

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

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UNITED STATES COAST GUARD  
Complainant  
vs.  
JESSE S. WARREN  
Respondent.

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Docket Number: CG S&R 2010-0355  
CG Case No. 3790774

**DECISION AND ORDER**

**Issued: March 11, 2011**

**Issued by: Hon. Michael J. Devine, Administrative Law Judge**

**PRELIMINARY**

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Jesse S. Warren's (Respondent) Merchant Marine License (MML) number 1148842. 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 Amended Complaint, dated September 17, 2010, alleges Respondent is the holder of a Coast Guard issued MML and that he violated 46 U.S.C. 7704(b) and 46 CFR 5.35 conviction for a dangerous drug law violation and 46 U.S.C. 7703(3) conviction under National Driver Register Act.

The Amended Complaint alleges that on January 31, 2008 Respondent was convicted of possession of marijuana in violation of North Carolina General Statute 90-95(d)(4). The

Complaint further alleges that on June 5, 2009, Respondent was convicted of impaired driving, a violation of North Carolina General Statute 20-138.1, an offense under the National Driver Register Act (49 U.S.C. 30304(a)(3)(A)).

On October 7, 2010, Respondent, through counsel, submitted an Answer to the Amended Complaint. The Answer admits he is the holder of the MML at issue in this case. Respondent also admitted he was convicted of possession of marijuana, a class III misdemeanor<sup>1</sup>, pursuant to North Carolina General Statutes 90-95(d)(4). Other matters were denied and various defenses asserted. On October 25, 2010, the Court partially granted the Coast Guard's Motion for Summary Decision finding Charge 1 of the Amended Complaint (conviction of a dangerous drug violation) **PROVEN**. Since Respondent did not admit the violation described in Charge 2, Conviction for impaired driving under North Carolina General Statute 20-138.1, is an offense under the National Driver Register Act (NDRA) (49 USC 30304(a)(3)(A), that charge remained in dispute. Additionally, in keeping with Appeals Decision 2678 (SAVOIE) (2008), the issue of an appropriate sanction for this matter remains before the Court.

An evidentiary hearing was held in New Bern, North Carolina on December 2, 2010. The hearing was conducted in accordance with Administrative Procedure Act, codified at 5 U.S.C. 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. 7702, and the procedural regulations set forth in 33 CFR Part 20.

At the hearing, LT Gregory Mosko, Investigating Officer and CDR Derek Dorazio appeared for the Coast Guard. Respondent appeared at the hearing and was represented by attorney Gary H. Clemmons.

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<sup>1</sup> Possession of marijuana is a misdemeanor in North Carolina. Since the violation is a "conviction" Appeals Decision 2683 (DESIMONE) (2009), is not applicable to this matter.

The Coast Guard presented nineteen (19) exhibits of which eight were admitted into evidence. Respondent presented four (4) exhibits at the hearing of which all were admitted into evidence.<sup>2</sup> Respondent initially marked and identified three (3) additional exhibits, but they were withdrawn and not offered into evidence. The witness and exhibit lists are contained in Attachment A. At the beginning of the hearing, Respondent stipulated through counsel that in regards to Charge 2, Respondent's June 5, 2009 conviction for impaired driving in North Carolina is an offense under the NDRA. (Tr. at 11-14).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The findings of fact and conclusions of law are summarized as follows:

1. At all relevant times, Respondent Jesse Scott Warren was the holder of Merchant Mariner's License 1148842 at issue in this case. (Amended Answer at 1; Resp. Ex. A).
2. On January 31, 2008, Respondent was convicted of a misdemeanor violation of possession of marijuana in violation of North Carolina General Statute 90-95(d)(4). (Amended Answer at 2).
3. On June 5, 2009, Respondent was convicted of impaired driving under North Carolina General Statute 20-138.1. (Tr. at 11-15).
4. Respondent previously had his license suspended pursuant to Coast Guard action under Title 46 U.S.C. Chapter 77 in 2003. (CG Ex. 13).
5. At the time of the hearing Respondent was participating in the New Horizons substance abuse program. (Tr. at 100-03; Resp. Ex. E).

