

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

UNITED STATES COAST GUARD
Complainant

vs.

RICHARD ALBERT CHESBROUGH

Respondent

Docket Number 2011-0224
Enforcement Activity No. 4006949

**ORDER GRANTING RESPONDENT'S REQUEST
FOR A TEMPORARY CREDENTIAL**

Issued: August 22, 2012

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

Appearances:

**LT Kimberly D. Rule
Sector Columbia River
For the Coast Guard**

**RICHARD ALBERT CHESBROUGH, Pro se
For the Respondent**

**ORDER GRANTING RESPONDENT'S REQUEST FOR A
TEMPORARY CREDENTIAL**

This Order follows Respondent's appeal of my July 25, 2012 Decision and Order, wherein he requested a temporary credential while his appeal is pending. In my Decision and Order, I found an outright suspension of two (2) months, followed by an eighteen-month (18) probationary period appropriate. The Coast Guard filed its objections and requested that I deny the temporary credential on August 17, 2012.

As there has been ongoing activity in this case, the transcript has not yet been forwarded to the Commandant. Thus, I retain jurisdiction over the issue of the temporary credential. See 46 C.F.R. §5.707(b) ("Action on the request is taken by the ALJ unless the hearing transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.") The APA provides that since there has been an appeal, my initial decision is not the final agency action in this matter. 5 U.S.C. § 557(b), 33 C.F.R. § 20.1101(b).

Under 46 C.F.R. §5.707(a), "[a] person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in § 5.59, may file a written request for a temporary credential or endorsement." The offenses listed in 46 C.F.R. § 5.59 are those for which revocation of a license, certificate, or document are mandatory and generally involve the use, possession, sale, association, or conviction involving dangerous drugs. Respondent's offenses in this matter did not involve any of those enumerated in 46 C.F.R. § 5.59, thus he is entitled to file a request for a temporary credential.

Temporary credentials are issued according to the criteria set forth in 46 C.F.R. § 5.707(c), which states,

A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the applicant

will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary document or license may be denied for that reason alone.

Respondent was not charged with any of the enumerated offenses listed in 46 C.F.R. § 5.61(a), therefore the presumption that his continued service is incompatible with safety at sea does not arise in this case.

The primary issue remaining in determining whether such a document should be issued is whether Respondent's continued service would be incompatible with safety at sea. "This inquiry serves to balance two conflicting policies: first, removal of an unfit mariner from the industry and elimination of further risk of harm to the public and, second, protection of an accused mariner's due process right to state his case on appeal without having already suffered the penalty, as well as the financial hardship, imposed by the decision at the hearing level." Appeal Decision 2499 (AILSWORTH) (1990) Suspension or revocation of a mariner's credentials is predicated solely on the charge found proved after all due process requirements have been complied with, therefore "the decision to grant or deny a temporary document or license must be based on a predictive judgment concerning that charge alone." Commandant v. Tombari , 6 N.T.S.B. 1617, NTSB ORDER NO. EM-150, (1988); see also AILSWORTH, supra. The issue I must decide is" not whether appellant should serve a sanction for a serious breach of maritime safety standards, but whether he should be forced to serve a sanction before his right to defend against the charge has been exercised fully." Commandant v. Lyons, 5 NTSB 2678, NTSB Order EM-142 (1987).

Respondent states that he has operated one- to two-hour excursions with this vessel in the area for approximately twelve years. The record in this case established that Appellant has held an MML for over thirty years, and no evidence of any prior actions against his license was introduced. I am aware that the Coast Guard has filed a subsequent action against Respondent's license based on a separate incident. However, case law clearly states that I may only consider

allegations found proved when making a determination about whether to issue a temporary license. See Lyons and Tombari, *supra*. As the pending matter has not yet been adjudicated, I have not considered the existence of a new complaint for purposes of this Order.

The Coast Guard has opposed the issuance of a temporary credential to Respondent. The National Transportation Safety Board has held that, where the Coast Guard opposes a temporary credential, its “obligation under the Administrative Procedure Act (“APA”) [is] to explain why appellant is ineligible for a temporary license under the applicable regulatory standard.” Commandant v. Moore, NTSB Order No. EM-200 (2005). Here, a denial of Respondent’s request for a temporary credential “would have to be supported by evidence sufficient to enable a reasonable predictive judgment that Appellant's continued service would be incompatible with safety at sea.” AILSWORTH, *supra*.

In its motion, the Coast Guard pointed to the recently filed charges against Respondent, which are not yet adjudicated, in support of its contention that “The Respondent has demonstrated a history of willful non-compliance with the terms of his vessel's COI.” However, as explained above, I may not consider any charges which have not been found proved. Moreover, provided the charged offense “is not one of the enumerated offenses giving rise to a presumption of incompatibility with the requirements for safety at sea, ‘the Coast Guard must do more than state that offense to justify denial of a temporary license.’ ” Moore, *supra* (quoting Lyons, *supra*). The Coast Guard has not articulated any other reasons, aside from Respondent’s violation of the vessel’s COI, why Respondent is ineligible to hold a temporary credential.¹

This record does not support a determination that Respondent’s continued service is incompatible with safety at sea, although a sanction at the lower end of the suggested range was

¹ The Coast Guard’s motion appears to imply that Respondent is unlikely to prevail on appeal, but does not directly oppose the temporary credential on these grounds. However, even if the Coast Guard intends to make this argument, it is not grounds for the denial of a temporary credential because due process considerations entitle Respondent to fully defend against the charges on appeal regardless of his likelihood of success. See, e.g., AILSWORTH, *supra*; Lyons, *supra*.

warranted. On the facts of this case, Respondent's right to state his case on appeal without having already suffered the hardships imposed by my order of suspension outweighs the risk of harm to the public. Based on the APA and Coast Guard regulations, my order in this matter is not yet final agency action and it should remain inoperative pending an appeal to superior agency authority. Accordingly, Respondent's request for a temporary credential is GRANTED.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: