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

UNITED STATES COAST GUARD
Complainant

vs.

CHESTER MANUEL ANDREWS III

Respondent

Docket Number 2012-0425
Enforcement Activity No. 4311325

DECSION & ORDER
Issued: January 31, 2013

Issued by: Hon. Bruce Tucker Smith
United States Administrative Law Judge

Appearances:

For the Complainant

Eric A. Bauer
U.S. Coast Guard Suspension & Revocation National Center of Expertise

For the Respondent

Chester M. Andrews, III, pro se

I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard or Agency) instituted this action against Chester M. Andrews, III (Respondent) on September 27, 2012, by filing a Complaint seeking revocation of Respondent's Merchant Mariner's Credential (MMC). The Complaint alleged that because Respondent had been convicted of various driving offenses under the National Driver Registration Act,[1] revocation is appropriate, per the provisions of 46 USC §7703(3).

On or about October 2, 2012, Respondent filed his Answer containing a lengthy discussion of the events alleged in the Coast Guard Complaint. The court interpreted the Respondent's Answer as a general denial of the allegations contained in the Complaint.

On October 11, 2012, the Coast Guard filed a "Motion for Summary Decision," supported by various documents and state code citations.

On October 22, 2012, Respondent filed a "Counter Motion for Summary Decision," also supported by various documents and letters.

On October 31, 2012, the court denied both the Motion and the Counter Motion based upon the existence of certain factual issues in apparent dispute.[2]

On December 4, 2012, the court convened this matter in the United States Federal Courthouse in Montgomery, Alabama. The court received certain items of documentary evidence from the parties and Respondent testified in person. The court recessed the hearing after one day.

On January 15, 2013, per the cautionary guidance suggested in Appeal Decision 2697 (GREEN) (2011), the court reconvened the hearing, telephonically, to consider certain legal issues raised by Respondent's testimony and evidence. The parties participated in that telephonic hearing from diverse geographical locations. The court heard testimony from Coast

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[1] See 49 USC §30304(a)(3)(A).
[2] See 33 CFR §20.901.

Guard witnesses James W. Krause and Dr. Laura G. Gillis. After hearing closing statements from the parties, the court adjourned the hearing.[3]

The court, having considered the entire administrative record, concluded that the Coast Guard met is burden of proof in this case and that Respondent's MMC should be **REVOKED.**

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court, having considered the entire administrative record and the demeanor and credibility of all witnesses, and having given due consideration to the applicable law, finds:

1. On August 10, 2009, Respondent CHESTER M. ANDREWS, III was arrested and cited for a violation of Alabama Code 32-5A-191, Driving While Under the Influence of Alcohol. (CG Ex. 4)

2. On February 1, 2010, Respondent CHESTER M. ANDREWS, III entered a plea of guilty in the Court for the City of Andalusia, Covington County, Alabama, to the charged offense, a violation of Alabama Code §32-5A-191, Driving While Under the Influence of Alcohol. (CG Ex. 4)

3. On or about June 24, 2010, the Coast Guard reissued Respondent CHESTER M. ANDREWS, III's Merchant Mariner Credential. (CG Ex. 1)

4. The Coast Guard had notice of Respondent CHESTER M. ANDREWS, III's August 10, 2009 arrest for Driving Under the Influence in Alabama before it reissued Respondent's Merchant Mariner's Credential on or about June 24, 2010. (Tr. Vol. II at 90 – 98, 114 – 118)(CG Ex. 10, 11)

5. The Coast Guard's reissuance of Respondent CHESTER M. ANDREWS, III's Merchant Mariner Credential, on or about June 24, 2010, was specifically conditioned upon a grant of a medical waiver for alcohol dependence. The terms of the waiver stated that the waiver would be invalidated by any future documented incident involving alcohol or Respondent's failure to maintain sobriety. (CG Ex. 11)

6. On October 20, 2011, Respondent CHESTER M. ANDREWS, III was arrested and cited for a violation of Section 577.010 of the Revised Statues of Missouri, Driving While Intoxicated. (CG Ex. 2)

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[3]Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Coast Guard followed by the exhibit number (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.)

