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

UNITED STATES COAST GUARD
Complainant

vs.

ROBERT JAMES DUPONT, III
Respondent

Docket Number 2012-0001
Enforcement Activity No. 4200528

DECISION & ORDER

Date Issued: July 3, 2012

Issued By: Honorable Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant
LT Kirstin Sullivan, IO
U.S. Coast Guard Marine Safety Unit Baton Rouge
CPO Cynthia Godwin, IO
U.S. Coast Guard Sector New Orleans

For the Respondent
Yigal Bander, Esq.
Manassen, Gill, Knipe, & Belanger, P.L.C.

I. PRELIMINARY STATEMENT

The United States Coast Guard Marine Safety Unit Baton Rouge ("Coast Guard") initiated the instant administrative action seeking revocation of Respondent Robert James Dupont, III's ("Respondent") Coast Guard-issued Merchant Mariner's Credential ("credential" or "MMC"). The instant action is brought pursuant to the legal authority codified at 46 USC §7703(2).

On January 3, 2012, the Coast Guard filed an original Complaint alleging that on August 8, 2011:

> Respondent was convicted by the 18th Judicial District, Iberville Parish, Louisiana, of Second Degree Battery, a felony violation of Louisiana Code Title 14 Criminal Law: Revised Statute 14:34:1, and that a conviction of Second Degree Battery… is a criminal conviction that would be subject to evaluation by the Coast Guard under Title 46, Code of Federal Regulations, Section 10.211 for a determination of safety and suitability for issuance of a [MMC].[sic]

The Coast Guard further alleged, "Respondent's felony conviction, as described above, is a conviction which would prevent the issuance or renewal of a [MMC] . . . as described by Title 46, U.S. Code Section 7703(2)." Based upon the foregoing allegations, the Coast Guard sought revocation of Respondent's credential as an appropriate sanction.

On January 5, 2012, the Coast Guard filed an Amended Complaint amending the original citations of 46 CFR §10, Ta. 10.211(g) to 46 CFR §12, Ta.12.02-4(c).[1] The Amended Complaint again alleged that on August 8, 2011:

> Respondent was convicted by the 18th Judicial District, Iberville Parish, Louisiana, of Second Degree Battery, a felony violation of Louisiana Code Title

[1] The Coast Guard's Amended Complaint sought to change a citation from 46 CFR §10, Ta. 10.211(g) in the fourth paragraph of the "Factual Allegations" in the original Complaint, to the amended citation, 46 CFR §12 Ta. 12.02-4(c). However, the fourth paragraph of the Coast Guard's Original Complaint does not cite to 46 CFR §10, Ta. 10.211(g). The third paragraph cites to 46 CFR §10, Ta. 10.211(g). Therefore, the Coast Guard incorrectly stated the changes it intended to make to the third paragraph of the Amended Complaint. Furthermore, 46 CFR §12, Ta.12.02-4(c) was relocated to 46 CFR §10, Ta. 10.211(g). As such, the Coast Guard's Original Complaint contained the correct CFR citations, and the Coast Guard's Amended Complaint contains incorrect CFR citations. Respondent did not object to either the change or the error and waived any claim of legal prejudice. (Tr. 11).

> 14 Criminal Law: Revised Statute 14:34:1, and that a conviction of Second Degree Battery . . . is a criminal conviction that would be subject to evaluation by the Coast Guard under Title 46, Code of Federal Regulations, Part 12 for a determination of safety and suitability for issuance of a [MMC].[sic]

The Coast Guard further alleged, "Respondent's felony conviction, as described above, is a conviction which would prevent the issuance or renewal of a [MMC] . . . as described by Title 46, U.S. Code Section 7703(2)." Based upon these allegations, the Coast Guard sought revocation of Respondent's credential as an appropriate sanction.

On February 29, 2012, Respondent filed an Answer to the Amended Complaint.

On March 1, 2012, the Chief Administrative Law Judge assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication.

On April 3, 2012, the court convened a telephonic pre-hearing conference wherein the court and parties discussed hearing dates/locations, and discovery deadlines.

On May 29, 2012, this matter came on for hearing at the U.S. Coast Guard Administrative Law Judge Courtroom, in the Hale Boggs Federal Building, in New Orleans, Louisiana.[2] The hearing was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 USC §§551-559, and the Coast Guard procedural regulations as set forth in 33 CFR Part 20. Coast Guard Investigating Officers (IOs) LT Kirstin Sullivan and CPO Cynthia Godwin appeared on behalf of the Coast Guard; Respondent was represented by counsel, Yigal Bander, Esq., and was present in court.

