

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

UNITED STATES COAST GUARD

Complainant

v.

ALBERT LYLE BLACKWELL

Respondent

Docket No: 2011-0047
CG Enforcement Activity No: 3905860

DECISION & ORDER

Date Issued: December 6, 2011

Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant

LT Shawn Merrick, IO
Robert Foster, SIO
U.S. Coast Guard Sector Mobile

For Respondent

John W. Beck, Esq.
The Law Offices of John W. Beck

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector Mobile (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Albert Lyle Blackwell's (Respondent) Coast Guard-issued Merchant Mariner's License (credential). This instant action is brought pursuant to the legal authority codified at 46 USC §7703(2).

On January 31, 2011, the Coast Guard filed a Complaint alleging that on July 29, 2010, Respondent was convicted in the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, for "violating Alabama State Code §13A-13-3, Incest (child victim)." The Coast Guard further alleged that "[a] conviction of Alabama State Code [§] 13A-13-3 Incest (child victim) is a conviction of an offense under the crimes against persons category of 46 CFR 10.211" and its attendant Table. According to the Coast Guard's original Complaint, "[a] conviction of Alabama State Code [§] 13A-13-3 Incest (child victim) is a conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document." Based upon the foregoing allegations, the Coast Guard sought revocation of Respondent's credential as an appropriate sanction.

On September 15, 2011, this matter came on for hearing in Mobile, Alabama, at the United States District Courthouse for the Southern District of Alabama. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 USC §§551-59, and the Coast Guard procedural regulations set forth at 33 CFR Part 20.

Coast Guard Investigating Officer (IO) LT Shawn Merrick and Senior Investigating Officer (SIO) Robert Foster appeared on behalf of the Coast Guard; Respondent appeared through counsel, John W. Beck, Esq., and was present in court.

Both parties appeared, presented their respective cases, and rested. Two witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered three exhibits into evidence, all of which were admitted. Respondent testified on his own behalf and offered the testimony of two additional witnesses. Respondent offered eleven exhibits into evidence, all of which were admitted.¹

The court obtained four additional documents, post-hearing, from the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, and labeled them ALJ Exhibits I – IV. Respondent's counsel provided the court with Respondent's psychological and psychiatric records, post-hearing. The court labeled those records as ALJ Exhibit V.

Prior to adjourning the hearing, the court announced that it would afford the parties an opportunity to submit briefs in support of their respective legal positions upon receipt of the transcript. The court subsequently entered an Order setting deadlines for submission of post-hearing arguments and briefs by the parties.

II. FINDINGS OF FACT

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

¹ Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations referring to Coast Guard Exhibits are as follows: Coast Guard followed by the exhibit number (i.e., CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

1. At all relevant times herein, Respondent Albert Lyle Blackwell was the holder of a Coast Guard-issued Merchant Mariner's License. (credential).
2. On or about July 29, 2010, Respondent Albert Lyle Blackwell was convicted by the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, of violating Alabama State Code § 13A-13-3, Incest. (CG Ex. 2).
3. At all relevant times herein, Alabama State Code § 13A-13-3, Incest, makes no reference to a "child victim."
4. Respondent was sentenced to ten-years' confinement in the Alabama Department of Corrections. His jail time, however, was suspended on condition of his compliance with various probationary orders. (CG Ex. 2). One particular condition of Respondent's probation was that he was/is allowed to leave the State of Alabama during his periods of service as a "Tug Boat Captain." (CG Ex. 2).
5. Mr. James Wilson Crouse, is employed by the Coast Guard's National Maritime Center, Martinsburg, West Virginia, as Chief of the Safety and Suitability Evaluation Branch. Mr. Crouse manages the branch that determines the safety and suitability of applicants for merchant mariner credentials. In that capacity, Mr. Crouse examines the criminal records of all applicants and determines whether there is any evidence "that might make the applicant a threat to the safety of persons on the vessel, life, property, or a threat to the National Security of the United States." (Tr. at 43-45).
6. Mr. James Wilson Crouse is "the" expert on the operation of the Coast Guard's Safety and Suitability Evaluation Branch at the National Maritime Center and the application of Title 46 CFR §10.211, et. seq. (Tr. at 63).
7. Mr. James Wilson Crouse testified that if he had evaluated Respondent's credential application in light of Respondent's criminal conviction for incest he would have denied Respondent's application for a mariner's credential. (Tr. at 68).
8. Mr. James Wilson Crouse also testified that he would not deny another mariner's application for a credential because of a criminal conviction for incest, in part because incest is not an offense listed in Table 10.211(g) (Tr. at 97-98).

