

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

UNITED STATES COAST GUARD
Complainant

vs.

STEPHEN SCOTT PERYER

Respondent

Docket Number 2012-0105
Enforcement Activity No. 4150920

**DECISION AND ORDER ASSESSING SANCTION
AFTER FINDING DEFAULT PROVED**

Issued: July 24, 2012

**By Administrative Law Judge:
Honorable George J. Jordan**

**Appearances:
CWO Carol R. Cruise
Sector Mobile
For the Coast Guard**

**STEPHEN SCOTT PERYER, Pro se
For the Respondent**

ORDER ASSESSING SANCTION

This is an administrative proceeding under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) concerning the suspension or revocation of a merchant mariner's credential pursuant to 46 U.S.C. § 7701 et seq. and its underlying regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5. The United States Coast Guard (Coast Guard) initiated this proceeding by filing a Complaint seeking to suspend Respondent's Coast Guard issued Credentials for a Conviction under the National Driver Registration Act. This matter comes before me for determination of an appropriate order following my previous approval of a motion for default under 33 C.F.R. § 20.310.

I. **PROCEDURAL HISTORY**

The Coast Guard initiated an administrative proceeding seeking a twelve (12) month suspension of Respondent's Merchant Mariner Credential (MMC) by filing a Complaint on March 1, 2012. Even though the Complaint was properly served, Respondent did not file a timely answer.

The Coast Guard filed its Motion for Default with the Docketing Center on April 23, 2012 and on April 27, 2012, the Coast Guard filed a return of service form indicating that the Investigating Officer had served the Motion for Default Order by certified mail and that it had been signed for by Respondent on April 25, 2012.

Upon review of the record, I issued an Order on June 11, 2012 finding the Respondent in default and directing the Coast Guard to supplement the record by supplying a copy of the Judgment of the Circuit Court of Mobile County, Alabama in this matter including any requirements for evaluation, training or rehabilitation mandated by the court and any suspensions

or restrictions on the Respondent's motor vehicle license. In particular, the record must be supplemented as to any remaining restrictions or suspension on the driver's license.

That order permitted the Respondent to respond to those materials. After the Agency supplemented the record, the Respondent had ten (10) days to respond. The Coast Guard made its submission on June 14, 2012. The Respondent did not file any response. Accordingly, this matter is now ripe for disposition.

Determination of an Appropriate Order

Having found Respondent in default, the regulations require that I "issue a decision against" Respondent. 33 C.F.R. § 20.310(d). In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a) (2). Here, the Coast Guard has proposed an order of twelve (12) months suspension. "The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence." 46 C.F.R. § 5.569(a).

As more fully discussed in my Default Order, an "Administrative Law Judge has wide discretion to formulate an appropriate sanction, an ALJ may also consider the following factors: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

In the Default Order, I discussed the implications of recent NTSB decisions that found the imposition of sanctions beyond the levels set in the Table entitled "Suggested Range of an Appropriate Order" codified at 46 C.F.R. § 5.569 to be excessive, arbitrary, and capricious.

Coast Guard v. Moore, NTSB Order No. EM-201 (2005) and USCG v. Ailsworth, NTSB Order No.211 (2012). The Board stated “unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard’s regulation without a clearly articulated explanation of aggravating factors.” Ailsworth, quoting Moore.

In this matter, the Respondent has been found in default as to a Conviction under National Driver Registration Act. In the Table entitled “Suggested Range of an Appropriate Order” codified at 46 C.F.R. § 5.569, there is no suggested range for a Conviction under National Driver Registration Act. However, the Coast Guard Marine Safety Manual (MSM)¹ has guidance concerning proposed sanctions in NDRA cases in Volume 5, Chapter C4, Section B.9.f. (Page C4-38):

If within 3 years from the initiation of S&R proceedings ...[t]here is 1 conviction that involved dangerous drugs or alcohol; then The proposed order should be a reasonable number of months of outright suspension. The minimum recommended suspension should be at least equal to any remaining suspension period assigned by a State of the mariner’s motor vehicle operator’s license. If the State has suspended a mariner’s motor vehicle license, but has issued the mariner a restricted license allowing operation of a motor vehicle, the suspension period may be remitted on probation

I determined that the issue in this matter was whether a twelve (12) month outright suspension was “a reasonable number of months of outright suspension” under the circumstances. Because of the limited record, there was no evidence in the record as to whether the State suspended the mariner’s motor vehicle operator’s license, whether the Court required any evaluation or rehabilitation, or the whether the motor vehicle license remained suspended.

