other people on board, is directly analogous and highly relevant on the safety and suitability of an applicant for an MMC.

3. For the purposes of a suspension and revocation hearing held to determine whether a mariner was in violation of 46 U.S.C. § 7703(2), a mariner's conviction of the Ohio offense of Reckless Operation of a Boat (Ohio R.C. § 1547.07) is not a conviction of an offense that would prevent the renewal of an MMC.

REJECTED, for the reasons set forth above.

4. Because it failed to review statutory evaluation factors, the Coast Guard did not perform a complete review of Respondent's file to determine whether his conviction for Reckless Operation of a Boat would have been the conviction of an offense that would prevent the renewal of his MMC.

REJECTED, for the reasons set forth above.

5. Respondent's Coast Guard disciplinary record may be admitted into evidence.

ACCEPTED. Respondent's entire record was admitted into evidence as Resp. Ex. B.

6. Pursuant to this proceeding under 46 U.S.C. § 7703 (2), Respondent was not convicted of an offense that would prevent the renewal of his MMC.

REJECTED, for the reasons set forth above.