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

UNITED STATES COAST GUARD
Complainant

vs.

BROOKS MCLEAN MITCHELL
Respondent

Docket Number 2016-0315
Enforcement Activity No. 5730483

DECISION AND ORDER

Issued: June 07, 2017

By Administrative Law Judge: Honorable Bruce Tucker Smith

Appearances:

For the Coast Guard;

LT Israel J. Parker
Sector Northern New England

Lineka N. Quijano
National Center of Expertise

For the Respondent;

Brooks Mclean Mitchell, *Pro se*

I. PRELIMINARY STATEMENT

On April 6, 2017, the court convened an adversarial due–process hearing in Jacksonville, Florida to hear the Coast Guard's evidence and testimony in support of the Complaint filed against Brooks McLean Mitchell (Respondent). The Complaint alleged that Respondent had been convicted of a criminal "offense that would prevent the issuance or renewal" of a Merchant Mariner's Credential (MMC), as per the provisions of 46 USC §7703(2). The Complaint sought revocation of Respondent's MMC as a sanction.

Lineka Quijano, Esq. and David Barnes represented the United States Coast Guard (Coast Guard). Respondent appeared *pro se*.

The Coast Guard called two witnesses and offered twelve items of documentary evidence (including a CD); eight of which were admitted. (Atch A). Respondent neither testified nor offered any items of documentary evidence. However, Respondent did actively participate, *pro se*, in his own defense. The court retrieved Respondent's MMC and marked it as ALJ Ex. I.

This Decision and Order finds the Coast Guard **PROVED** the allegations in the Complaint and further directs that Respondent's MMC be **REVOKED**. [1]

II. PROCEDURAL HISTORY

The procedural history of this case is lengthy and involved. Because of Respondent's status as a *pro se* litigant, the court's handling of this case is largely informed by the apparent guidance set forth in Appeal Decision 2697 (GREEN)(2011), which suggests the court "make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training."

[1] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Coast Guard Exhibits are as follows: CG 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.). A list of all exhibits offered and admitted, together with the names of the parties' respective witnesses, are set forth in Attachment A.

On October 11, 2016, the Coast Guard filed a Complaint against Respondent alleging that on September 29, 2016, Respondent was convicted of a violation of Florida Statutes Annotated, title XLVI, §827.03(c), "child abuse," a third–class felony, by the Circuit Court, Seventh Judicial Circuit, Volusia County, Florida. The Complaint alleged that Respondent's conviction was "an offense that would prevent the issuance or renewal" of a Merchant Mariner's Credential, as per the provisions of 46 USC §7703(2). The Complaint also requested revocation of Respondent's MMC as a sanction for Respondent's violation.

On October 23, 2016, Respondent filed a written Answer to the Complaint, admitting all of the jurisdictional allegations and all of the factual allegations on the Complaint. Respondent included written information with his Answer, including a two–page typewritten report from a treating psychiatrist, which suggested Respondent "was on medication that contributed to my actions that led to my conviction."[2] On October 27, 2016, the Coast Guard filed a Motion for Summary Decision, based largely upon Respondent's Admissions of both the jurisdictional and factual allegations in the Complaint. The court deferred ruling on that Motion, again informed by the apparent guidance in GREEN, *supra*.

Thereafter, the parties and the court engaged in several pre–hearing telephonic conferences. The general subject matter of those interim conferences was to discuss Respondent's claimed efforts to retain legal counsel to assist him in his petition to overturn his criminal conviction.

On December 7, 2016, the court convened a telephonic pre–hearing conference with the parties. Respondent again informed the court of his ongoing efforts to obtain an attorney to assist him with his petition to overturn his criminal conviction. In an abundance of caution for

[2] Respondent offered no such proof at the April 6, 2017 hearing.

the interests of the *pro se* Respondent, the court then scheduled another telephonic pre–hearing conference for December 19, 2016, to again discuss Respondent's efforts to retain counsel.[3]

On December 19, 2016, the court convened another telephonic pre–hearing conference with the parties. Unfortunately, Respondent did not attend or participate in the telephonic pre–hearing conference, despite having received written notice to do so. Accordingly, the Coast Guard made a spoken Motion for Default. The court denied the Coast Guard's spoken Motion, but on December 19, 2016, the court entered a written Order directing Respondent to show cause, before January 7, 2017, in writing, why the Coast Guard's Motion for Summary Decision should not be granted.