II. SUMMARY OF DECISION

The instant matter is governed by 46 USC §7703(2). That statute provides that a mariner's credential may be suspended or revoked if the mariner is convicted of a criminal offense that would have prevented the original issuance or renewal of the credential.

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[2] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number

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

III. 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. At all relevant times herein, Respondent Robert James Dupont, III was the holder of a Coast Guard-issued Merchant Mariner Credential.

2. On or about August 8, 2011, Respondent Robert James Dupont, III was convicted in a court of the 18th Judicial District, Iberville Parish, Louisiana, for violating La. Rev. Stat. Ann §14:34.1, Second Degree Battery. (CG Ex. 1).

3. Respondent Robert James Dupont, III's criminal conviction arose from an April, 2010 bar-fight wherein Respondent was intoxicated and had "blacked out." (Tr. 113 - 114).

4. Second Degree Battery is defined by the Louisiana Criminal Code as a crime that is committed by the intentional infliction of "serious bodily injury," meaning a bodily injury which involves unconsciousness, "extreme physical pain, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death." La. Rev. Stat. Ann §14:34.1 (Tr. 132).

5. James Wilson Crouse is Chief of the Safety and Suitability Evaluation Branch of the Coast Guard's National Maritime Center in Martinsburg, West Virginia. Mr. Crouse supervises 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 of possibility of an unsafe or unsuitable merchant mariner." (Tr. 24 - 25).

6. James Wilson Crouse testified that if he had evaluated Respondent Robert James Dupont, III's criminal conviction for Second Degree Battery, he would have denied Respondent's application for a mariner's credential. (Tr. 51).

7. The Coast Guard did not offer any affirmative proof of aggravating circumstances arising from Respondent Robert James Dupont, III's criminal conviction for

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(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.).

Second Degree Battery and the potential impact of that conviction (and underlying conduct) on either safety at sea, discipline, or the national security.

8. Respondent Robert James Dupont, III's treating psychologist, Dr. Curtis M. Vincent, testified that he diagnosed Respondent Robert James Dupont, III with alcohol abuse disorder (in remission) and a generalized anxiety disorder that caused him discomfort when around other people. (Tr. 76 - 77).

9. Respondent Robert James Dupont, III's anxiety worsens when he is around other people and is "much worse in group situations." (Tr. 85).

10. As captain of a fishing charter boat, Respondent Robert James Dupont, III is often surrounded by groups of people who may consume alcohol. (Tr. 61).

11. Respondent Robert James Dupont, III's treating psychologist, Dr. Curtis M. Vincent, prescribed that Respondent attend Alcoholics Anonymous and that Respondent had not attended Alcoholics Anonymous meetings. (Tr. 84).

12. Respondent Robert James Dupont, III has not started Alcoholics Anonymous because he does not believe that Alcoholics Anonymous works. (Tr. 101, 112).

13. Respondent Robert James Dupont, III denied that he is an alcoholic. (Tr. 114 – 115).

14. Respondent Robert James Dupont, III admitted that he is an alcoholic. (Tr. 116).

15. Respondent Robert James Dupont, III started drinking when he was about fifteen years old and has, in the past, consumed enough alcohol to have blackouts. (Tr. 114 - 115).

16. Respondent Robert James Dupont, III was involved in other alcohol-related incidents, including Driving Under the Influence, before the crime for which he was convicted. (Tr. 115)

IV. DISCUSSION

A. General

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea, per 46 USC §7701(a).

In Suspension and Revocation hearings, the ALJ has broad discretion in making credibility determinations and in resolving inconsistencies in the evidence. Appeal Decision 2519 (JEPSON) (1991).

The ALJ's findings must be supported by sufficient evidence in the record, but need not

be consistent with all of the evidentiary material presented at the hearing. See Appeal Decision 2685 (MATT) (2010) (citing Appeal Decision 2395 (LAMBERT) (1985)).

Pursuant to 46 CFR §5.19, an ALJ has the authority to admonish, suspend, or revoke a mariner's credential for certain violations. Here, however, 46 USC §7703(2) limits the range of possible sanctions to either suspension or revocation. An admonishment is apparently not an available sanction, here, by operation of the statute.