9. Mr. James Wilson Crouse's testimony on the question of whether a criminal conviction for incest would preclude issuance of a mariner's credential, although contradictory, was credible.
10. Mr. James Wilson Crouse's determination that Respondent's criminal conviction for incest was the product of a case-by-case post facto, analysis. (Tr. at 79-101).
11. Respondent's marine employer, Mr. Michael Paul Weeks of DeLoach Marine Services, being fully apprised of the nature of Respondent's criminal conviction, regarded him as a safe, trustworthy and competent marine. (Tr. 154-156).
12. Respondent had a twenty-year history of substance abuse, but is presently sober. (Tr. 171-173).
13. Respondent has been diagnosed with "severe attention deficit disorder and alcohol and substance abuse," a significant "mood disorder," Post-Traumatic Stress Disorder, a history of having been sexually abused in his youth, and bi-polar disorder. (Tr. 129-130, 152; Resp. Ex. B).
14. Respondent poses a low risk of recidivism and that he is "fully capable of performing his duties" as the master of a vessel and that he was not unsafe on the seas or waterways. (Tr. at 142-143, 150).
15. The Coast Guard proved that a criminal conviction for incest would preclude issuance or reissuance of a mariner's credential. 46 USC §7703(2).
16. The Coast Guard did not offer proof of aggravating circumstances arising from Respondent's criminal conviction for incest and the potential impact of that conviction (and underlying conduct) on either safety at sea, discipline or the national security.

III. SUMMARY OF DECISION

The instant matter is governed by the interplay of 46 USC §7703(2) and 46 CFR §10.211 (and its attendant Table). The statute provides that a mariner's credential may be suspended or revoked if that mariner is convicted of a criminal offense that would have prevented the original issuance or renewal of that credential. The regulation, in turn, provides a framework for the analysis of a wide spectrum of criminal

offenses vis a vis the original issuance or renewal of a mariner's document. Cases such as these require, essentially, a hindsight determination of whether Respondent would have been denied a credential, ab intio, if the Coast Guard would have known about his criminal conviction.

For the reasons discussed herein, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence, that Respondent Albert Lyle Blackwell was convicted of a criminal offense that would otherwise preclude the issuance of a credential as contemplated by 46 USC §7703(2).

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 USC §7701. Pursuant to 46 CFR §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 USC §7703.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).² Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

² Pursuant to 46 CFR §5.65, “[t]he decisions of the Commandant in cases of appeal . . . are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges.”

B. Jurisdiction

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). “Where an Administrative forum acts without jurisdiction its orders are void.” Appeal Decision 2025 (ARMSTRONG) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decisions 2620 (COX) (2001); 2425 (BUTTNER) (1986); 2025 (ARMSTRONG) (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

In the instant case, the Coast Guard proved that at all relevant times mentioned herein Respondent Albert Lyle Blackwell was the holder of a Coast Guard-issued Merchant Mariner’s credential. That is the only requisite jurisdictional finding necessary in a case such as this.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 USC §7703, and the implementing regulations, 46 CFR Part 5; Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act, 5 USC §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a

preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 CFR §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 450 U.S. 91, 107 (1981)). 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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

D. Discussion of the Evidence

At the hearing, the Coast Guard bore a three-part burden of proof to establish:

1. That Respondent was convicted of a criminal offense, and
2. That the conviction would have prevented the original issuance or renewal of that credential, and
3. An evidentiary basis for revocation of Respondent’s credential.