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<sup>2</sup> Respondent had previously marked several additional exhibits (B, F and G) but they were withdrawn and not offered or admitted into evidence at the hearing. Respondent counsel also presented a trial brief at the hearing which is attached as Court Exhibit I.

## 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). Certain matters only require that the mariner be the holder of a merchant mariner credential when a violation occurs. The Coast Guard 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 (10) years before the beginning of the suspension and revocation proceedings. 46 U.S.C. 7704(b). Charge 1 of the Amended Complaint asserts Respondent's conviction, in January 2008 for possession of marijuana, is a dangerous drug law violation under 46 CFR 5.35, and grounds for revocation under 46 U.S.C. 7704. Respondent admitted to this conviction in his Answer. Since there is an admission to a dangerous drug law conviction within the past ten (10) years, jurisdiction is clearly established for Charge 1.

With respect to Charge 2, the analysis is similar to Charge 1. The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner, within the three (3) year period preceding the initiation of suspension or revocation proceeding, is convicted of an offense described in section 30304(a)(3)(A) or (B) of Title 49 U.S. Code (National Driver Register Act). See 46 U.S.C. 7703(3). In his Answer, Respondent admitted to the conviction for impaired driving on June 5, 2009. At the hearing, Respondent also stipulated that the June 5, 2009 conviction was an offense under the National Driver Register Act.<sup>3</sup> (Tr. at 11-15). Therefore, based on the pleadings with regard to Charge 1 and the pleadings combined with the

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<sup>3</sup> Judgments of convictions for dangerous drug offenses and offenses under the National Driver Register Act are admissible under 33 CFR 1307.

stipulation at the beginning of the hearing that Respondent's conviction in Charge 2 was a violation under the National Driver Register Act, jurisdiction is established in this matter.

### **Coast Guard's Case-in-Chief Seeking Sanction of Revocation**

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). Once a violation is proven, it is a matter within the discretion of the Court to assess an appropriate sanction. 46 CFR 5.569. The Table contained in 46 CFR 5.569 provides some guidance in regard to assessing an appropriate sanction but is not binding on the Administrative Law Judge.

In this case, the focus of the hearing was on what the appropriate sanction should be under the circumstances presented in this case with regard to the relevant aggravating or mitigating circumstances for this particular Respondent and applying the law and regulations for Coast Guard suspension and revocation proceedings.

Soon after the Complaint was filed in this matter, the Coast Guard submitted a Motion for Summary Decision based on the evidence of Respondent's convictions and seeking revocation. However, the undersigned denied the Coast Guard's motion with regard to assessing a sanction and advised both parties of Appeals Decision SAVOIE (2678) (2008) (holding that revocation is not mandatory for a dangerous drug conviction violation).

## Rulings on Evidence Presented by Coast Guard

At the hearing, the Coast Guard presented a total of 19 exhibits in support of their case. A number were ruled inadmissible when offered at the hearing but noted to be subject to reconsideration based on further development of the evidence. Final rulings on what may properly be considered under the regulations are contained in this decision. Exhibits 1 and 3 are documentation of the convictions that are the subject of Charges 1 and 2 and were admitted without objection. (Tr. at 36, 39). Exhibit 2 is the citation for the matter that resulted in Respondent's conviction for impaired driving. Although initially not admitted and a ruling on admissibility was reserved, I find that matters of *res gestae*<sup>4</sup> regarding the offenses and matters related to Charges 1 and 2 in this case are admissible. The same analysis applies to Exhibit 4 and it is also admitted on that basis. (Tr. at 286). Exhibits 5, 6, 7, 8, 9, 10, and 11 were not admitted into evidence. (Tr. at 281, 287). Some of these matters were allegations of violations of probation which were dismissed. These matters essentially are allegations of bad acts that fit within the prohibition of Federal Rule of Evidence 608 which limits when character evidence should be considered. None of this should have been offered in the first instance since at best it might only be considered relevant if Respondent testified as a witness. Then, after a witness testifies the matter may be inquired on in cross examination<sup>5</sup> but the use of extrinsic evidence is not permitted. See Fed. R. Evid. 608(b).<sup>6</sup>