7. On April 19, 2012, Respondent CHESTER M. ANDREWS, III entered a plea of guilty in the 33rd Judicial District, State of Missouri to the charge of a violation of Missouri Revised Statutes §577.010, Driving While Intoxicated. (CG Ex. 2)

8. On April 19, 2012, Respondent CHESTER M. ANDREWS, III was convicted of the charge of a violation of Missouri Revised Statutes of §577.010, Driving While Intoxicated, before the 33rd Judicial Circuit, Scott County Circuit Court, State of Missouri. Respondent received a Suspended Imposition of Sentence of two years unsupervised probation from the date of the conviction. The net effect of the Missouri court's order was that if Respondent complied with all of the court's orders and was not thereafter charged with another offense, his conviction would be "expunged." The "two years" referenced by the Missouri court will not expire until April 19, 2014 – approximately fifteen months in the future as of the date of this Decision and Order. (CG Ex. 2)

9. Absent any proof that the anticipated expungement described in the Missouri court's April 19, 2012, order was due to the conviction having been in error, Respondent CHESTER M. ANDREWS, III's April 19, 2012, conviction in the State of Missouri for Driving While Intoxicated is valid for the purposes of the instant revocation action. 20 CFR §20.1307.

III. EVIDENCE & ANALYSIS

A respondent's MMC may be "suspended or revoked" if:

> Within the 3-year period preceding the initiation of the suspension or revocation proceeding, [the respondent] is convicted of an offense described in 49 USC §30304(a)(3)(A) or (B) of Title 49.

46 USC §7703(3).

One of the offenses listed in 49 USC §30304(a)(3)(A) is a state-law conviction for "operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance" – commonly referred to as either a DWI (driving while intoxicated) or DUI (driving under the influence). Id.

The Coast Guard's Evidence

The Coast Guard presented documentary evidence of Respondent's two separate convictions: a DUI in Alabama on February 1, 2010 and a DWI in Missouri on April 19, 2012. Thus, both convictions occurred within the three-year time limit specified in 46 USC §7703(3).

Coast Guard Exhibit 4 is a combined "Ticket and Complaint" and "Court Action and Disposition" for the City of Andalusia, Covington County, Alabama. That document reflects that on August 10, 2009, Respondent was arrested and cited for a violation of Alabama Code 32-5A-191, Driving While Under the Influence of Alcohol. The same Exhibit also reveals that on February 2, 2010, Respondent entered a plea of "guilty as charged" to the charged offense, a violation of Alabama Code §32-5A-191, Driving While Under the Influence of Alcohol.

Likewise, Coast Guard Exhibit 2 is a "Circuit Court Docket Sheet," dated May 7, 2012, from the 33rd Judicial District, State of Missouri. That Exhibit reveals that on October 20, 2011, Respondent was arrested and cited for a violation of Section 577.010 of the Missouri Revised Statutes, Driving While Intoxicated. The same Exhibit also reveals that on April 19, 2012, Respondent entered a plea of guilty to the charged offense, a violation of Missouri Revised Statutes §577.010.

Respondent's Defenses

Respondent appeared in this case, pro se. Accordingly, this court's actions are shaped, in part, by the Commandant's guidance to administrative law judges found in Appeal Decision 2697 (GREEN) (2011). There, the Commandant specifically noted, "[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." Id. quoting Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983). GREEN apparently obliges this court to examine the record for potential defenses available to the pro se litigant and to develop any underlying facts which may illuminate any such defense. Here, the facts suggest two potential defenses are available to Respondent: waiver/estoppel and operation of state law.

First, Respondent contends that the Coast Guard knew of his August 10, 2009, arrest for DUI in Alabama but nevertheless reissued him a MMC on June 24, 2010. Such evidence may

suggest that the Coast Guard may have either waived its right to rely upon that conviction as the basis for the instant revocation action or that it is now estopped from asserting the fact of the Alabama conviction.