In this instance, it was undisputed that Respondent was convicted in the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, of violating Alabama State Code §13A-13-3: incest. Respondent did not plead to, nor was he convicted of: rape in the first degree³; rape in the second degree⁴; sodomy in the first degree⁵; sodomy

³ Alabama State Code §13A-6-61.

⁴ Alabama State Code §13A-6-62.

⁵ Alabama State Code §13A-6-63.

in the second degree⁶; sexual misconduct⁷; sexual abuse in the first degree⁸; indecent exposure⁹; or enticing a child to enter a vehicle, house, etc. for immoral purposes.¹⁰

A criminal investigation report indicated that Respondent had engaged in sexual intercourse with his biological child, a daughter, on or about between 2005 and 2008. (CG Ex. 3). The criminal indictment, however, did not specify the number of times Respondent had sex with his daughter, nor on what date(s) or at what precise geographical location(s). Rather, the 2008 Grand Jury indictment only alleges a single accusation of incest, in violation of Alabama State Code §13A-13-3(a)(1). (CG Ex. 2).

Although the Coast Guard's Complaint (and its post-hearing brief) gratuitously, repeatedly, allege that Respondent was convicted of "incest – (child victim)," there is no Alabama statutory element which describes either a "victim" or a "child victim" for the purposes of incest. The Alabama incest statute makes no reference whatsoever to the term "victim" or to the age or specific gender of the parties.¹¹

The record also reflects that on March 3, 2010, Respondent, through counsel, filed a Notice of Intent to Plead Guilty in case no. cc-08-3966 and, specifically, that cases cc-08-3967, cc-08-3964, cc-08-3965 would be resolved, nolle prosequi,¹² that is to say, "without prosecution." (CG Ex. 2). The record further reflects that on July 29, 2010, Respondent entered a plea of guilty to one charge of incest levied in the indictment and that he was sentenced to ten-years' confinement in the Alabama Department of

⁶ Alabama State Code §13A-6-64.

⁷ Alabama State Code §13A-6-65.

⁸ Alabama State Code §13A-6-66.

⁹ Alabama State Code §13A-6-68.

¹⁰ Alabama State Code §13A-6-69.

¹¹ A fair reading of the comments to Alabama State Code §13A-13-3 discloses the legislative intent to specifically avoid making reference to either a "victim" or a "victim's age" or specific relation to the other party. The Section "is limited to defining the relationships which constitute the crime of incest." Id.

¹² Cases "cc-08-3967," "cc-08-3964," and "cc-08-3965" described one charge of incest and two charges of rape, second degree (sex with a person under the age of 16). (ALJ Ex. I, III, & IV).

Corrections—jail time suspended, conditioned upon on his compliance with various court orders. (CG Ex. 2).

In addition to the fact that he was not incarcerated, Respondent’s probation specifically allowed him to leave the State of Alabama during his periods of service as a “Tug Boat Captain.” (CG Ex. 2).

Title 46 USC §7703(2) directs that if a credentialed-mariner is convicted of a criminal offense, that credential may be either suspended or revoked if that criminal offense is one which would have precluded original issuance or renewal of that credential. As a matter of practice, in cases such as these, the court is asked to look back in time to determine whether a credential would have been originally issued (or reissued) to a mariner, if had the Coast Guard known of the conviction at the time.

The regulatory scheme provided at 46 CFR Subpart B, and most particularly at 46 CFR §10.211, et. seq., provides the framework for appropriate Coast Guard officials to determine whether a mariner is an appropriate candidate for original issuance or renewal of his/her credential.

That the Coast Guard engages in a post facto determination of whether a criminal conviction for incest would have been disqualifying plainly raises Constitutional issues of notice, vagueness and due process.¹³ Those inquiries, while intriguing, must be resolved another day.¹⁴

¹³ Respondent’s Post-Hearing Brief contends that the Coast Guard’s procedure in such cases is unconstitutional because it does not provide advance notice to a mariner of what conduct is proscribed. Respondent argues that the decision whether a given criminal offense is disqualifying is an entirely ad hoc, subjective decision whereby a mariner could never know—in advance of his conduct—if he was exposing himself to the jeopardy of a Suspension and Revocation proceeding. The legal touchstone, here, is one of prior notice. In United States v. Lanier, 520 U.S. 259, 265 (1997), the Supreme Court said that the fundamental requirement of a law is that it must provide adequate advanced notice of what is proscribed; it is what Justice Holmes described as fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line

The immediate factual question before this court is whether Respondent's conviction for incest would have prevented the original issuance or renewal of a credential, per 46 USC §7703(2).

