

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

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**UNITED STATES COAST GUARD**

**Complainant**

**vs.**

**Robert M. Larson**

**Respondent**

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**Docket No: 05-0486**  
**CG Enforcement Activity No: 2455787**

**ORDER AMENDING SANCTION**

**Issued: September 30, 2009**

**Issued by: HON. DEAN C. METRY,  
Administrative Law Judge**

**Investigating Officer:**

**MSTCM Donald L. Snider**

**USCG Sector Houston-Galveston**

**Respondent:**

**Robert M. Larson, Pro se**

## **I. Background**

On July 16, 2007, a Decision and Order (Previous Order) was issued revoking Respondent's Coast Guard issued Merchant Mariner Credentials. The revocation was based on the Administrative Law Judge's (ALJ) finding that the Coast Guard proved two (2) charges of Misconduct under 46 CFR 5.27 and a third charge that Respondent had been convicted of an offence described in the National Driver Register Act of 1982.

Respondent subsequently appealed the decision, but requested to withdraw said appeal thereafter. On July 9, 2009, Respondent's request to withdraw the appeal was granted.

On July 15, 2009, Respondent filed a Motion to Reopen the Proceedings with the ALJ Docketing Center for the review of additional pieces of evidence. Respondent indicated that he intended to prove that he is cured and has undergone character rehabilitation. Respondent ultimately sought modification of the previous order of revocation in accordance with 33 CFR 20.904(f).

On August 18, 2009, the undersigned conducted a telephonic conference regarding the pending Motion to Reopen. MSTCM Donald L. Snider appeared for the Coast Guard and Respondent appeared pro se. Respondent indicated that he had been in contact with the Coast Guard regarding the Motion to Reopen and that all parties were in agreement that it should be granted. At the conference, the Coast Guard agreed and made clear that it had no objections to the Motion to Reopen or Respondent's prayer for the Previous Order of revocation to be modified. Respondent then summarized the progress he had made over the last few years regarding his character rehabilitation and cure.

In light of Respondent's preliminary showing and the Coast Guard's concurrence with Respondent's Motion to Reopen, it was found that the public interest warranted a reopening of the record in this proceeding. See 33 CFR 20.904(c).

On August, 26, 2009, the undersigned issued an Order indicating that the submission of documentary evidence and arguments in mitigation and rehabilitation of each of the three charges previously found proved in this case would be accepted. The Order further indicated that the undersigned would accept narrative statements with reasoning as to why the Previous Order of revocation is no longer valid and why vacating that Order is compatible with the requirements of good discipline and safety at sea.

On September 2, 2009, Respondent filed a two (2) page narrative statement with twenty-eight (28) attachments in support of why vacating the Order of revocation is compatible with the requirements of good discipline and safety at sea. Resp't Ex. 1. This filing contains documentation showing Respondent's successful completion of drug and alcohol rehabilitation, Respondent's spiritual affiliations and accomplishments, as well as numerous letters of reference and other documentation attesting to Respondent's progress in this regard. Id.

## **II. Discussion**

It is clear from the record and from the August 18, 2009 telephone conference that all parties are in agreement that the previous sanction of revocation should be vacated and that Respondent's credentials should be returned to him. In light of the parties' agreement and Respondent's filing which clearly shows Respondent's tremendous personal progress, I am inclined to agree. However, whether revocation is required for a particular charge is a question of law and the parties' agreement and intention to have Respondent's credentials returned to him despite the charges that have been found proved would be inoperative and not binding since a

court cannot be controlled by agreement of counsel on a subsidiary question of law. Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 289-90 (1917) (citations omitted); see also Appeal Decision 2268 (HANKINS) (1981). Therefore, it must be determined whether suspension is an available sanction for the underlying charges in this case or alternatively whether the ALJ was and still is required to revoke. For the reasons discussed below, I find that suspension is indeed an available sanction and that revocation, while available as an appropriate sanction, was not and is not required in this case.