Second, Respondent presented evidence that suggests that his April 19, 2012, DWI conviction in Missouri was not a conviction for the purposes of 46 USC §7703(3). If Respondent is correct in this regard, then his 2012 conviction in Missouri was not a disqualifying offense for the purposes of the National Driver Registration Act[4], and the Coast Guard cannot now rely upon same in the instant revocation action.

Whether the Coast Guard Waived its Right to Seek Revocation of the Alabama Conviction

Coast Guard Exhibit 4 reveals that Respondent was arrested in Alabama on August 10, 2009, for DUI. The same Exhibit reveals that Respondent was convicted of that offense on February 1, 2010, approximately five months after his arrest.

Coast Guard Exhibit 10 is a letter to Respondent, dated January 8, 2010, from Lieutenant Commander A.B. DeYoung, the Deputy Chief, Mariner Evaluations Division, National Maritime Center. That letter was sent in response to Respondent's August 13, 2009, application for reissuance of his MMC. LCDR DeYoung's letter specified that:

> After a comprehensive safety/security, professional qualifications, and medical evaluation your application request is pending and in need of additional supporting documentation and/or information.

LCDR DeYoung's letter also asked Respondent to provide certain items of documentary evidence, including "Amplifying Information from Physician: Completion of a 12 week outpatient substance abuse program focused on relapse prevention and Documented completion of 90 Alcoholics Anonymous meetings in a ninety day period." (CG Ex. 10).

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[4] 49 USC §30304(a)(3)(A).

Respondent testified that he complied with the terms of LCDR DeYoung's letter and provided the requested documentation. (Tr. Vol. I at 41 – 43).

Coast Guard Exhibit 11 is another letter to Respondent; this one dated May 28, 2010, from CWO2 K.D. McGhee, Operations Chief, Medical Division, National Maritime Center. That letter acknowledges the Coast Guard's receipt of the materials Respondent sent pursuant to LCDR DeYoung's direction. The May 28, 2010, letter specified that after an evaluation by the Coast Guard Medical Evaluation Division, Respondent was classified as suffering "alcohol dependence in remission" but was, nevertheless, granted a medical waiver and reissuance of his MMC.

Mr. James Krause, the Chief of the Safety and Suitability Evaluations Branch, United States Coast Guard National Maritime Center, admitted that the Coast Guard had actual notice of Respondent's August 10, 2009, arrest for DUI in Alabama. (Tr. Vol. II at 90 – 98).[5] However, the subsequent legal proceedings resulting from Respondent's August 10, 2009, arrest for DUI were not tracked by any department within the Coast Guard. In fact, Respondent's eventual February 1, 2010, conviction for DUI in Alabama was not known by the National Maritime Center's Suspension and Revocation Branch until other Coast Guard safety investigators (in Mobile, Alabama) discovered that fact, by happenstance, in the summer of 2012. (Tr. Vol. II at 96 – 100).

[5] Which department within the Coast Guard's National Maritime Center (NMC) interacted with Respondent was a matter of some interest. The record reveals that the NMC is subdivided into distinct functions; including the Safety and Suitability Branch and a separate Suspension and Revocation Branch. Mr. Krause testified that the Safety and Suitability Branch (i.e., medical) interacted with Respondent during the relevant time period and that Respondent's arrest for DUI in Alabama was viewed as a medical issue – not as a disciplinary issue which might have been handled by the Suspension and Revocation Branch. Here, the Safety and Suitability Branch never communicated the fact of Respondent's August 10, 2009 arrest for DUI to the Suspension and Revocation Branch. (Tr. Vol. II at 99).

Dr. Laura Girandola Gillis[6], Division Chief of the Medical Evaluations Division of the Coast Guard's National Maritime Center, testified regarding her division's review of Respondent's file. She testified that Respondent's August 10, 2009 arrest for DUI in Alabama was reviewed in terms of medical safety for service in the maritime environment – not in terms of a potential revocation action. (Tr. Vol. II at 114). Dr. Gillis suggested that the fact of a criminal conviction was not germane to a medical evaluation. (Tr. Vol. II at 114 – 115). Dr. Gillis' review of Respondent's medical record reveals no reference to his criminal conviction whatsoever. (Tr. Vol. II at 118).