To reiterate, 46 CFR Subpart B, and most particularly at 46 CFR §10.211, et. seq. appear to define the procedures employed by the Coast Guard in determining a mariner's original fitness for a credential.¹⁵ There is no reference in any of the regulations that

should be clear. Id. (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In other words, no person should be held responsible for conduct which he or she could not reasonably understand to be proscribed. Id. at 265-66. This is the essence of the “vagueness doctrine.” This is the essence of Respondent's objections to the Coast Guard's regulation, here, and the procedures it follows in attempting to revoke his credential, based upon his criminal conviction. See Appeal Decision 2074 (LOWEN) (1976) “For Appellant to be found to have committed misconduct as alleged he must be shown to have actual or constructive notice that his actions were wrongful.”

¹⁴ Those Commandant's Decisions on Appeal (CDOAs) that touch upon constitutional concerns provide conflicting guidance. In Appeal Decisions 2613 (SLACK) (1999) and 1862 (GOLDEN) (1971), the Commandant bluntly said of Constitutional questions: —“[i]f appellant wishes to complain about my [regulatory] definitions and interpretations he is free to do so, but this is not the forum in which he will obtain his desired remedy.” Such logic is perplexing as both SLACK and GOLDEN rely upon appellate authority that says an ALJ cannot hold a statute unconstitutional; however, neither case cites federal appellate authority on the question whether an agency, or an ALJ, can hold a regulation unconstitutional. Accord, Appeal Decision 2202 (VAIL) (1980).

Yet in Appeal Decision 2632 (WHITE) (2002), the Vice Commandant said: — “[w]ith respect to determinations of Constitutionality, the courts have long held that ‘ . . . an . . . agency may always determine questions about its own jurisdiction.’” Id. (internal citations omitted). Therefore, WHITE undercuts the blanket prohibition advanced by SLACK and GOLDEN and says that an ALJ may, in fact, determine constitutional questions about agency jurisdiction in Suspension and Revocation cases.

A review of Supreme Court and federal circuit authority renders mixed results. In Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994), the Supreme Court shed light on the authority of an administrative agency's authority to rule on the constitutionality of a congressionally-enacted statute wherein the Court noted its agreement that —“adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies (citations omitted). This rule is not mandatory . . .” Id. at 215 (emphasis added). Thus, Thunder Basin begs the question whether, if a federal administrative agency has the power to hold a statute unconstitutional, would it not have a more probable authority to hold a regulation unconstitutional? The Supreme Court has not squarely addressed that question.

In McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States, 264 F.3d 52, reh'g en banc den., 278 F. 3d 29, cert. den. 537 U.S. 821 (D.C. Cir. 2001), the court said that administrative agencies have an obligation to address properly presented constitutional claims which do not challenge agency actions mandated by Congress. In the instant case, Respondent does not suggest that the Coast Guard's institution of revocation proceedings be ruled unconstitutional. Rather, he contends that the regulations under which he was charged (i.e., 46 CFR §10.211, et. seq.) be ruled unconstitutional; and as such, he does not challenge a Congressionally-mandated duty imposed on the Coast Guard.

¹⁵ Interestingly, Title 46 CFR §10.211(a) says that a criminal record review of a prospective mariner is permissive—not mandatory. (Query: If not all original credential applications require a criminal record review, why would Respondent be subject to such a review?)

dictates a certain outcome; that is, there is no “list” of automatically-disqualifying offenses. Nor is there a “bright line” rule or test which clearly states who will (and who will not) receive a credential. Rather, the regulations provide suggestive guidance for the Coast Guard decision-maker at the National Maritime Center.