Exhibits 12 and 13 were admitted into evidence as aggravation evidence that fit within 33 CFR 20.1315(a). (Tr. at 47-49). Respondent objected to Exhibit 14 and it was not admitted because it did not fit within the parameters of 33 CFR 20.1315. (Tr. at 51). Next, the Coast

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<sup>4</sup> The circumstances of an act or event are generally admissible. Black's Law Dictionary (5<sup>th</sup> Ed. 1979) at 1173.

<sup>5</sup> The investigating officer was allowed to ask the witnesses whether they were aware of Respondent's past convictions. Eg. Tr. at 166-171; 184-185.

<sup>6</sup> Eg. U.S. V. Nazareus, 983 F.2d 1480 (8<sup>th</sup> Cir. 1993).

Guard offered Exhibits 15, 16 and 17 as aggravating evidence in support of the Coast Guard argument to impose a sanction of revocation. These past violations by Respondent were more than ten (10) years old. All of the matters that are beyond the time limit of ten (10) years, as specified in 33 CFR 20.1315(a), were rejected and not considered for any purpose in this matter. (Tr. at 32, 52-53).

The regulations are to be construed to secure a just and speedy determination. 33 CFR 20.103. Where there is a specific regulatory provision for these proceedings the regulations control. In the absence of a specific regulation, the regulations indicate the Court should look to the Federal Rules of evidence for guidance. Id. Here, the regulations provide a specific rule that generally prohibits the use of convictions more than ten (10) years old. This is also consistent with the Federal Rules of Evidence. See Fed. R. Evid. 609(b). At the hearing the undersigned advised the Coast Guard representatives they could attempt to articulate some basis for admission of the disciplinary record matters over ten years old if they so chose in their post hearing brief. The Coast Guard again argued for consideration of those matters but failed to provide any persuasive legal justification for not following their own regulations. The ALJ is bound to follow the applicable regulations; therefore, the ruling at the hearing that these matters are not admissible under 33 CFR 20.1315(a) and not considered for any purpose in this matter remains in effect. The certificate of documentation for Respondent's vessel the BIG TAHUNA was admitted without objection as Exhibit 19. Exhibit 18 was admitted into evidence for the limited purpose of providing the *res gestae* factual circumstances of the Charge 2 offense. The Court rejected the Coast Guard's effort to provide additional hearsay evidence of whatever else the arresting officer might have said to the Investigating Officer. While the strict rules of evidence are not applicable and hearsay may be permitted in administrative proceedings, the

concept of using testimony of an Investigating Officer to bolster a case with hearsay is something that should be avoided. In summary, only matters within 33 CFR 20.1315 have been considered as admissible aggravating evidence offered by the Coast Guard in determining a sanction in this matter. Additionally, the general circumstances surrounding the current charged offenses which have been found proved are *res gestae* and may be considered for limited purposes as discussed above.

### **Respondent's Rebuttal**

Respondent did not contest the violations alleged in Charges 1 and 2. Instead, Respondent argued for mitigation of the sanction for these charges. Respondent's rebuttal of the Coast Guard's case focused on evidence that he is a capable and safe captain and operator of the vessel BIG TAHUNA. This was presented through testimony of a number of prior passengers/fishermen, his crew member and himself. Based on the combination of that testimony, Respondent's efforts in rehabilitation and in contending that in keeping with the SAVOIE case a sanction of a period of suspension is more appropriate than revocation. Respondent testified on his own behalf and presented another six (6) witnesses. One of those witnesses was his crew member who is also a licensed mariner. Four (4) of the witnesses were friends and passengers that had fished with him and testified to his safe practices and skill as a fishing boat captain. The other witness was a probation officer that testified regarding his performance in regard to his probation.