The Previous Order imposed revocation based collectively on two counts of misconduct and one count of conviction for a driving under the influence of alcohol offense under the U.S. National Driver Register Act. The Order does not distinguish which charge or which combination of charges triggered the revocation, but rather seems to consider the totality of all three charges to justify revocation. I will discuss the sanction restrains as well as the new sanction for each charge previously found proved in turn.

#### A. Misconduct Related to Renewal Application

As discussed above, Respondent committed acts of misconduct while acting under the authority of his document by failing to disclose previous drug use on his renewal application. Generally, his documents may be suspended or revoked under 46 U.S.C. 7703.

There are several Commandant Appeal Decisions that speak directly to the point of whether a Coast Guard credential must be revoked or may be suspended in cases such as this where a credential was procured by incorrect statements. “[W]here fraud in the procurement of a license is proved in a suspension and revocation hearing, revocation is the only appropriate sanction.” Appeal Decision 2613 (SLACK) (1999); see also Appeal Decision 2570 (HARRIS) (1995) (revocation appropriate sanction where fraud in procurement of license proved); Appeal

Decision 2569 (TAYLOR) (1995) (revocation appropriate sanction for fraudulent application submitted for MMD); Appeal Decision 2346 (WILLIAMS) (1984) (revocation affirmed for wrongful and fraudulent application submitted to Coast Guard); Appeal Decision 2205 (ROBLES) (1980) (fraud in procurement of license, revocation only appropriate disposition).

Thus, the question of whether revocation was and is required will turn on whether it was previously found proved that Respondent's incorrect statements rose to the level of being fraudulent, or alternatively were not proven to that extent.

A thorough analysis of Commandant Appeal Decision reveals the difference between fraudulent statements and false statements. A "fraudulent statement" is one made by the respondent with either actual or constructive knowledge that the declaration is materially flawed or false. Appeal Decision 2456 (BURKE) (1987); Appeal Decision 809 (MARQUES) (1955). Conversely, a "false statement" is an incorrect statement of material fact. Appeal Decision 1381 (CLINTON) (1963). The two categories of statements share the requirement of materiality, but only a fraudulent statement is made with knowledge or constructive knowledge of its falsity.

There is no doubt answers to questions regarding whether a mariner was ever a user of or addicted to the use of dangerous drugs are material, and a negative response would be clearly be materially flawed when the applicant should have answered in the affirmative.

In the instant case, Respondent answered "no" to this question despite subsequent admissions that the answer should have been "yes." There is little doubt, therefore, that it was previously proven that his answers satisfied the materiality elements for both "false" and "fraudulent" statements. It must now be determined whether it was proven that his answers were made with actual or constructive knowledge of their falsity and therefore rising to the level of fraud.

A statement is made with actual knowledge if done without belief in its truth or reckless disregard of its truth or falsity. Appeal Decision 809 (MARQUES) (1955). Constructive knowledge exists if the person had a reason to know the representation was false. Id. The relevant statement in the instant case is Respondent's answer of "no" to the question whether he had ever been a user of or addicted to the use of a dangerous drug on his renewal application for his Coast Guard credential despite his admission of previous drug use.

While rejecting Respondent's argument that intent was a necessary element to find this charge proved, the Previous Order stopped short of affirmatively finding that Respondent made a fraudulent statement, as opposed to a mere false statement. Instead, it speaks of failure to disclose, lack of disclosure, and lack of accuracy and/or truthfulness. USCG v. Larson, 05-0486 (USCG ALJ July 16, 2007). Further, a discussion of whether Respondent knew or should have known that he should have answered the question in the affirmative was absent. Thus, despite that fraud could have been present, it seems that this finding was not specifically made in the Previous Order at the time of adjudication and thus cannot trigger required revocation at this time. That said, there is nothing in this Order that should be interpreted or construed as making the finding that fraud was not present, but instead should be limited to the proposition that fraud simply was not found proven in the Previous Order.