In sum, the Coast Guard had actual notice of Respondent's August 10, 2009 arrest for DUI in Alabama long before it reissued Respondent's MMC on or about June 24, 2010. The Coast Guard did not, apparently, have actual notice of his February 1, 2010 conviction for DUI in Alabama until sometime in late 2012.[7]

These events raise the question whether the Coast Guard waived its right to demand revocation based upon the Alabama conviction.

This court concludes that although the Coast Guard had actual knowledge of Respondent's August 10, 2009 arrest for DUI in Alabama before reissuing his MMC, it did not waive its right to pursue revocation, here. Nor is the Coast Guard estopped from proving that conviction.

The court points with particularity to the May 28, 2012, letter sent by the Coast Guard to Respondent which coincided with the reissuance of Respondent's MMC. That letter, (CG Exhibit 11), specifically reads in part:

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[6] See Coast Guard Exhibit 12, Dr. Gillis' curriculum vitae.

[7] Apparently, the Coast Guard is not automatically notified of a given mariner's criminal conviction as might be occasioned by an interaction between the Coast Guard computer database (containing mariners' names) and computer resources at the Department of Homeland Security or the National Crime Information Center. (Tr. Vol. II at 100 – 101).

> Based upon the submitted results of your medical examination, the Medical Evaluation Division has determined that special circumstances exist that warrant granting a medical waiver for the following medical condition(s): Alcohol dependence, in remission – Waiver becomes invalid for any future documented incident involving alcohol. Waiver requires maintenance of sobriety.

Id. (emphasis added).

Assuming, arguendo, that the Coast Guard's reissuance of Respondent's MMC somehow constituted a waiver of its right to institute a revocation action – that waiver was rendered null and void upon Respondent's April 19, 2012, conviction for DWI in the State of Missouri. (In fact, it might be argued that Respondent's MMC was effectively revoked on April 19, 2012 by the express terms of the May 28, 2012 waiver letter.)

The court could find no Commandant's Decision on Appeal that squarely addresses this question.

However, a cursory review of pertinent American appellate jurisprudence seems to reveal that courts disfavor imposing a "waiver" or "estoppel" against a governmental entity. The decisions hold that estoppel or waiver may not be invoked against a governmental entity if to do so would prevent that governmental entity from performing its statutory duty.[8]

Thus, this court concludes that the Coast Guard's knowledge of Respondent's arrest prior to the reissuance of his MMC is immaterial and does not constitute the basis for a defense of estoppel or waiver. Specifically, the unambiguous terms of the Coast Guard's medical waiver letter required that Respondent avoid "any future documented incident involving alcohol." Id.

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[8] See Matter of 333 E. 89 Realty v. New York City Water Bd., 272 A.D.2d 549, 550 (N.Y. App. Div. 2000). An exception to the general rule is "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice" Bender v. New York City Health & Hosps. Corp., 345 N.E.2d 561,564 (N.Y. 1976); see LoCiciro v. Metropolitan Transp. Auth., 288 AD2d 353, 354 (N.Y. App. Div. 2001). Some courts have invoked the doctrine of estoppel against governmental entities where its "misleading nonfeasance would otherwise result in a manifest injustice." Landmark Colony at Oyster Bay v. Bd. of Supervisors of County of Nassau, 113 AD2d 741, 744 (N.Y. App. Div. 1985).

Respondent's subsequent arrest and conviction in Missouri rendered the medical waiver a nullity.

Accordingly, the Coast Guard may rely upon the Alabama conviction for the purposes of 46 USC §7703(3), here.