The evidence of his safety practices is noted. However, neither 46 U.S.C. 7704 nor 46 U.S.C. 7703(3) require the underlying offense have a connection to drugs or being under the influence of alcohol while performing duties under the authority of the Coast Guard credential. Instead, these matters have been identified by Congress to be of concern in regard to safety at

sea. Respondent's testimony regarding his efforts in rehabilitation in avoiding alcohol and drugs is beneficial but the overall record indicates these efforts have not been demonstrated for an extended time. Respondent's testimony regarding the potential financial impact of a loss of his license has also been considered. However, consideration of personal hardship is subservient to the remedial purposes of suspension and revocation proceedings. Appeal Decision 2346 (Williams); Appeal Decision 2524 (TAYLOR) (1991) aff'd by NTSB Order EM-174 (1993).

### **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 possession of marijuana, in violation of North Carolina General Statute 90-95(D)(4), on January 31, 2008, by the Criminal Division of the Dare County Court of Manteo North Carolina.
3. Respondent was convicted of one (1) count of driving impaired, in violation of North Carolina General Statute on June 9, 2009, by the Criminal Division of the Dare County Court of Manteo North Carolina.
4. Respondent's June 9, 2009 conviction under North Carolina Statute for driving impaired is an offense within the National Driver Register Act and the conviction was within three (3) years of the beginning of these proceedings under 46 U.S.C. 7703(3).
5. Respondent's January 31, 2008 conviction under North Carolina Statute 90-95(D)(4) for possession of marijuana a 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).

### 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 a dangerous drug violation within the past ten (10) years and of an impaired driving offense within the past three (3) years that is an offense within the National Driver Register Act. Respondent did not dispute these convictions. 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, pursuant to 46 U.S.C. 7703(3), a merchant mariner’s license and document may be suspended or revoked upon proof of a

conviction of an offense under the NRDA (49 U.S.C. 30304(a)(3)(A)) within the three (3) years prior to these proceedings.

In Respondent's Post Hearing Brief, Respondent cited to SAVOIE and correctly asserted that the undersigned has the power to enter a sanction 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. The Coast Guard presented argument in support of its position that revocation is still authorized and should be appropriate in this case instead of a period of suspension.

Respondent requested he receive a sanction no greater than a four (4) month suspension referring to the sanction assessed in SAVOIE. An appropriate sanction should be developed on the record and facts in each individual case. Here, in 2008 Respondent was convicted of a dangerous drug law violation and subsequently in June 2009 was convicted of impaired driving. I have carefully reviewed the record and considered all of the evidence presented in this matter beginning with the Amended Complaint and including the exhibits and testimony presented at the hearing and the post hearing submissions of the parties. The proposed sanction of revocation is permitted within the suggested range of sanctions contained in Table 5.569 of 46 CFR 5.569. The evidence of Respondent having any other violations or incidents was limited to the matters less than ten (10) years old and as specifically addressed in the Decision and Order above. Respondent presented a number of witnesses and some documentary evidence that Respondent has been a good fishing boat Captain and has followed proper safety procedures in operating his boat the Big Tahuna. This evidence was considered in Respondent's favor and served as mitigating evidence.

As noted above, the purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. After considering the evidence of record as a whole, I find that based on the specific facts of this matter the appropriate sanction in this case is revocation. Respondent has a history of problems with substance abuse and such matters have been identified by Congress as a basis for revocation in the interests of safety at sea. Respondent's convictions in North Carolina in 2008 and 2009 raise a clear concern for safety at sea and the appropriate sanction in this matter is revocation.

In addition to 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.

WHEREFORE,

**ORDER**

**IT IS HEREBY ORDERED THAT** the Merchant Mariner's License and all other Coast Guard licenses, certificates and documents issued to Respondent Jesse Scott Warren are **REVOKED**. Respondent must immediately surrender his Coast Guard issued credentials to the Coast Guard, Coast Guard Marine Safety Detachment Nags Head, 114 West Wood Hill Drive, Nags Head, North Carolina 27959. If you knowingly continue to use your documents, you may be subject to criminal prosecution.