¹ The MSM is a form of guidance document and not a regulation. The term “guidance document” means an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended, section 3(g)), that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue. Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (2007). While not binding on the public, the MSM can provide guidance to the public and can bind agency personnel.

In light of Ailsworth, I determined that I had to further develop the record to determine an appropriate sanction.

In response to my Order, the Coast Guard has provided certified court documents from the Circuit Criminal Court of Mobile County, Thirteenth Judicial Circuit of the State of Alabama. These court documents provide information concerning the disposition of two (2) separate DUI cases; CC-2011-002610 for an 8/27/2010 DUI arrest and CC-2011-002605 for a 10/27/2009 DUI arrest. Both cases were adjudicated on September 28, 2011. According to court records, Respondent pled guilty to one charge and was sentenced to 90 days imprisonment, the execution of which was suspended for one year on good behavior, as well as a \$600 fine and court costs. Respondent admitted to a prima facie case in the other matter and adjudication was withheld; Respondent was placed on good behavior for one year to run concurrently with the other matter.

The Coast Guard also provided a certified copy of the Respondent's Driver License Abstract from the Alabama Department of Public Safety dated June 13, 2012, which showed that the Respondent's Driver License is currently revoked. Additionally, the Coast Guard has included a Delinquency Report from the Court Referral Officer, Mobile Circuit Court of Mobile County, Alabama showing that the Respondent has failed to meet any of his imposed sentences.

The ground to suspend or revoke a merchant mariner's credential based on a conviction for a NDR offense was created by the Oil Pollution Act of 1990. Pub.L. 101-380, Title IV, § 4103(b), Aug. 18, 1990, 104 Stat. 511. The conference report for that act states that the amendment to 46 U.S.C. § 7703(3) "expands the existing bases in law for suspending or revoking a license, certificate, or document by adding two (2) new grounds: (1) the individual is convicted of an offense that would prevent the issuance of the license, certificate, or document;

or (2) the individual is convicted of an offense described in the National Driver Register Act (such as driving under the influence of alcohol or dangerous drugs, reckless driving, or leaving the scene of an accident), within the three-year period immediately before the suspension or revocation.” H.R. Conf. Rep. 101-653 P.L. 101-380, Oil Pollution Act OF 1990 House Conference Report No. 101–653 at 130-131

The report stated that “[t]he purpose of this section ... is to ensure that the Coast Guard can identify vessel personnel with motor vehicle offenses related to the use of alcohol and drugs. Abuse of these substances may evince possible unsafe vessel operations, leading to additional accidents and oil spills.” *Id.* at 128. “These provisions are intended to provide an additional tool in the effort to promote a drug- and alcohol-free workplace in the maritime industry.” *Id.* The conference report also stated that they needed to expand access to the NDR to vessel personnel, “given the relevancy of alcohol or drug infractions involving a motor vehicle to safe vessel navigation and the need for drug- and alcohol-free vessel operation.” *Id.* at 129.

Coast Guard regulations state that revocation of a respondent's credential or endorsements is appropriate “when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline.” 46 C.F.R. § 5.61(b). Given the clear congressional purpose in adding 46 U.S.C. § 7703(3), and its finding of relevance of alcohol or drug infractions involving a motor vehicle to safe vessel navigation and the need for drug- and alcohol-free vessel operation, the fact that Respondent is currently unable to legally drive a motor vehicle is a major aggravating factor.

In my earlier order I discussed guidance from the Coast Guard Marine Safety Manual (MSM)² concerning proposed sanctions in NDRA cases in Volume 5, Chapter C4, Section B.9.f. (Page C4-38): That guidance applied to the allegations as pled. However the sanction guidance also has different policy if a license is revoked. The manual states -

The appropriate order for cases involving a conviction for an offense listed in the NDRA shall be based on the following guidelines.

If within 3 years from the initiation of S&R proceedings:

- There are 2 or more convictions which involved dangerous drugs or alcohol; or
 - There is 1 conviction that involved dangerous drugs or alcohol and 1 conviction that did not involve dangerous drugs or alcohol; or
 - The State has revoked the mariner's motor vehicle operator's license; then
- The proposed order should be revocation.