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 Decision 2425 (BUTNER) (1986). See also Appeal Decision 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 Robert James Dupont, III was the holder of a Coast Guard-issued MMC. Respondent did not contest jurisdiction. Hence, this court is vested with jurisdiction to adjudicate this case.

C. Burden of Proof

The Administrative Procedure Act (APA), 5 USC §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes the imposition of sanctions when the charges are supported by reliable, probative, and substantial evidence, upon a consideration of the entire record as a whole. See 5 USC §556(d) (2012). The

Coast Guard bears the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 CFR §§20.701-02. See Appeal Decisions No. 2468 (LEWIN) (1998); 2477 (TOMBARI) (1988). See also Dept. of Labor v. Greenwich Colleries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 101-03 (1981). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 CFR §§20.701-02; 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)).

In this case, the Coast Guard alleged that Respondent was convicted of a criminal offense that would prevent the issuance or reissuance of an MMC per the provisions of 46 USC §7703(2).

In this case, the Coast Guard bears 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. That an evidentiary basis for revocation of Respondent's credential exists.

Thus, it is appropriate to address each element of the Coast Guard's case vis á vis Respondent.

1. Criminal Conviction

Here, the uncontroverted evidence established that Respondent was convicted of Second Degree Battery in the court of the 18th Judicial District, Iberville Parish, Louisiana. (CG Ex. 1). Second Degree Battery is a felony and is described in Louisiana Revised Statutes Annotated 14:34.1 as an act "when the offender intentionally inflicts serious bodily injury . . . '[S]erious bodily injury' means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death." Id.

Respondent entered a plea of "No Contest," and was sentenced to serve five years with the Department of Corrections. (CG. Ex. 1). However, Respondent's sentence was suspended, and instead, Respondent was ordered to serve three years of probation, to pay monetary fines, and to perform thirty-two hours of community service. Id. Respondent's probation was terminated early on January 5, 2012, by an Order from the 18th Judicial District Court, Parish of Iberville, Louisiana. (Resp. Ex. B).

Respondent testified that his conviction arose from a drunken altercation he had in a bar. (Tr. 113 - 114).

The court is satisfied that Respondent was convicted of the foresaid felony.

2. A conviction that "would prevent" issuance or reissuance of a credential

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 prevent" the original issuance or renewal of that credential.

The sole inquiry in this part of the analysis is simply whether a conviction for Second Degree Battery in Louisiana "would prevent" the issuance or reissuance of an MMC. Per a plain

reading of 46 USC §7703(2), that is the only inquiry here; not what methodology or analysis the Coast Guard might have employed in determining whether a mariner is a suitable candidate, not whether the applicant is a safe and suitable mariner, nor what an "assessment period" might reveal, etc. Title 46 USC §7703(2) does not ask what use the Coast Guard makes of a criminal conviction in the credential application process.

A classic rule of statutory construction provides assistance, here. The "plain meaning rule"[3] dictates that the term "would" means "certainty" or "necessarily" or at least, a high degree of probability. See Fund for Animals v. Babbitt, 903 F. Supp. 96, 111 (D. D.C. 1995), amended 967 F. Supp. 6 (D. D.C. 1997); U.S. Cas. Co. v. Kelly, 50 S.E.2d 238, 240 (1914).

Thus, in this case, the Coast Guard must prove, and the court must find, only that Respondent's Louisiana conviction for Second Degree Battery certainly or necessarily prevented original issuance or reissuance of a credential.

In its Amended Complaint and at trial, the Coast Guard described a process whereby it looks back in time to determine, hypothetically, whether a credential would have been originally issued (or reissued) to Respondent, had the Coast Guard known of the conviction at the time. The Coast Guard's hindsight analysis is driven by 46 CFR Subpart B, and particularly 46 CFR §10.211, et seq.[4] Those are the regulations the Coast Guard uses, on a case-by-case basis, as an analytical framework to determine whether a given mariner is an appropriate candidate for a

[3] In United States v. Caminetti, 242 U.S. 470, 490 (1917), the Court said: "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning…[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." Id. See also United States v. Gonzales, 520 U.S. 1, 6, (1997).

[4] 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?)

credential. (Tr. 23). After that analysis, the Coast Guard then decides whether to issue or reissue a MMC to an applicant.

