

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

UNITED STATES COAST GUARD

Complainant

vs.

MARK JUNIOR GUIDA

Respondent

Docket Number 2012-0131
Enforcement Activity No. 4244719

DEFAULT ORDER

Issued: September 24, 2012

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

**LT JONATHAN D. SHUMATE
Sector New York**

For the Coast Guard

MARK JUNIOR GUIDA, Pro se

For the Respondent

PROCEDURAL BACKGROUND

The United States Coast Guard initiated this administrative action seeking suspension or revocation of the Merchant Mariner's Credential ("MMC") issued to Mark Junior Guida, the Respondent in this case. The Complaint, dated March 23, 2012, alleges On March 14, 2012, the Investigating Officer at Sector New York filed a Complaint against the Respondent for a violation of 46 USC 7703(1)(B) and 46 CFR 5.27. On April 23, 2012 the Coast Guard Investigating Officer submitted a Motion and proposed Settlement Agreement for review in keeping with the regulations.

On April 24, 2012, the undersigned Administrative Law Judge for the U.S. Coast Guard was assigned this matter. A complete review of the record in this case was made. On May 8, 2012, the undersigned issued an Order Rejecting Settlement providing the reasons for rejection and giving the parties a month to resolve the identified issues and if the parties agreed they could submit a revised settlement agreement on or before June 8, 2012. The Order Rejecting Settlement was served by the Office of ALJ Baltimore including service to Respondent's last known address.

Neither party submitted anything to the Court by June 8, 2012. Since neither party had submitted anything as of July 24, 2012, the undersigned issued an Order to Show Cause to both parties. The Order gave the parties until August 6, 2012 to submit any information or efforts to complete a revised settlement agreement or otherwise demonstrate why either (1) Respondent should not be considered in default; or (2) if the Complaint should be dismissed for failure of the Government to take further action.

On August 3, 2012, the Coast Guard Investigating Officer, provided a response to the July 24, 2012 Order to Show Good Cause. The Coast Guard's response provided substantial detail of efforts to communicate with the Respondent and address actions in this matter. The Coast Guard response showed that from March 14, 2012 through July 31, 2012 there were

approximately 13 different instances of communication or attempted communication with the Respondent. The Coast Guard further contends that there has not been a failure to prosecute this matter and the Coast Guard stands ready to continue to go forward with the Complaint as a contested matter.

To date nothing has been received from Respondent. The record shows that Orders and pleadings have been served on his last known address. Service is valid in keeping with 33 CFR 20.304(f). The record also shows that the Complaint dated March 14, 2012 was served on April 3, 2012 by federal express courier. To date Respondent has not filed an Answer to the Complaint. Respondent has not provided any response to either the Order Rejecting Settlement dated May 8, 2012 or the Order to Show Good Cause dated July 24, 2012. Service of the Order Rejecting Settlement and the Order to Show Cause was in compliance with 33 CFR 20.304(h) and more than twenty days has passed since the issuance of the Show Cause Order. More than twenty days has also passed after the Coast Guard served its response to the Show Cause Order. In view of Respondent's failure to file an Answer to the Complaint and failure to respond to the Order to Show Cause Respondent is in Default. 33 CFR 20.310(a); *see also* Appeal Decision 2700 (THOMAS) (2012). The regulations require the ALJ, upon finding Respondent in default, to issue a decision against Respondent. 33 C.F.R. § 20.310(d). "Default by respondent constitutes ... an admission of all facts alleged in the complaint and a waiver of his or her right to a hearing on those facts." 33 C.F.R. § 20.310(e).