Subsection (d) of 46 CFR §10.211 asks if the criminal record review reveals whether the applicant is “not a safe and suitable person or cannot be entrusted with the duties and responsibilities of [the credential].” The definition of a “safe and suitable person” is found at 46 CFR §10.107, which reads:

[Safe and suitable] means a person whose prior record, including but not limited to criminal record . . . provides no information indicating that his . . . character and habits of life would support the belief that permitting such a person to serve under the [credential] . . . would clearly be a threat to the safety of life or property, detrimental to good discipline, or adverse to the interest of the United States. (emphasis added)

Based upon a plain reading of the definition, the requirement is clear that the mariner’s character and habits of life must have a demonstrable nexus, or direct relation, to either safety, discipline or the interests of the United States. Proof of this nexus is part-and-parcel of the Coast Guard’s burden.

Subsection (g) of the regulation directs an appropriate Coast Guard decision-maker to use “Table 10.211(g) to evaluate applicants who have criminal convictions,” but cautions that the table is not an all-inclusive list of criminal behavior.

Taken together, however, the court reads to foregoing regulations and table to permit an appropriate Coast Guard official to make a case-by-case determination whether mariner’s “character and habits of life” bear a direct nexus to safety at sea, discipline aboard a maritime vessel or the national interest.

As the facts and evidence produced at the hearing revealed, that ad hoc determination in the instant case was, and is, a highly individualized process.

The court heard extensive testimony from Mr. James Wilson Crouse. Mr. Crouse is employed by the Coast Guard's National Maritime Center, in Martinsburg, West Virginia. Mr. Crouse, a retired Coast Guard officer, presently serves the as the Chief of the Safety and Suitability Evaluation Branch. (Tr. at 43-44). Mr. Crouse manages the branch that "determines the safe and suitability of applicants for merchant mariner" credentials. (Tr. at 44). In that capacity, Mr. Crouse examines the criminal records of all applicants and determines whether there is any evidence "that might make the applicant a threat to the safety of persons on the vessel, life, property, or a threat to the national security of the United States." (Tr. at 45). (The court accepts Mr. Crouse's definition of the regulatory phrase "interests of the United States" to mean "the national security of the United States.")

Plainly said, Mr. Crouse is "the" expert on the operation of the Coast Guard's Safety and Suitability Evaluation Branch at the National Maritime Center and the application of Title 46 CFR §10.211, et. seq. to credential applications. (Tr. at 63).

As the cornerstone of the Coast Guard's case, Mr. Crouse testified that if he had evaluated Respondent's incest conviction in light of the appropriate regulations and table, he would have denied Respondent's original application for a mariner's credential. (Tr. at 68).

It is upon this testimony that the Coast Guard's case rests: that based upon Mr. Crouse's post facto analysis, Respondent's conviction was "an offense that would prevent

the issuance or renewal” of a credential because he thought a conviction for incest was not “good character and habits of life.” (Tr. at 76).

Mr. Crouse explained that incest renders Respondent an inherently unsuitable mariner, saying “it abandons certain social values that inherent in being a military officer, being an officer aboard a vessel. It abandons moral fortitude.” (Tr. at 87). (Query: Mr. Crouse’s reference to Respondent’s service as a ‘military officer?’) This testimony constituted the Coast Guard’s proof that Respondent’s “character and habits of life” bear a nexus to either safety or discipline.¹⁶

Thus, the Coast Guard presented honest, but contradictory testimony from the same witness regarding the import of a criminal conviction for incest. On the one hand, Mr. Crouse testified he would deny/revoke this Respondent’s credential because of a conviction for incest—and, on the other hand, would not deny another mariner a credential in the event of a conviction for the same crime.

The court accepts as credible Mr. Crouse’s view of “what would have happened” had Respondent’s conviction (and the unique and the particular facts of his case) preceded his original application for a credential. In this case, the court assigns great weight to Mr. Crouse’s expertise and his authority as the Coast Guard’s decision maker on applications. The court defers to his statement that in this particular case, Respondent’s application would have been denied. Thus, given the lessened standard of proof—here, only by a mere preponderance—the Coast Guard met its burden of proof.