Although those regulations are a useful tool for Coast Guard officials in its daily operations -- those regulations neither address the sole requirement of 46 USC §7703(2), nor the court's inquiry, here. The statute requires only that the agency prove that a given criminal conviction would prevent issuance of a credential, without reference to any other consideration. Thus, the Coast Guard's reliance upon the operation of 46 CFR Subpart B, and particularly 46 CFR §10.211, et seq., in hearings such as these, is misplaced.

For instance, the regulatory framework in 46 CFR Subpart B, does not inform whether a given criminal conviction is one which "would prevent" original issuance or reissuance of a mariner's credential. Neither does the regulatory framework provide a "list" of automatically-disqualifying criminal offenses. Nor is there a "bright line" rule or test which clearly states who will (and who will not) receive a credential. Simply said, none of the regulations dictate an outcome certain.

The regulatory framework only creates a method by which each individual applicant's file is originally evaluated, resulting in an ad hoc -- case by case analysis [5] -- which is plainly at odds with the simple certainty required by the statute at issue, 46 USC §7703(2).

At the hearing, the court heard extensive testimony from James Wilson Crouse. Mr. Crouse is employed by the Coast Guard's National Maritime Center, in Martinsburg, West Virginia. (Tr. 22 – 23). Mr. Crouse presently serves the as the Chief of the Safety and Suitability Evaluation Branch. Mr. Crouse supervises the reviewing board that "determines the safety and suitability of applicants for merchant mariner credentials." (Tr. 24). When applicants have past

[5] That the Coast Guard engages in a post facto analysis of whether a given criminal conviction would have prevented original issuance or reissuance plainly raises a variety of legal questions. Query: Whether a mariner can know, in advance of his conduct, whether his conviction is one which "would prevent" issuance of a credential? However, here, Respondent did not allege any affirmative defense, nor did he raise a question of the Constitutionality of 46 USC §7703(2). But see United States v. Lanier, 520 U.S. 259, 265 (1997).

criminal convictions, Mr. Crouse personally examines the applications to determine whether the applicant is a threat to safety of persons on the vessel, life, property, or a threat to the national security of the United States. (Tr. 27). In short, Mr. Crouse uses 46 CFR Subpart B on a daily basis to analyze credential applications.

As Mr. Crouse's testimony revealed, the ad hoc determination of a mariner's suitability was, and is, a highly individualized, case-by-case process. (Tr. 22 - 54).

Although enlightening, much of Mr. Crouse's testimony was irrelevant to the simple question at bar: Whether Respondent's conviction for Second Degree Battery "would prevent" issuance of a mariner's credential.

In this case, however, Mr. Crouse testified that if he had evaluated Respondent's conviction for Second Degree Battery, he would have denied Respondent's application for a mariner's credential. (Tr. 51). It is upon that simple statement that the Coast Guard's case rests entirely.

It is true, as Respondent's counsel pointed out, that Mr. Crouse had not reviewed Respondent's character references or employment history (Tr. 32); or Respondent's participation in an anger-management program or his successful completion of probation (Tr. 33); or Respondent's payment of restitution or performance of community service (Tr. 34). However, those infirmities serve only to impugn the hypothetical process Mr. Crouse might have used, employing 46 CFR Subpart B, and particularly 46 CFR §10.211, et seq., had he reviewed Respondent's entire file for an original credential application.

Unfortunately for Respondent, the result of the Coast Guard's analysis of a hypothetical application is not the question before the court.

The only question here is whether Respondent's conviction for Second Degree Battery "would prevent" issuance of a credential, not whether Respondent's original application would

have been successful. To reiterate: Title 46 USC §7703(2) does not ask whether a Coast Guard analysis of an application would result in a denial. The statute asks only whether a mariner was convicted of an offense that "would prevent" original issuance of that credential. In that regard, the other contents of Respondent's application file or what use Mr. Crouse may have made of them are irrelevant to the salient question.

Absent a thorough, empirically-based challenge, (i.e., evidence of how frequently a conviction for Second Degree Battery actually prevents issuance or reissuance of a credential or a statistical analysis of the frequency a given crime results in the denial of a credential) the agency must prevail in this case.

The Coast Guard presented Mr. Crouse's testimony and a certified copy of Respondent's conviction and rested. This quantum of proof meets the "preponderance" standard applicable in Suspension and Revocation hearings. See 33 CFR §20.701-02. Thus, absent evidence to the contrary, the court finds that Mr. Crouse's answer to the salient question, together with the copy of Respondent's criminal conviction, allows the court to find, in this case, that the Coast Guard **PROVED** -- and the court finds -- that Respondent's criminal conviction was one which "would prevent" the issuance or reissuance of a credential.

