

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

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UNITED STATES COAST GUARD

Complainant

vs.

JAMES BRIAN KINANE

Respondent

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Docket Number 2013-0292  
Enforcement Activity No. 4675627

**ORDER MEMORIALIZING BENCH DECISION**

**Issued: December 13, 2013**

**By Administrative Law Judge: Honorable Michael J Devine**

**Appearances:**

**LT JOSHUA J. WEIDMAN  
LCDR JANNA OTT  
RICHARD YAZBEK**

**Sector Northern New England  
For the Coast Guard**

**JAMES BRIAN KINANE, Pro se**

**For the Respondent**

This Order is issued in accordance with 33 C.F.R. § 20.902(c), which authorizes the issuance of an initial oral decision. The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of the Merchant Mariner's Credential issued to James Brian Kinane, the Respondent in this case. The Complaint, dated August 8, 2013, alleges Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. § 7703(3) (convictions under National Driver Register Act) by convictions for operating a vehicle under the influence in the state of Maine on June 20, 2013. The Complaint alleges Respondent was convicted of two (2) offenses of driving under the influence of alcohol on June 20, 2013, by the Penobscot County Superior Court – Bangor, Maine. The Complaint further alleges that these convictions are in violation of 46 USC 7703(3). Respondent, acting on his own behalf filed his Answer on August 22, 2013. Respondent neither admitted nor denied the allegations but did not agree with the proposed sanction of revocation and requested settlement discussions. On October 28, 2013, the Coast Guard submitted a Motion for Summary Decision (Motion). Respondent did not provide a reply or opposition to the Coast Guard Motion and on November 14, 2013, the Court issued an Order partially granting the Coast Guard Motion finding the charged violations proved but holding that a hearing to determine a sanction was required.

On December 12, 2013, the Administrative Law Judge (ALJ) conducted a hearing in the above named matter in Portland, Maine. The hearing was conducted in accordance with Administrative Procedure Act, amended and codified at 5 U.S.C. §§ 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. § 7702, and the procedural regulations codified at 33 C.F.R. Part 20. LT Joshua J. Weidman, LCDR Janna Ott and Mr. Richard Yazbek appeared on behalf of the Coast Guard. Respondent James Brian Kinane, appeared on his own behalf (pro se). During the hearing, the Coast Guard referred to the exhibits attached to their Motion. The Coast Guard did not offer any new exhibits into evidence and did not present any

witness testimony. Respondent moved to have four (4) exhibits admitted to the record. All were admitted as Exhibits A through D, and Respondent testified on his own behalf.

At the conclusion of the hearing, both parties waived the opportunity to file written argument and Proposed Findings of Fact and Conclusions of Law. As permitted by 33 C.F.R. 20.710 and 20.902, an Oral Decision was rendered. Pursuant to the ALJ's Order of November 14, 2013, the charged violations were **PROVED**. After consideration of all of the evidence in the record and applying the regulations contained in 33 C.F.R. Part 20 and 46 C.F.R. Part 5 Respondent's credentials are revoked but the revocation is **STAYED** during twelve (12) months probation. Respondent is required to comply with the terms of probation stated in this Order during the probationary period. The findings of fact and conclusions of law are summarized as follows:

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent James Brian Kinane is the holder of Merchant Mariner Credential (MMC) 4675627 and held that credential on the dates of the violations charged under 46 U.S.C. § 7703(3).
2. Respondent James Brian Kinane and the subject matter of this proceeding is within the jurisdiction of the Coast Guard vested under the authority of 46 U.S.C. Chapter 77 and was not disputed at the hearing.
3. On June 20, 2013 Respondent was convicted of operating a vehicle under the influence on or about November 30, 2012 in violation of Maine Revised Statutes Title 29-A §2411 an offense within 49 U.S.C. 30304(a)(3)(A) and 46 U.S.C. 7703(3).
4. On June 20, 2013 Respondent was convicted of operating a vehicle under the influence on or about March 6, 2013 in violation of Maine Revised Statutes Title 29-A § 2411 an offense within 49 U.S.C. 30304(a)(3)(A) and 46 U.S.C. 7703(3).

5. Based on the record as a whole, the Coast Guard has proved by a preponderance of reliable and credible evidence that Respondent was convicted of two offenses of operating a vehicle under the influence in violation of Maine Revised Statutes Title 29-A § 2411 which are within 49 U.S.C. 30304(a)(3)(A) and 46 U.S.C. 7703(3).

### CONCLUSION

The ALJ determined that because Coast Guard hearings are remedial in nature as provided by 46 C.F.R. 5.5 and in keeping with the Table found at 46 C.F.R. 5.569, the charged violations when considered along with the evidence of aggravation and mitigation, the sanction should be **REVOCATION STAYED**, and if the terms of probation are successfully completed the revocation will be remitted. Terms of probation are that revocation is stayed pending twelve (12) months probation, beginning with three (3) months outright suspension commencing the date of the hearing, December 12, 2013. Respondent must be in compliance with the alcohol safety program as required by the state of Maine and shall provide documentary evidence to the investing officer of attendance at Alcoholics Anonymous (AA) meetings at least two (2) times per month for the twelve (12) month probationary period beginning on December 12, 2013. Furthermore, Respondent may not commit any other disqualifying violations as described in this order within the twelve (12) month probationary period. For Respondent's benefit a copy of Table 46 C.F.R. 10.211(g) and Table 46 C.F.R. 10.213(c) are included as Attachment B of this Order. These Tables and the regulations applicable to Coast Guard suspension and revocation proceedings may be accessed through the internet at <http://ecfr.gpoaccess.gov>. Respondent also remains subject to administrative action for any other potential violations.

## ORDER

**IT IS HEREBY ORDERED** Respondent's credential is **REVOKED**; but **REVOCATION IS STAYED** and will be remitted pending successful completion of twelve (12) months probation including **THREE (3) MONTHS OUTRIGHT SUSPENSION followed by NINE (9) MONTHS SUSPENSION ON PROBATION**. After three (3) months outright suspension Respondent's credential may be returned. During the twelve (12) month probationary period Respondent must remain in compliance with the alcohol safety program, as required by Maine State Law, and shall not be found guilty or proven to have violated any law or regulation that is listed in Table 46 C.F.R. 5.569, or listed in Table 46 C.F.R. 10.211(g), or Table 46 C.F.R. 10.213(c) or of a violation that would preclude the issuance of a Merchant Mariner Credential during the probationary period. Respondent shall also attend Alcoholics Anonymous (AA) meetings twice per month. Respondent shall provide documentary evidence to the investigating officer of attendance at AA meetings at least two (2) times per month for the twelve (12) month probationary period beginning on December 12, 2013.

**IT IS HEREBY FURTHER ORDERED** that if Coast Guard determines that Respondent has violated the terms of probation within the probationary period the Coast Guard may provide notice of intent to execute the stayed revocation of Respondent's credentials. Within ten (10) days of the Notice of Violation of Probation, Respondent may submit a written request to the ALJ Docketing Center, with a copy to the Coast Guard Investigating Officer to request an ALJ hearing solely for determining whether the terms of probation have been violated. Failure to submit a written request within ten (10) days waives the opportunity to request a hearing. If Respondent does not request a hearing within ten (10) days of adequate service of a Notice of Violation of Probation the Coast Guard may execute the Order to Revoke.

**IT IS HEREBY FURTHER ORDERED** the outright suspension commenced on the date of the hearing, December 12, 2013. Respondent's credentials were deposited with the Investigating Officer at the close of the hearing.

**PLEASE TAKE NOTICE** that service of this Order on the parties and/or parties' representative(s) serves as Notice of Appeal rights set forth in 33 C.F.R. 20.1001 – 20.1004. (**Attachment A**). The time period within which the parties may file a Notice of Appeal shall commence the day of receipt of this Order. A transcript will be provided if requested during the time for submitting a Notice of Appeal.

**Michael J Devine**  
**US Coast Guard Administrative Law Judge**

Date: December 13, 2013

**ATTACHMENT A**  
**NOTICE OF 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;
    - (j) Reasons supporting the appeal; and
    - (k) 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.



**ATTCHMENT B**

**TABLE 10.211(G)—GUIDELINES FOR EVALUATING APPLICANTS FOR MMCs WHO HAVE CRIMINAL CONVICTIONS**

Crime <sup>1</sup>	Assessment periods	
	Minimum	Maximum
<b>Assessment Periods for Officer and Rating Endorsements</b>		
Crimes Against Persons:		
Homicide (intentional)	7 years	20 years.
Homicide (unintentional)	5 years	10 years.
Assault (aggravated)	5 years	10 years.
Assault (simple)	1 year	5 years.
Sexual Assault (rape, child molestation)	5 years	10 years.
Robbery	5 years	10 years.
Other crimes against persons <sup>2</sup>		
Vehicular Crimes		
Conviction involving fatality	1 year	5 years.
Reckless Driving	1 year	2 years.
Racing on the Highways	1 year	2 years.
Other vehicular crimes <sup>2</sup>		
Crimes Against Public Safety		
Destruction of Property	5 years	10 years.
Other crimes against public safety <sup>2</sup>		
Dangerous Drug Offenses <sup>345</sup>		
Trafficking (sale, distribution, transfer)	5 years	10 years.
Dangerous drugs (Use or possession)	1 year	10 years.
Other dangerous drug convictions <sup>6</sup>		
<b>Assessment Periods for Officer Endorsements Only</b>		
Criminal Violations of Environmental Laws		
Criminal violations of environmental laws involving improper handling of pollutants or hazardous materials	1 year	10 years.
Crimes Against Property		
Burglary	3 years	10 years.
Larceny (embezzlement)	3 years	5 years.
Other crimes against property <sup>2</sup>		

<sup>1</sup>Conviction of attempts, solicitations, aiding and abetting, accessory after the fact, and conspiracies to commit the criminal conduct listed in this table carry the same minimum and maximum assessment periods provided in the table.

<sup>2</sup>Other crimes will be reviewed by the Coast Guard to determine the minimum and maximum assessment periods depending on the nature of the crime.

<sup>3</sup>Applicable to original applications only. Any applicant who has ever been the user of, or addicted to the use of, a dangerous drug shall meet the requirements of paragraph (f) of this section. Note: Applicants for reissue of an MMC with a new expiration date including a renewal or additional endorsement(s), who have been convicted of a dangerous drug offense while holding a license, MMC, MMD, STCW endorsement or COR, may have their application withheld until appropriate action has been completed by the Coast Guard under the regulations which appear in 46 CFR part 5 governing the administrative actions against merchant mariner credentials.

<sup>4</sup>The Coast Guard may consider dangerous drug convictions more than 10 years old only if there has been another dangerous drug conviction within the past 10 years.

<sup>5</sup>Applicants must demonstrate rehabilitation under paragraph (l) of this section, including applicants with dangerous drug use convictions more than 10 years old.

<sup>6</sup>Other dangerous drug convictions will be reviewed by the Coast Guard on a case by case basis to determine the appropriate assessment period depending on the nature of the offense.

**TABLE 10.213(c)—GUIDELINES FOR EVALUATING APPLICANTS FOR MMCs WHO HAVE NDR MOTOR VEHICLE CONVICTIONS INVOLVING DANGEROUS DRUGS OR ALCOHOL<sup>1</sup>**

<b>Number of convictions</b>	<b>Date of conviction</b>	<b>Assessment period</b>
1	Less than 1 year	1 year from date of conviction.
1	More than 1, less than 3 years	Application will be processed, unless suspension, or revocation <sup>2</sup> is still in effect. Applicant will be advised that additional conviction(s) may jeopardize merchant mariner credentials.
1	More than 3 years old	Not necessary unless suspension or revocation is still in effect.
2 or more	Any less than 3 years old	1 year since last conviction and at least 3 years from 2nd most recent conviction, unless suspension or revocation is still in effect.
2 or more	All more than 3 years old	Application will be processed unless suspension or revocation is still in effect.

<sup>1</sup>Any applicant who has ever been the user of, or addicted to the use of, a dangerous drug shall meet the requirements of paragraph (f) of this section.

<sup>2</sup>Suspension or revocation, when referred to in table 10.213, means a State suspension or revocation of a motor vehicle operator's license.