**PLEASE TAKE FURTHER NOTICE** that Service of this Order on the parties and/or parties representatives serves as notice of appeal rights as set forth in 33 CFR 20.1001-1003. (Attachment C). If requested during the time period for submitting an appeal, a copy of the transcript of the hearing will be provided at no cost to Respondent. The time period to file a notice of appeal is thirty (30) days or less after issuance of the decision. 33 CFR 20.1001.

Done and dated March 11, 2011  
Baltimore, Maryland

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**HON. MICHAEL J. DEVINE**  
Administrative Law Judge

**ATTACHMENT A**  
**WITNESS AND EXHIBIT LIST**

**Coast Guard Witnesses**

LT Gregory Mosko

**Respondent Witnesses**

1. Jesse S. Warren
2. Wayne Robert Mathis
3. Kenneth Forlano
4. Kenneth James Koci
5. Geoffrey C. Mathis
6. Deborah Robin Bateman
7. Desmond Foster, Jr.

**Coast Guard Exhibits**

1. Judgment for Impaired Driving entered against Respondent June 6, 2009 (offense date 02/09/2009)(admitted)
2. Citation issued to Respondent dated 02/09/2009 (admitted)
3. Judgment for Possession of Marijuana entered against Respondent January 31, 2008 (offense date 2/14/2007) (admitted)
4. Incident Investigation Report dated 02/14/2007 (admitted)
5. Violation Report dated 4/08/08. (not admitted)
6. Order on Violation of Probation or on Motion to Modify (not Admitted)
7. Violation report dated 3/16/09 (not admitted)
8. Order on Violation of Probation or on Motion to Modify (not admitted)
9. Order on Violation of Probation or on Motion to Modify (not admitted)
10. Warrant (not admitted)

11. Dismissal Notice (not admitted)
12. Judgment imposing community punishment dated 03/11/2003 (admitted)
13. Consent Order dated May 5, 2003. (admitted)
14. Citation for BWI from 2003 (not admitted)
15. Virginia Order regarding Conviction dated May 24, 1995 (not admitted)
16. Virginia Order regarding Conviction dated July 26, 1995 (not admitted)
17. Virginia Order regarding Conviction dated July 13, 1995 (not admitted)
18. Arrest report dated 02/09/2009 (admitted)
19. Certificate of Documentation for vessel BIG TAHUNA Official No. 620223 (admitted)

**Respondent Exhibits**

- A. Merchant Marine License 1148842 issued to Jesse Scott Warren (admitted).
- B. Respondent Probation File for Dare County, NC (withdrawn)
- C. Character reference from Deborah Robin Bateman (admitted)
- D. Character reference from Andrea Facci (admitted)
- E. New Horizons outpatient substance abuse treatment program (admitted)
- F. New Horizon assessment (urinalysis) (withdrawn)
- G. Previously marked Exhibit G was not offered at Hearing. (withdrawn)

**Court Exhibits**

- I. Respondent's Trial Brief

**ATTACHMENT B**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**ATTACHMENT B—PARTIES’ PROPOSED FINDINGS OF FACT**

**Coast Guard’s Proposed Findings of Fact**

1. Respondent is currently, and was at all times relevant to this proceeding, the holder of MML number 1148842. (Respondent’s Ex. A).

**ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

2. Respondent was convicted of possession of marijuana, in violation of NC General Statute 90-95(d)(4), on 31 January 2008, in the General Court of Justice, Superior Court Division, Dare County, NC. (CG Ex. 3).

**ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

3. Respondent was convicted of Impaired Driving, in violation of NC General Statute 20-138.1, on 5 June 2009, in the General Court of Justice, District Court Division, Dare County, NC. (CG Ex. 1).

**ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

4. Respondent was previously convicted in 1995 in Henrico County, VA for misdemeanor possession of marijuana and felony possession of marijuana with intent to distribute. (CG Ex. 15-17).

**REJECTED**, as provided in the Decision and Order.

5. Respondent admitted at hearing to operating a vessel after consuming alcohol on 8 February 2003, and he was in fact arrested/cited for it. (CG Ex. 14; Tr. at 76-78, 144).