¹⁶ It must be noted, however, that Mr. Crouse admitted that in other circumstances, he would not deny a mariner’s application for a credential because of a criminal conviction for incest. (Tr. at 97-98). Mr. Crouse further added that he would not revoke or deny a mariner’s credential because “incest” was “not here on the table.” [Table 10.211(g)] (Tr. at 98).

V. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At all relevant times herein, Respondent Albert Lyle Blackwell was the holder of a Coast Guard-issued Merchant Mariner's License (credential).
2. On or about July 29, 2010, Respondent Albert Lyle Blackwell was convicted by the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, of violating Alabama State Code § 13A-13-3, Incest. (CG Ex. 2).
3. Respondent was sentenced to ten-years' confinement in the Alabama Department of Corrections. His jail time, however, was suspended on condition of his compliance with various probationary orders. (CG Ex. 2). (CG Ex. 2).
4. The Coast Guard proved that Respondent Albert Lyle Blackwell's unique criminal conviction for incest would preclude issuance or reissuance of a mariner's credential. 46 USC §7703(2).
5. The Coast Guard did not offer proof of aggravating circumstances arising from Respondent's criminal conviction for incest and the potential impact of that conviction (and underling conduct) on either safety at sea, discipline or the national security.

VI. SANCTION

It is appropriate at this juncture to ensure this Decision and Order is read in the appropriate light; to understand what these proceedings are and what they are not. These are administrative licensure proceedings. As the Commandant has repeatedly said, the purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. Appeal Decision 2689 (SHINE) (2010). See also 46 USC §7701.

These are not criminal proceedings. The criminal prosecution and sentencing of Respondent -- indeed, the vindication of the public's outrage -- were, and are, the sole province of the State of Alabama. It is not for this court, or any other, to supplant its wisdom for that of the Alabama criminal court. Rather, this court's hand must be guided

entirely by the applicable law and not by human passions that certainly arise, given the circumstances underlying Respondent's conviction.

Title 46 US Code §7703(2) says that a mariner's credential may be suspended or revoked upon proof the mariner was convicted of an offense that would have prevented the original issuance or renewal of that credential. Hence, the court is vested with the discretion to assign either a suspension or a revocation in cases such as these, based upon the evidence and 46 CFR §5.569 and its attendant table.

The court notes that neither 46 CFR §5.569, nor its attendant table, address cases such as the one at bar. There simply is no provision for a mariner who has been convicted of a criminal offense that would preclude the original issuance or reissuance of a credential. Table 5.569 does make provision for "Failure to comply with U.S. law" and suggests a suspension of between one and three months. There is no other category that comes closer to the issue at bar.

Although the court has found that Respondent's conviction was one which would have precluded the original issuance/renewal of a credential; the Coast Guard nevertheless failed to prove why Respondent's credential ought be revoked.

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 CFR §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 USC §7701; 46 CFR §5.5; Appeal Decision 1106 (LABELLE) (1959).

Title 46 CFR §5.569 says that “except for acts of offenses for which revocation is mandatory,” the court should consider three salient factors in assessing an appropriate order. Those factors are:

Remedial Action: Here, Respondent provided evidence that he sought psychiatric and psychological counseling to assist him with his various diagnoses which contributed to the commission of the crime of incest. (Resp. Ex. A, B).

Respondent admitted that his incestuous conduct with his daughter was facilitated, in part, by his life-long alcoholism and drug abuse. He testified that he had a twenty-year history of substance abuse, but that he is presently sober. (Tr. 171-173). Respondent’s treating psychologist, Dr. Daniel Koch, testified that he had diagnosed Respondent with “severe attention deficit disorder and alcohol and substance abuse,” a significant “mood disorder,” and a history of having been sexually abused in his youth. The Respondent’s medical records also reveal diagnoses of Bi-polar Disorder and Post Traumatic Stress Disorder. (Tr. 129-130, 152).

Respondent testified that he had never consumed alcohol or used illegal drugs while aboard a vessel. (Tr. at 173). His employer testified that Respondent had never failed or refused a drug test. (Tr. at 157). Dr. Koch generally opined that Respondent did not pose a risk of recidivism. (Tr. at 150). Moreover, Dr. Koch testified that despite his several diagnoses, Respondent is “fully capable of performing his duties” as the master of a vessel and that he was not unsafe on the seas or waterways. (Tr. at 142-143).