3. Selection of an Appropriate Order

In this case, the Coast Guard seeks revocation of Respondent's MMC. The ALJ has the authority to select an appropriate order for Respondent's violation per 46 CFR §5.569. In the instant matter, 46 USC §7703(2) provides that the Respondent's credential may be suspended or revoked upon proof of a disqualifying criminal conviction. Id. Thus, revocation is not mandatory in this case.

In Commandant v. Moore, NTSB Order No. EM-201 (2005), the NTSB ruled that in cases other than those where revocation is mandatory, the Board would not uphold a sanction that is more severe than the one enumerated in the Coast Guard's regulation, absent proof of

aggravating factors. Here, the controlling statute, 46 USC §7703(2), allows the judge to either suspend or revoke a mariner's credential upon proof of a criminal conviction that would have prevented original issuance or reissuance of the mariner's MMC. Hence, revocation is not mandatory in this case and will likely only be sustained as a sanction upon adequate proof of aggravation. See Coast Guard v. Ailsworth, NTSB Order No. EM-211 (2012).

There are no federal regulations that specifically address or define an appropriate sanction for the unique violation of 46 USC § 7703(2). However, the court may look to 46 CFR Table 5.569 for guidance. That Table is designed to promote uniformity in sanctions rendered by providing a guide for the court to use when determining the degree of sanction to order.

In the instant case, the Table does not specifically reference a conviction of an "offense that would prevent the issuance or renewal of a" credential. Nor is Respondent's particular crime, Second Degree Battery, listed in Table 5.569. However, Table 5.569 does reference "Violent acts against other persons [resulting in injury]" and suggests a range of sanctions, from a four-month suspension to revocation. Again, revocation is a permissible sanction – not a mandatory sanction.

Mitigating or aggravating factors may also be considered when issuing an order to affect the appropriate range of sanctions issued, per 46 CFR §5.569. When considering aggravating or mitigating factors, the court is given wide discretion in imposing an appropriate sanction. See 46 CFR §5.569(a); See also Appeal Decisions 2680 (McCARTHY) (2006); 2569 (TAYLOR) (1995). Factors that may affect the selection of an appropriate order include: (1) remedial actions the respondent has undertaken to correct the violation, (2) the respondent's prior record of offenses and the length of time between the offenses, and (3) mitigating or aggravating evidence. See 46 CFR §5.569.

a. Mitigating Evidence

Respondent testified that he had undertaken certain remedial actions in his life. For

instance, he completed the terms of his probation. (Tr. 88; Resp. Ex. B). He also testified regarding his continuous full-time employment and his safety record at sea since being issued his MMC. (Tr. 96 - 97).

Laudably, Respondent has been voluntarily treated by Dr. Curtis M. Vincent, a certified medical psychologist. (Tr. 102; Resp. Ex. A). Unfortunately, Respondent's failure to fully follow his psychologist's advice constitutes aggravating evidence, infra.

In addition, Respondent produced photographs that suggest his physical appearance is healthier than it was two years ago when he committed the battery (Resp. Ex. E). The court does not assign great probative weight to this evidence.

Respondent also produced letters of recommendation from two mariners and his grandfather that all describe him as a trusted mariner at sea. (Resp. Ex. D). However, all of those letters were written in support of Respondent's original credential application and before the events which led to Respondent's conviction. Thus, those letters are of only marginal probative value to the court.

b. Aggravating Evidence

Ironically, it was Respondent's own testimony that provides the most significant aggravating evidence in this case.

The gravamen of Respondent's conviction (particularly in light of the Coast Guard's abiding interest in promoting safety at sea) is the fact of his alcoholism and the fact he was heavily intoxicated at the time of his violent crime.

At the hearing, the court initially asked Respondent, "Are you an alcoholic?" Respondent answered, "I am not." (Tr. 114). Respondent's statement was in clear contradiction of his own treating psychologist's testimony that, indeed, Respondent is an alcoholic. (Tr. 76 – 85).

However, when the court again asked Respondent if he was an alcoholic, Respondent this time answered in the affirmative. (Tr. 116).

Respondent's treating psychologist, Dr. Vincent, testified that Respondent has failed to attend Alcoholics Anonymous – despite medical advice that he do so. (Tr. 76 – 85). Respondent explained his animosity toward Alcoholics Anonymous saying, "I never really believed in A.A. . . . So I have no faith in Alcoholics Anonymous." (Tr. 101). Then, again, later in the hearing, Respondent candidly reiterated, "I have not started A.A. because I do not have faith that A.A. works." (Tr. 112). But later in the hearing, when the court asked Respondent: "When are you going to start A.A.?" Respondent replied, "Whenever you want me to. Tonight." (Tr. 116 - 117). Given the timing and the self-serving nature of Respondent's declaration, the court finds Respondent's statement less than fully credible.

Respondent's troubled history includes prior convictions for Driving Under the Influence and other alcohol-related incidents, plus a personal history of drinking hard liquor since he was fifteen-years old. (Tr. 114-115).

The court points to the insidious nature of alcoholism and the absolute necessity that an alcoholic must honestly confront the reality of his/her condition before embarking on a life-long struggle against the disease. The first step in that journey is an admission by the alcoholic that he/she cannot combat the illness alone.

Respondent's character witness, Mr. Travis Miller, testified that Respondent is often exposed to charter-fishing clients who consume alcohol while afloat or during an overnight camp. (Tr. 61 - 62). Mr. Miller's testimony is important, because Respondent's treating psychologist, Dr. Vincent, testified that Respondent is more likely to drink when he suffers bouts of anxiety, and that he suffers anxiety in groups of people. (Tr. 76 - 77, 82 - 85).

Admirably, Respondent testified that he is presently sober because he has a strong will power to quit drinking. (Tr. 100 - 101, 112, 116).

But it was Respondent's own counsel who candidly underscored the difficulty of his client's refusal to attend Alcoholics Anonymous:

> [H]e doesn't believe in A.A. I know that's a problem. I didn't expect him to say that. I didn't know he believed that. That's every lawyer's nightmare when a client surprises him on something as important as that. . .There isn't a court in the country, there isn't a medical practitioner in the country, there isn't a substance abuse counselor in the country – and I used to be a licensed clinical social worker, and I worked in substance abuse treatment. There is nobody who will ever stand up in a mainstream forum and say A.A. is wrong, people can overcome it with willpower. That is just not something any court is ever going to follow.
>
> (Tr. 121 – 122).

The purpose of Suspension and Revocation hearings is to promote safety at sea. 46 USC §7701(a). The court finds that Respondent is an unsafe mariner because the crime for which he was convicted was occasioned by his alcoholism. Respondent's history reveals a tendency for violence and black-outs when he drinks. Despite his attempts to assure the court of his present (and future) sobriety, Respondent's conflicted testimony reveals that he has not yet honestly admitted to himself that he is, in fact, an alcoholic. He has not embraced his psychologist's recommended therapy at Alcoholics Anonymous.

Respondent's treating psychologist's testimony reveals that Respondent is at risk for recidivism when suffering bouts of anxiety – a condition occasioned and exacerbated by the presence of others in confined spaces (i.e., a fishing vessel). (Tr. 76 -77, 82 - 85).

Respondent's reluctance to attend Alcoholics Anonymous is troubling; he believes he can combat his illness by will-power alone. Even his attorney knows otherwise. (Tr. 121 – 122).

The record contains ample evidence of aggravating circumstances sufficient to warrant **REVOCATION** of Respondent's MMC.

However, the court believes Respondent is sincere in his desire to pursue a safe career as a fishing-charter captain. The court takes particular note of the apparent pride Respondent takes in being a successful captain and guide. (Tr. 97; Resp. Ex. F). The court believes that Respondent is beginning to appreciate the consequences of his illness and his behavior. (Tr. 99). Thus, if within the next twelve months (commencing upon the date of this Order) Respondent

completes all of the following, the court will favorably entertain a Motion to Reopen, per 33 CFR §20.904(f):

1. Respondent will attend Alcoholics Anonymous meetings at least twice a month for the next twelve months and he will maintain verifiable written evidence (including signatures by appropriate Alcoholics Anonymous members/leaders) of his attendance at Alcoholics Anonymous for presentation to the court.

2. Respondent will continue psychological counseling with an appropriate psychiatrist, psychologist, or other appropriate mental health provider for the next twelve months, as is deemed medically necessary by that psychiatrist, psychologist, or other appropriate mental health provider. The court may require verifiable proof of Respondent's presence at any/all of the required counseling sessions.