**ACCEPTED IN PART AND REJECTED IN PART**, as provided in the Decision and Order.

6. Respondent was convicted on 11 March 2003 for assault on Coast Guard boarding officer and resisting a state (NC) law enforcement officer, and Respondent admitted at hearing that this was from the same incident when he operated a vessel after consuming alcohol on 8 February 2003. (CG Ex. 12; Tr. at 76-79, 133, 145-146).

**ACCEPTED IN PART AND REJECTED IN PART**, as provided in the Decision and Order.

7. Respondent admitted at hearing that the Court ordered him to complete a substance abuse evaluation as part of the sentence for the two 11 March 2003 convictions discussed in paragraph 6 above; however, he does not remember the results of that evaluation. (CG Ex. 12; Tr. at 133-135).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

8. Respondent's MML was suspended on 5 May 2003 for misconduct for assault & battery of Coast Guard boarding officer. It was suspended for 3 months followed by 12 months of probation, pursuant to a settlement agreement. Respondent testified at hearing that this resulted from the same incident that occurred on 8 February 2003 when he operated a vessel after consuming alcohol and was subsequently convicted of assault on Coast Guard boarding officer and resisting a state (NC) law enforcement officer. (CG Ex. 13; Tr. at 76-80, 113, 133). **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

9. Respondent was arrested/cited for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia and felony possession of a firearm by a felon in Dare County, NC on 14 February 2007. Respondent admitted at hearing to this arrest, and the subsequent conviction for possession of marijuana and possession of drug paraphernalia on 31 January 2008 resulting from this arrest. (CG Ex. 3 & 4; Tr. at 90-92, 122-127). **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

10. While on probation for the possession of marijuana and possession of drug paraphernalia convictions described in paragraph 9 above, Respondent was again found to be in possession of drug paraphernalia on 20 March 2008, and he was subsequently issued an order on violation of probation on 27 October 2008 for this. (CG Ex. 5 & 6; Tr. at 233-235). **REJECTED**, as provided in the Decision and Order. Additionally, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

11. While on probation for the possession of marijuana and possession of drug paraphernalia convictions described in paragraph 9 above, Respondent tested positive for THC and cocaine on a probation ordered drug screen on 12 February 2009. Respondent was subsequently issued an order on violation of probation on 14 May 2009 for this. Respondent admitted at hearing to this 12 February 2009 positive drug screen and probation. **REJECTED**, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

12. Respondent was arrested/cited for DWI and possessing an open container of alcohol in a vehicle (both misdemeanors) in Dare County, NC on 9 February 2009. Respondent's BAC was .12. The legal limit in NC is .08. Respondent was subsequently convicted of DWI on 5 June 2009 based on this arrest. Respondent was ordered to obtain substance abuse assessment and complete all recommended education/treatment as part of his sentence for this conviction. Respondent admitted at hearing to arrest and DWI conviction. (CG Ex. 1 & 18; Tr. at 92-94, 135-141). **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. Respondent was issued an order on violation of probation on 13 November 2009 giving him until 20 January 2010 to complete his substance abuse hours determined by Dr. Facci. (CG Ex. 9; TR. at 242-244).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

14. Respondent completed his court-ordered substance abuse treatment with Dr. Facci for his 5 June 2009 DWI conviction on 19 October 2009 – 21 January 2010. (Tr. at 118-119).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

15. Respondent voluntarily enrolled in “New Horizons” outpatient substance abuse treatment program after the initial complaint was served on him in this case (served on 29 July 2010). His counselor is Ms. Cheri Peele, and he testified that he continues to see Ms. Peele once a week for continuing outpatient treatment. (Respondent’s Ex. E; Tr. at 116-118).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

16. Respondent provided documentation at hearing of a negative drug screen that he took on/about 29 November 10, three days before the hearing. Respondent admitted that this drug screen was not random. He scheduled it with New Horizons. He also admitted that the urine collection was not observed. This drug screen was not cleared or approved by the FDA, nor by DOT. (Respondent’s Ex. D; Tr. at 113-116).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