Because the Coast Guard offered no evidence to rebut Respondent’s efforts at remediation, the court accepts them as proven.

Respondent's Prior Records: The court notes that the Respondent held a 100-ton license, Issue No.4, which had not been the subject of previous disciplinary action.

The court also heard testimony from Mr. Michael Paul Weeks, an operations and risk manager for Respondent's employer, DeLoach Marine Services. (Tr. at 154-155).

Mr. Weeks testified that Respondent's service as a vessel Master was "flawless....I can't say enough about him. He's a good employee" (Tr. at 156). Specifically, Mr. Weeks said that he was fully aware of the nature of Respondent's criminal offense, and testified:

The Court: Now, when you received that information, did that cause you any concern about the Respondent's fitness for employment with your company or his ability to safely command or navigate a vessel?

Mr. Weeks: No.

(Tr. at 164-165)

Respondent's other supervisors and co-workers, who provided written statements in support of Respondent, were in accord. Because it is unknown whether those other supervisors and co-workers were aware of Respondent's criminal conviction or the underlying circumstances, the court assigns only marginal probative weight to those opinions. (Resp. Ex. D - K).

The Coast Guard produced no evidence of any prior sanctions or disciplinary action. Moreover, the Coast Guard simply did not present any evidence which related Respondent's conviction to either safety at sea, discipline or the national security. This failure weighed heavily in the court's decision when assigning an appropriate sanction.

Mitigation or Aggravation: The Coast Guard presented no probative evidence (beyond speculative argument) in aggravation stemming from Respondent's conviction. The Coast Guard's post-hearing brief stated: "Let it be noted that none of the substance

abuse was ever noted on [Respondent's] application for Coast Guard credentials, a matter of aggravation in this case." (emphasis added). The Coast Guard badly misapprehends the nature of aggravating evidence. Aggravation means the adverse impact of a respondent's offense upon factors related to safety at sea. (If the Coast Guard wanted to charge Respondent for failing to disclose his addiction on a credential application, then it ought to have done so. Thus, the court will not consider uncharged misconduct as an aggravating factor.)

The Coast Guard might have offered affirmative proof of how a conviction for incest (or the underlying conduct) might pose a threat to safety at sea, discipline, or the national security; but it did not. This omission weighed heavily in the court's determination of an appropriate sanction. In fact, the Coast Guard's only evidence in regard to mitigation or aggravation was Coast Guard Exhibit 2, a court order allowing Respondent to leave the State of Alabama during periods of service as a mariner. The Coast Guard's own evidence militates against an order of revocation.

VII. CONCLUSION

No one should read this decision as an endorsement of Respondent's behavior or whether this court personally believes Respondent is a suitable and safe mariner. Rather, this decision is guided by the applicable law and is based solely upon the facts adduced at the hearing and the controlling regulations. For the reasons discussed above, the Court finds the Coast Guard has **PROVED** the allegation that Respondent was convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document (credential). The Coast Guard did not, however, provide an evidentiary basis for the revocation it proposes.

Using Table 5.569 and the evidence as a basis, Respondent's credential is therefore **SUSPENDED** for three months. Revocation is not appropriate herein as the Coast Guard failed to produce any factors in aggravation, etc. as discussed, supra.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations contained in the Coast Guard's Complaint were **PROVED** and that Respondent Albert Lyle Blackwell's Coast Guard-issued Merchant Mariner's License is **SUSPENDED FOR THREE MONTHS**.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of 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 the 6th day of December, 2011,
at New Orleans, Louisiana.



**HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD**

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Albert Blackwell Merchant Mariner's Document Application and credential (5 pages)
2. State of Alabama v. Blackwell, Albert, Mobile County, Alabama Circuit Court Case No. CC-2008-003966 certified records (11 pages)
3. Mobile Police Department, Follow-Up Investigative Report, dated May 20, 2008 (12 pages)

COAST GUARD WITNESSES

1. Cpl. Michael Shavers, Mobile Police Department
2. James Wilson Crouse, United States Coast Guard National Maritime Center

RESPONDENT EXHIBITS

- A. C. Van Rosen, Ph.D., P.C., Outpatient Forensic Evaluation Report, dated September 8, 2008 (11 pages)
- B. Mobile Psychological Associates, Evaluation Report, dated May 26, 2010 (3 pages)
- C. River Oaks Hospital, Medical Records, (116 pages)
- D. Breton J. Mcvay, Character Reference Letter, dated April 21, 2010 (1 page)
- E. Laura Chatom, Character Reference Letter, dated April 21, 2010 (1 page)
- F. Bryan Englett, Character Reference Letter, dated May 3, 2011 (1 page)
- G. Larry Fitch, Owner-Operator Mohawk Transportation, LLC, Character Reference Letter, dated April 16, 2008 (1 page)
- H. Brendan L. Mclaughlin, Character Reference Letter, dated April 21, 2010 (1 page)
- I. Thomas R. Paine, General Manager Deloach Marine Services, Character Reference Letter, dated September 14, 2011 (1 page)
- J. Frank Yoho, Port Captain Deloach Marine Services, Character Reference Letter, dated September 14, 2011 (1 page)
- K. Michael Paul Weeks, Safety-Claims-Training Deloach Marine Services, Character Reference Letter, dated September 14, 2011 (1 page)

RESPONDENT WITNESSES

1. Dr. Daniel Koch
2. Michael Paul Weeks, Deloach Marine Services
3. Albert Blackwell

ALJ EXHIBITS

- I. State of Alabama v. Blackwell, Albert, Mobile County, Alabama Circuit Court Case No. CC-2008-003967 certified records (7 pages)
- II. State of Alabama v. Blackwell, Albert, Mobile County, Alabama Circuit Court Case No. CC-2008-003966 certified records (7 pages)

- III. State of Alabama v. Blackwell, Albert, Mobile County, Alabama Circuit Court Case No. CC-2008-003965 certified records (7 pages)
- IV. State of Alabama v. Blackwell, Albert, Mobile County, Alabama Circuit Court Case No. CC-2008-003964 certified records (8 pages)
- V. Respondent psychological/psychiatric records:
 - C. Van Rosen, Ph.D., P.C. Outpatient Forensic Evaluation Report, dated September 8, 2008 (11 pages)
 - Authorship unknown, handwritten note, dated July 28, 2009 (1 page)
 - MMPI-2 Extended Score Report, dated July 28, 2009 (15 pages)
 - Carl Brutkiewicz, M.D., office notes, dated August 4, 2009 (1 page)
 - Authorship unknown, handwritten note, dated September 14, 2009 (1 page)
 - T.O.V.A. Visual Performance Test Report, dated October 22, 2009 (6 pages)
 - Authorship unknown, unknown text, p. 220 “Diagnostic Categories,” handwritten notes by unknown author and hand dated October 22, 2009 (1 page)
 - Authorship unknown, drawing of female, dated October 22, 2009 (1 page)
 - Authorship unknown, drawing of a house, dated October 22, 2009 (1 page)
 - Mobile Psychological Associates, evaluation report, dated May 26, 2010 (3 pages)
 - Authorship unknown drawing of a house, dated October 22, 2009 (1 page)
 - Authorship unknown, drawing of a tree, dated October 22, 2009 (1 page)
 - Carl Brutkiewicz, M.D., office notes, dated October 26, 2009; November 2, 2009; November 23, 2009; March 8, 2010; April 22, 2010 (1 page)
 - Authorship unknown, handwritten notes, dated April 22, 2010 (1 page)
 - Carl Brutkiewicz, M.D., office notes, dated April 22, 2010; June 2, 2010 (1 page)

ALJ WITNESS LIST

none

ATTACHMENT B – NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

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

33 CFR 20.1002 Records on appeal.

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

33 CFR 20.1003 Procedures for appeal.

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

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

33 CFR 20.1004 Decisions on appeal.

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