SANCTION

After finding Respondent in default and that the facts alleged in the Complaint are deemed admitted, I carefully reviewed the record and considered the facts presented in this matter as set forth in the Complaint. The Coast Guard indicated a proposed sanction of six (6) months outright suspension followed by another six (6) months suspension on six (6) months

probation. The facts indicate that Respondent committed misconduct by assaulting another merchant sailor on the vessel COMET by choking him until he lost consciousness and fell to the floor of the galley. Title 46 CFR 5.569(d) specifically states that the Table 5.569 is for the information and guidance of Administrative Law Judges. For the violation of “Violent acts against other persons (injury)” the suggested range of an appropriate order is 4 months suspension up to revocation. See Table 5.569 of 46 CFR 5.569.

The Coast Guard has not presented additional aggravating evidence beyond the facts alleged in the Complaint. However, the facts in the Complaint are sufficient to support the sanction of revocation. The record does not show any explanation for the actions of Respondent. The undisputed fact that Respondent choked another merchant mariner on the COMET until he lost consciousness, raises a clear concern for safety at sea. As provided in 46 CFR 5.5 the purpose of administrative actions against Merchant Mariner Credentials are remedial in nature and are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. In this case, Respondent’s undisputed violent action against a fellow sailor makes his continued service under Merchant Mariner Credentials contrary to the interests of safety at sea. The violent nature of Respondent’s misconduct and an absence of mitigating factors in the record were significant factors in determining an appropriate sanction.

The Table of Average Orders is only intended to provide information and guidance, and the Administrative Law Judge is not bound by the range of appropriate orders in 46 CFR 5.569(d). Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Evidence of mitigating or aggravating circumstances may justify departing from the suggested range. “An order within the range would not be considered excessive.” 46 CFR 5.569(d). In this case, the sanction of revocation is within the suggested range for the charged violation.

After considering all of the evidence in the record, the undisputed facts as provided in the charge of misconduct regarding violence against another Mariner by choking him until he lost consciousness is sufficient to support a sanction of revocation. Based on the record as a whole, I find that revocation is the appropriate sanction in this case.

Respondent is provided notice that under 33 CFR 20.310(e) for good cause shown, an Administrative Law Judge may set aside a finding of Default. Respondent may file a **motion** to set aside the finding with the ALJ Docketing Center, Baltimore. Respondent may also submit a request to reopen these proceedings after service of this order in keeping with the regulations. See 33 CFR 20.904.

WHEREFORE,

Upon consideration of the record, I find Respondent is in **DEFAULT**. A default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing. (33 CFR 20.310).

ORDER

Accordingly, I hereby **ORDER** that the allegations set forth in the Complaint are deemed **PROVED**.

IT IS HEREBY FURTHER ORDERED that Respondent's Coast Guard issued Merchant Mariner Credential is **REVOKED**. The sanction of revocation is within the range of suggested orders under 46 CFR § 5.569. Respondent's Merchant Mariner Credential #000061105 was deposited with Sector New York on April 17, 2012. The Coast Guard shall retain the credentials at least for a period of 30 days after service of this order which is the time permitted for filing a motion to reopen the proceedings provided by 33 CFR 20.904.

IT IS HEREBY FURTHER ORDERED The Respondent shall immediately deliver by mail or in person any other Coast Guard issued credentials, licenses, certificates or documents to the Coast Guard at Sector New York, attention of the Investigating Officer LT Colleen M. Smith, United States Coast Guard Sector New York, 212 Coast Guard Drive, Staten Island, NY 10305, telephone (718) 354-4234. If you knowingly continue to use your Merchant Mariner credentials, you may be subject to criminal prosecution.

IT IS HEREBY FURTHER ORDERED that **under 33 CFR 20.310(e) for good cause shown**, an Administrative Law Judge may set aside this finding of Default. You may file a **motion** to set aside the finding with the ALJ Docketing Center, Baltimore.

Service of this Default Order upon you serves to notify you of your right to appeal as set forth in 33 CFR Part 20 Subpart J (Attachment A).

Michael J Devine
US Coast Guard Administrative Law Judge

Date: September 24, 2012

(ATTACHMENT A)
33 C.F.R. PART 20
SUBPART J
APPEALS

§ 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.

§ 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.

§ 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.

§ 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.