Whether Respondent's Missouri Conviction was a Conviction for the Purposes of 46 USC §7703(3)

Respondent submitted two letters from his Missouri criminal defense attorney explaining that Respondent's April 19, 2012, DWI conviction was not, in fact, a "conviction." Respondent's Exhibit "A" is comprised of two letters (one dated October 5, 2012 and one dated October 19, 2012) from Respondent's Missouri attorney, David C. Mann, Esq. Attorney Mann opined that in Missouri, if a person is not sentenced for an offense for which he has been found "guilty," his sentence is deemed "suspended" and is not a conviction. As Attorney Mann explained,

> [Respondent] was placed on unsupervised probation through the court for a period of two years. If this probation is completed without any problems or violations he will be released and there will be no record of a conviction. Therefore, there is no record of a guilty finding by the court.

(Resp. Ex. A).

The record reflects that on April 19, 2012, Respondent entered a guilty plea to the charge of DWI before the 33rd Judicial Circuit, Scott County Circuit Court, State of Missouri.[9] Respondent received a Suspended Imposition of Sentence (SIS) of two years unsupervised probation.[10]

[9] Missouri R.S. §557.011.2(3)-(4) gives Missouri courts the options of either suspending the imposition of sentence, with or without placing the person on probation or pronouncing the sentence and suspend its execution, placing the person on probation.

[10] The court takes particular note that Respondent's "two years" will not expire until April 19, 2014 – approximately fifteen months in the future as of the date of this Decision and Order. Hence, even if the court adopted Attorney Mann's explanation, Respondent still would not be entitled to his "defense" until 2014.

The Missouri Supreme Court agrees that a SIS does not constitute a conviction. Yale v. City of Independence, 846 S.W.2d 193 (Mo. 1993). [11]

Yet even the Missouri courts concede that that federal law, not state law, controls the interpretation and use of the term "convicted" as it is used in a federal statutes or regulations, particularly given the Congressional intent for the federal statute to establish a comprehensive, uniform and nationwide system. See Doe v. Keathley, 344 S.W.3d 759 (Mo. App. W.D. 2011).

Federal jurisprudence, likewise, dictates a similar interpretation. For instance, in cases involving the Comprehensive Drug Abuse Prevention and Control Act of 1970, it is well-established within the Eighth Circuit that federal law, and not state law, governs for the purpose of determining whether a prior state conviction is final.[12]

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[11] Missouri courts have routinely held that a "Suspended Imposition of Sentence is not considered a final judgment. State v. Lynch, 679 S.W.2d 858, 860 (Mo. 1984); State v. Prell, 35 S.W.3d 447, 450 (Mo. App. W.D. 2000). Therefore, "if one is found guilty of an offense, placed on probation and received a suspended imposition of sentence ("SIS"), Missouri law does not consider it a conviction." Matthews v. Director of Revenue, 72 S.W.3d 175, 179 (Mo. App. S.D. 2002). The term "[c]onvicted 'is generally used in its broad and comprehensive sense meaning that a judgment of final condemnation has been pronounced against the accused." Neibling v. Terry, 177 S.W.2d 502, 504 (Mo. 1944) quoting State v. Townley, 48 S.W. 833 (Mo. 1898). "The term 'conviction' requires a final judgment when one suffers a loss of privileges or the imposition of a disability." An Opinion of the Missouri Attorney General, dated February 13, 1987, explains that the "term 'conviction' has a variable meaning depending upon the context and, therefore, the term may be used in the more strict sense of requiring a final judgment, when the context of the situation involves some collateral adverse consequences such as the loss of privileges or the imposition of a disability." Mo. Att'y. Gen. Op. No. 11-87 (February 13, 1987).