Furthermore, since this Order is strictly limited to matters in mitigation of charges previously found proved, I decline to disturb the previous finding of whether and to what extent the charges were found proved and also decline to revisit the question of whether Respondent's statements rose to the level of fraud. This question will go unanswered.

Therefore, since fraud was never found proven in this case, I find that suspension is an available sanction. Furthermore, in light of this finding, the parties' joint support of

Respondent's credentials being returned to him, and Respondent's filing demonstrating the complete rehabilitation of his mind, body, and soul in mitigation of the charges found proved by the Previous Order, I find that suspension is the only appropriate sanction.

#### B. Second Misconduct Charge

The second misconduct charged found proved by the Previous Order involved an incident wherein Respondent reported to work under the influence of alcohol, was denied entry to the job site by a security guard due to his intoxication, and then subsequently jumped a security fence after being refused entry. The complaint alleged this conduct constituted misconduct as it was in violation of the company policy for safe work practices and the Coast Guard sought five (5) months outright suspension for this charge. The Previous Order found this charge proved, but as previously discussed, an overall sanction of revocation was imposed based on a totality of all three charges and individual sanctions were not attributed to individual charges. It is thus unclear what sanction would have been imposed individually for this charge had this charge stood alone or to what extent this charge contributed to the overall sanction of revocation.

In any case, suspension as opposed to revocation is certainly permissible for misconduct for failure to follow a duly established rule. In light of this finding, the parties' joint support of Respondent's credentials being returned to him, and Respondent's filing demonstrating the complete rehabilitation of his mind, body, and soul in mitigation of the charges found proved by the Previous Order, I find that suspension is the only appropriate sanction for this charge as well.

#### C. Conviction under the U.S. National Driver Register Act.

The final charge found proved by the Previous Order was predicated on an October 2005 conviction Respondent received for driving under the influence of alcohol. The relevant statute provides that a Coast Guard document "may be suspended or revoked if the holder . . . within a

3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in 30304(a)(3) or (b) of title 49.” 46 U.S.C. 7703(3). While revocation is clearly authorized under the statute, there does not appear to be any statutory law, case law, or regulatory mandate that revocation be imposed upon this charge being found proved.

As previously stated, a careful analysis of the Previous Order reveals that revocation was based on the totality of all three charges and it is unclear whether and to what extent this charge contributed to the overall sanction imposed. Therefore, in light of this, the parties’ joint support of Respondent’s credentials being returned to him, and Respondent’s filing demonstrating the complete rehabilitation of his mind, body, and soul in mitigation of the charges found proved by the Previous Order, I find that suspension is the only appropriate sanction for the final charge found proved by the Previous Order.

In conclusion, it is well taken in Respondent’s favor that he has gone to great lengths to turn his life around and move in the right direction toward improving his mind, body, and soul for the sake of his family and himself. Resp’t Ex. 1. This significantly mitigates the charges found proved by the Previous Order to the point that revocation is no longer an appropriate sanction and will be substituted for an Order of suspension for each of these three charges. Furthermore, since Respondent has been without his Coast Guard credentials for a number of years since the Previous Order was issued, I find that this time has functioned as a sufficient suspension and agree with the parties that his credentials should be returned to him immediately.

WHEREFORE,

**ORDER**

**IT IS HEREBY ORDERED** that the sanction of revocation previously imposed is vacated, but that all other findings in the Previous Order are undisturbed.

**IT IS HEREBY FURTHER ORDERED** that an Order of suspension is imposed for each of the three charges found proved in the Previous Order.

**IT IS HEREBY FURTHER ORDERED** that this Order of suspension commenced on the date of the Previous Order and has been fully served and satisfied.

**IT IS HEREBY FURTHER ORDERED** that Respondent's Coast Guard credentials be immediately returned to him.

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

Done and dated this 30th day of September 2009 at  
Houston, TX

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**HON. DEAN C. METRY**  
**Administrative Law Judge**  
**United States Coast Guard**