3. Respondent will not violate any Federal, State, Parish or City criminal law (minor traffic violations excepted) for the next twelve months.

4. Respondent will submit himself to random drug and/or alcohol testing, at a Coast Guard-designated, Department of Transportation-approved facility, at his own expense, at such times as the Coast Guard deems appropriate. Respondent will promptly provide the Coast Guard with the written results of such testing as immediately practical after such test(s) are completed.

If Respondent successfully completes all of the requirements of paragraphs 1 through 4 above during the twelve month period described herein, then the court will view a Motion filed under 33 CFR §20.904(f) in a light favorable to Respondent. If, however, Respondent fails to demonstrate his compliance with the terms set forth in paragraphs 1 through 4 above, then his MMC will remain **REVOKED.**

V. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At all relevant times herein, Respondent Robert James Dupont, III was the holder of a Coast Guard-issued MMC.

2. On or about August 8, 2011, Respondent Robert James Dupont, III was convicted by the 18th Judicial District, Iberville Parish, Louisiana, of violating Louisiana Code Title 14 Criminal Law: La. Rev. Stat. Ann 14:34.1, Second Degree Battery. (CG Ex. 1).

3. Respondent Robert James Dupont, III's criminal conviction arose from an April, 2010, bar-fight wherein Respondent was intoxicated and had "blacked out." (Tr. 113 - 114).

4. Respondent Robert James Dupont III's criminal conviction of Second Degree Battery would prevent the issuance or reissuance of a mariner's credential. 46 USC §7703(2).

5. Respondent Robert James Dupont, III has a seventeen-year history of alcohol abuse that has led to several DUI convictions, other alcohol-related incidents and the Second Degree Battery conviction that served as the basis for the Coast Guard's original and Amended Complaints. (Tr. 113 - 115).

6. Respondent Robert James Dupont, III both admits and denies that he is an alcoholic. (Tr. 114 - 116).

7. Respondent Robert James Dupont, III denies the potential efficacy of Alcoholics Anonymous in his life. (Tr. 101 - 112).

8. Respondent Robert James Dupont, III often works in close proximity with groups of people who may consume alcohol. (Tr. 101).

9. Respondent Robert James Dupont, III is likely to suffer from anxiety disorder when in close proximity to people. Respondent is, in turn, more likely to consume alcohol when suffering from anxiety disorder. (Tr. 76 -77, 82 - 85).

10. The following additional aggravating factors warrant revocation: Respondent's criminal conviction arose from his severe alcohol intoxication; Respondent's treating psychologist diagnosed Respondent as an alcoholic; Respondent has not fully embraced the fact of his alcoholism and has, to date, refused to comply with his treating psychologist's recommendation to attend Alcoholics Anonymous; Respondent is more likely to consume alcohol when suffering from anxiety disorder and his anxiety disorder may be exacerbated by working in close proximity to people like those he would encounter aboard a small fishing vessel.

VI. SANCTION

Based upon the record as a whole, the appropriate sanction is **REVOCATION** of Respondent's MMC. If Respondent successfully completes all of the stated requirements contained in paragraphs 1 through 4 above during the twelve month period described herein, then the court will favorably view a Motion filed under 33 CFR §20.904(f). If, however, Respondent fails to comply with all of the terms set forth in paragraphs 1 through 4 above, then his MMC will remain **REVOKED.**

The Coast Guard will maintain physical custody of Respondent's MMC during the twelve month period described herein.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that all allegations of the Complaint filed against Respondent Robert James Dupont, III are found **PROVED**.

IT IS FURTHER ORDERED, that Respondent Robert James Dupont, III's Coast Guard-issued MMC is remanded to the custody of the Coast Guard to be retained for a period of twelve months from the date of this Order. Respondent is hereby barred from acting under the authority of his MMC. Inasmuch as the court had retained Respondent's MMC after the hearing, the court will forward same to the appropriate Coast Guard facility for maintenance.

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

Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date: July 03, 2012

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Criminal conviction
2. (inadmissible)

COAST GUARD WITNESSES

1. James Wilson Crouse

RESPONDENT'S EXHIBITS

A. Curriculum Vitae of Curtis Vincent
B. Probation Order
C. (withdrawn)
D. Three letters
E. Photograph of Respondent
F. Photographs of fishing

RESPONDENT'S WITNESSES

1. Travis Miller
2. Curtis Vincent
3. Respondent Robert James Dupont III

ALJ EXHIBITS

None

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.