17. Respondent offered no other negative drug screens at the hearing in support of his case.

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. Respondent’s MML authorizes him to carry up to 6 passengers for hire out as far as 100 NM offshore, in a passenger vessel not subject to inspection by the Coast Guard. It also authorizes him to provide commercial towing assistance to vessels in need. (Respondent’s Ex. A; Tr. at 29, 82).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

19. Respondent is the owner/operator of M/V BIG TAHUNA (O.N. 620223), a 30 GRT, 44.7’ length motor vessel with a coastwise trade endorsement. (CG Ex. 19; Tr. at 27-30, 86-87).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

20. Respondent testified at hearing that he operates this vessel commercially carrying 1 – 6 passengers for hire for fishing charters, which he charges \$1400 per charter regardless of number of passengers, and that he completes an average of approximately 150 of these charters each year. (Tr. at 87).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

### **Respondent's Proposed Findings of Fact**

1. Jesse Scott Warren, Respondent, currently lives at 50543 Timber Trail, Frisco, North Carolina. He is 43 years of age. (Tr. p.72).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

2. Respondent received a marketing degree at Longwood College in Farmville, Virginia, and minored in psychology. He has lived in the Hatteras, North Carolina area for approximately 14 or 15 years. His work experience has always been commercial fishing. (Tr. pp. 71-74).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

3. Sometime before 2003, he received Merchant Mariner's License (MML) #1148842, limited to transporting six (6) passengers within one hundred (100) miles of the shoreline of the United States. In 2002, his MML was suspended for three (3) months, followed by a probationary period. Respondent complied with the conditions of his probation, and his MML was returned to him after three (3) months. (Tr. pp.75, 78-81, 89).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

4. On or about June 28, 2006, Respondent's MML was renewed for a five (5) year period. His current MML expires June 28, 2011. (Respondent's Exhibit "A").

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

5. For the past eight (8) years, Respondent has been the Captain of a vessel known as the “Big Tahuna”. Respondent is the owner of “Big Tahuna, Ltd.”, which conducts offshore fishing expeditions for hire in the Hatteras, North Carolina area. (Tr. pp. 86-87).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

6. Respondent completes approximately 150-200 commercial fishing trips per year under the commercial enterprise of “Big Tahuna, Ltd.” (Tr. p. 87).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

7. For each of the last five (5) years, Respondent has received a satisfactory annual Coast Guard inspection. (Tr. p. 88).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

8. Respondent is involved in no other business through which he earns an income, other than as the Captain and owner of the commercial fishing charter business within the corporate framework of Big Tahuna, Ltd. For the past five (5) years, Respondent’s First Mate on those commercial fishing charters is Kenny Koci. (Tr. pp. 89, 186-187).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

9. On or about January 31, 2008, Respondent was convicted of possession of marijuana of one (1) ounce or less in Dare County, North Carolina, pursuant to N.C.Gen. Stat. § 90-95(d)(4). The subject marijuana was found outside of his house in the shower in a small mason jar. The amount of marijuana was less than one (1) gram. Although he may not have “owned” the marijuana, he owned the real property on which it was found. Respondent took responsibility for the ownership of the marijuana and agreed to plead guilty to possession of marijuana. (Coast Guard Exhibit “3”, Tr. pp. 91-92).

**NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

10. On or about June 5, 2009, Respondent pled guilty to and was convicted of driving while impaired (DWI), in violation of N.C. Gen. Stat. § 20-138.1. He accepted responsibility for his actions. (Coast Guard Exhibit “1”); (Tr. p. 94).

**ACCEPTED IN PART**, as provided in the Decision and Order the evidence of conviction was admitted. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

**ATTACHMENT C**

**NOTICE OF APPEAL RIGHTS**

**33 CFR 20.1001 General.**

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

**33 CFR 20.1002 Records on appeal.**

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

**33 CFR 20.1003 Procedures for appeal.**

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

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

**33 CFR 20.1004 Decisions on appeal.**

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