Upon review of the record and relying on the MSM sanction guidance and the legislative history of 46 U.S.C. § 7703(3) to determine agency policy, the proposed sanction of twelve (12) months suspension would not appear to meet the Congressional intent of promoting drug- and alcohol-free vessel operation given the fact that Respondent's license is currently revoked. Based on that fact, the appropriate sanction is revocation.

By his default, the Respondent has waived his opportunity to be heard and also his opportunity to present evidence of any remedial actions or mitigation. Further he failed to respond to the submissions of the Agency even though he was given that opportunity. The record establishes only matters in aggravation—in particular that Respondent has failed to meet the requirements of any of his imposed sentences and has had his license revoked. Continued service at sea by a mariner who cannot legally drive a car due to alcohol offenses undermines

² The MSM is a form of guidance document and not a regulation. The term “guidance document” means an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended, section 3(g)), that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue. Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (2007). While not binding on the public, the MSM can provide guidance to the public and can bind agency personnel.

national policy promoting drug- and alcohol-free vessel operation and constitutes a threat to the safety of life or property and to safe navigation. Accordingly, an order of revocation is appropriate under the circumstances. Should respondent have his license returned within the next three years, he may request a re-opening under 33 C.F.R. § 20.904(f) to modify this order (See Appendix B of this Order).

ORDER

The Allegations in the Complaint having been previously found **PROVED by DEFAULT;**

IT IS HEREBY ORDERED that that Respondent's Mariner's credentials are **REVOKED. IT IS SO ORDERED.**

The parties have a right to appeal, as set forth in 33 C.F.R. Subpart J, Section 20.1001 (Attachment A)

An Administrative Law Judge may set aside this finding of Default under the provisions of 33 C.F.R. § 20.310(e) for good cause shown. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

George J. Jordan
US Coast Guard Administrative Law Judge

Date:

APPENDIX A
33 CFR PART 20- APPEALS
SUBPART J

§ 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 thirty (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 such 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.

§ 20.1002 - Records on Appeal

- (a) The record of appeal 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.

§ 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 sixty (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 thirty-five (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.

APPENDIX B
NOTICE CONCERNING REVOCATION OF CREDENTIAL

This order has revoked your credential and any endorsements to it.

1. You must immediately surrender your credential to the U.S. Coast Guard. 46 C.F.R. 5.567(d).
2. You should surrender your credential to Sector Mobile, the office that brought this matter. The address is:

USCG Sector Mobile
1500 15th Street
Brookley Complex
Mobile, AL 36615-1390

However, you may surrender your credential to any Officer in Charge of Marine Inspection at any Coast Guard Sector.

3. You may no longer use your credential.
4. If you use your REVOKED credential or accept employment under authority of your REVOKED credential, you may be subject to the criminal penalties described in 18 U.S.C. 2197. U.S. v. Morris, 203 F.3d 423 (6th Cir. 2000).
5. Section 2197 of Title 18 of the U.S. Code provides, in pertinent part, that:

Whoever, not being lawfully entitled thereto, uses, exhibits, or attempts to use or exhibit, ... any certificate ... issued to ... seamen by any officer or employee of the United States authorized by law to issue the same ... shall be fined under this title or imprisoned not more than five years, or both.
6. You may request modification of this order of revocation. Coast Guard regulations at 33 C.F.R § 20.904(f) provide that “[t]hree years or less after an S&R proceeding has resulted in revocation of a credential, endorsement, license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center.” The motion “must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new merchant mariner credential with appropriate endorsement is compatible with the requirement of good discipline and safety at sea.” 33 C.F.R § 20.904(f)(1).
7. You also may request issuance of a new credential under the provisions of 49 C.F.R. Subpart L. You may apply one year after revocation. 46 C.F.R § 5.901(c). For a person whose credential or endorsement has been revoked or surrendered for offenses related to alcohol abuse, the waiting period may be waived by the Commandant upon a showing that the individual has successfully completed a bona fide alcohol abuse rehabilitation program and is actively participating in a bona fide alcohol abuse monitoring program. 46 C.F.R § 5.901(e). See 46 C.F.R § 5.903 for the application procedures.