[12] See U.S. v. Craddock, 593 F.3d 699, 701 (8th Cir. 2010) citing United States v. Davis, 417 F.3d 909, 912-13 (8th Cir.2005), cert. denied 546 U.S. 1144 (2006); United States v. Slicer, 361 F.3d 1085, 1086-87 (8th Cir. 2004), cert. denied 543 U.S. 914 (2004); United States v. Franklin, 250 F.3d 653, 665 (8th Cir. 2001), cert. denied 534 U.S. 1009 (2001); United States v. Ortega, 150 F.3d 937, 948 (8th Cir.1998), cert. denied 525 U.S. 1087 (1999). Other circuits have held that deferred adjudications or probated sentences constitute convictions in the context of Comprehensive Drug Abuse Prevention and Control Act. United States v. Cisneros, 112 F.3d 1272, 1281 (5th Cir.1997); United States v. Mejias, 47 F.3d 401, 403-04 (11th Cir.1995) (per curiam); United States v. Meraz, 998 F.2d 182, 184-85 (3d Cir.1993); United States v. Campbell, 980 F.2d 245, 250-51 (4th Cir.1992); United States v. McAllister, 29 F.3d 1180, 1184-85 (7th Cir.1994)). U.S. v. Ferrara, 334 F.3d 774 (8th Cir. 2003), is also noteworthy to this discussion. There, the defendant was convicted of contempt of court. In calculating his sentence, the court considered the defendant's two prior driving while intoxicated charges wherein he was granted a Suspended Imposition of Sentence. The Eight Circuit ruled that the previous convictions resulting in Suspended Impositions of Sentence and imposition of terms of probation were "convictions" for the purposes of federal law.

Although the term "expungement" is not explicitly used in Missouri R.S. §557.011.2(3)-(4), nor discussed by Attorney Mann, nor cited in any of the cited Missouri appellate cases, the effect of the Missouri "Suspended Imposition of Sentence" is tantamount to an "expungement."

Particular guidance is provided in 20 CFR §20.1307, regarding "expungement." There, it is clearly specified that:

> (d) If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads guilty or no contest or, by order of the trial court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 USC 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error.

Id. (emphasis added).

In this regard, Appeal Decision 2699 (MAXWELL)(2012) is controlling. There, in a case presenting issue similar to those at bar, the Commandant explained:

> The import of [20 CFR §20.1307] . . . is that once a mariner is brought under the criminal jurisdiction of a court, any of the enumerated actions - deferred adjudication or a court requirement to attend classes, make contributions of time or money, receive treatment, submit to probation or supervision, or forgo appeal, or subsequent action by the court to expunge a conviction ~ is immaterial to the Coast Guard's determination that the person has been convicted of a dangerous drug offense. I conclude that "the scheme of a State for the expungement of convictions" is descriptive and refers generally to the broad authority of a court to vacate and expunge convictions. I further conclude that the intent of both provisions is that expungement does not negate a conviction unless the impetus for the expungement was the court's conclusion that the conviction was in error. There is no evidence that was the case here.

Id. at 9 (emphasis added).

Here, as in MAXWELL, absent any proof that the (future) expungement is due to the conviction's having been in error, this court regards Respondent's April 19, 2012 Missouri for DWI conviction is valid for the purposes of 46 USC §7703(3) the instant revocation action.

IV. SANCTION

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).

The decision on an appropriate sanction is one of the most crucial aspects of a court's resolution of a Suspension and Revocation hearing.

The court is mindful that Title 46 USC §7703(3) provides that a respondent's MMC may be either "suspended or revoked" in cases such as the one at bar: revocation is not automatic.

Guidance on whether a credential ought to be suspended or revoked is found in 46 CFR §5.569 and its attendant Table. The Table provides a "Suggested Range of Appropriate Orders" for various offenses. The purpose of the Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 CFR §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. In this case, the Coast Guard seeks revocation of Respondent's MMC.

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action was brought against a mariner for Misconduct, alleging his refusal to submit to a drug test. The NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the Administrative Law Judge find, specific factors in aggravation sufficient to depart from the guidance provided in 46 CFR Table 5.569. The NTSB explained that the guidance contained in the Table is "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered."

While it is true that 46 CFR §5.569(d) also explains that "[the] table should not affect the fair and impartial adjudication of each case on its individual facts and merits," it is not for the

undersigned to speculate what those individual aggravating facts and merits are relative to this Respondent, absent an evidentiary basis.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an Administrative Law Judge should consider: any remedial actions undertaken by a respondent; a respondent's prior records; and evidence of mitigation or aggravation. See 46 CFR §5.569(b)(1)-(3).

Remedial Action: Respondent testified that after his [most recent] "DUI conviction, I went to rehab and continued my recovery as of today. It is a fact that nothing has occurred that interferes with the performance of my Mariner duties." (sic) (Tr. Vol. II at 122). The court notes Respondent's testimony and lauds his expressed intent to remain sober and compliant with alcohol recovery.

Respondent's Prior Records: At the hearing, the Coast Guard attempted to offer documents that described a 2007 Complaint, Settlement Agreement and Consent Order, stemming from an alcohol-related incident in the maritime environment. (CG Ex. 6, 7, 8). In an abundance of caution and with regard to the Respondent's due process interests, the court denied admissibility of those documents for want of an appropriate evidentiary foundation. (Tr. Vol. I at 25 – 29). The court was particularly concerned that the prejudicial impact of those documents might override the probative value they might have had on the ultimate question whether Respondent had committed the acts alleged in the Coast Guard's Complaint.

Mitigation or Aggravation: Although the court had earlier rejected the Coast Guard's attempted introduction of Respondent's 2007 alcohol-related incident, Respondent himself subsequently raised the issue in his own testimony. Respondent testified that "I feel that I have not had any alcohol related incidents since May 2007 while operating a towboat and I've

continued by rehabilitation program. . ." (Tr. Vol. II at 122).[13] Thus, Respondent "opened the door" to the court's consideration of the 2007 alcohol-related incident.

Moreover, the court does not draw the same distinction that Respondent does regarding that incident. The fact that Respondent has not had an alcohol-related incident "while operating a towboat" since 2007 appears to willfully ignore his two subsequent state convictions for automobile DUI/DWI. The very fact of the two post-2007 convictions suggests that Respondent did not respond favorably to any lesson he might have learned as a result of the 2007 incident. The court regards this as a serious matter in aggravation.

Nevertheless, the court carefully read Respondent's lengthy handwritten submission contained at Respondent's Exhibit B. The court believes the Respondent is sincere in his desire to deal effectively with his alcoholism. However, it appears to this court that while Respondent is making efforts to combat the disease of alcoholism, the record reveals that an insufficient amount of time has passed since his last alcohol-related offense. In short: the court believes that Respondent remains a danger to himself, other persons and property in the maritime environment.

V. CONLCUSION

A complete review of the administrative record, coupled with a consideration of all potential defenses available to the Respondent, leads to the inevitable conclusion that **REVOCATION** is the only appropriate sanction that can be imposed in this case.

VI. ORDER

IT IS HEREBY ORDERED, that Respondent's Coast Guard-issued Merchant Mariner's Credential is **REVOKED**. Inasmuch as the court had retained the Respondent's

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[13] The 2007 event was reflected in the Coast Guard Exhibits 6, 7, 8 which the court had earlier ruled as inadmissible. Hence, it was Respondent, and not the Coast Guard, who put the fact of an alcohol-related incident in 2007 before the court. Such is the risk of proceeding without the benefit of legal counsel in these matters.

Merchant Mariner's Credential, same will be forwarded to the appropriate Coast Guard agency for proper disposition.

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

VII. ATTACHMENT A: LIST OF WITNESSES & EXHIBITS

Coast Guard Exhibits

1. Respondent's MMC
2. MO Circuit Court Docket Sheet
3. MO Revised Statute
4. Ticket and Complaint
5. AL Statute
6. Complaint – May 2, 2007 **NOT ADMITTED**
7. Motion for Approval of Settlement Agreement – May 3, 2007 **NOT ADMITTED**
8. Consent Order – **NOT ADMITTED**
9. Report of Investigation
10. Letter, dated January 8, 2010
11. Letter, dated 28 May 2010
12. Gillis c.v.

Respondent Exhibits

A. Letters from Attorney David C. Mann
B. Respondent's handwritten letter to the court

ALJ Exhibits

none

Coast Guard's Witnesses

James W. Krause
Laura G. Gillis, M.D.

Respondent's Witnesses

Respondent

VIII. ATTACHMENT B: SUBPART J, APPEALS

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.

Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date: January 28, 2013