On December 23, 2016, however, the Coast Guard filed a written Motion for Default Order.

On January 4, 2017, Respondent sent an *ex parte* e–mail to the court (which was then forwarded to the Coast Guard) advising that he had retained counsel to assist him in his petition to overturn his criminal conviction. Respondent's e–mail further indicated that the un–named attorney would not represent Respondent in the instant administrative proceedings instituted by the Coast Guard.

On January 17, 2017, the court convened a telephonic pre–hearing conference with the parties to discuss the Coast Guard's pending Motions for Default and for Summary Decision. During the telephonic pre–hearing conference, the court **DENIED** the Coast Guard's December 23, 2016, Motion for Default, despite the fact Respondent had previously admitted both the jurisdictional and factual allegations in the Complaint and despite Respondent's failure to appear at the December 19, 2016, telephonic pre–hearing conference. GREEN, *supra*. The court then instructed the Coast Guard to file its Motion for Summary Decision anew, to be "supported by

[3] Throughout the pendency of this litigation, the court conducted several pre-hearing telephonic conferences (November 7, 2016; December 6, 2016; January 17, 2017) to afford Respondent opportunities to retain counsel to

affidavit(s) and appropriate legal research." The court also directed Respondent to file his written response to the Coast Guard Motion for Summary Decision.

On February 10, 2017, after a lengthy review of both the Coast Guard's Motion for Summary Decision and supporting affidavits and Respondent's materials, the court **DENIED** the Motion for Summary Decision and directed that this matter be set for hearing.

Thereafter, on March 6, 2017, the court set April 6–7, 2017, as the dates for hearing the Coast Guard's evidence against Respondent.

On March 22, 2017, the court published a detailed Order, specifically informing Respondent of his obligation to comply with the court's discovery Orders and further informed Respondent that his penchant for communicating with the court, *ex parte*, via e–mail, ran afoul of his obligation to file such documents formally as per previously–described procedure. Moreover, the same Order specifically identified the central legal issue to be resolved in the pending hearing.[4]

On April 6, 2017, the court convened the adversarial due–process hearing in Jacksonville, Florida. The hearing was concluded in one day.

On April 10, 2017, Respondent again sent an *ex parte* e–mail to the court. That e–mail was immediately forwarded to the Coast Guard for its consideration. The substance of Respondent's April 10, 2017 e–mail was, essentially, a Motion to Suppress items of documentary evidence obtained by the Coast Guard from the civilian prosecutorial authorities; some of which was offered and admitted into evidence by the court at the April 6, 2017 hearing. Respondent's improvident Motion was and is **DENIED**.

III. FINDINGS OF FACT

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assist him in both the instant administrative action and in his underlying criminal case.

[4] "The issue in this case is whether the Coast Guard may take action against Respondent's MMC under 46 USC §7703(2), based on a conviction that would have precluded the issuance of renewal of Respondent's MMC."

These findings of fact are based on a thorough and careful analysis of the documentary evidence, the testimony of witnesses, and the entire record taken as a whole:

1. Respondent is the holder of MMC 000359743. (Answer at 1; ALJ Ex. I).

2. Because Respondent is a holder of an MMC, the court has subject-matter jurisdiction over this suspension and revocation proceeding alleging a violation of 46 USC §7703. Id.

3. On September 29, 2016, the Circuit Court, Seventh Judicial Circuit, Volusia County, Florida, convicted Respondent of violating Florida Statues Title XLVI, section 827.03(c), Child Abuse, a third degree felony. (CG Ex. 4).

4. Respondent's conviction results from his knowing use of "a computer, the Internet and a cell phone to solicit a child whom the Defendant believed to be a thirteen (13) year old girl with the intent to engage in some form of unlawful sexual activity with that child." (CG Ex. 2).

5. Florida law enforcement officials apprehended Respondent after he solicited a law enforcement official acting as a thirteen (13) year old girl over the phone and internet. (Tr. at I-73).

6. After his conviction, Respondent was sentenced to five years' probation and was made subject to an "Order of Conditions of Sex Offender Probation 948.30." (CG Ex. 5).

7. Florida also ordered Respondent to complete the state's sex offender program and that he be prohibited from being in contact with or near a child under the age of 18. (CG Ex. 18).

8. As of the date of the hearing, less than a year has lapsed since Florida Convicted Respondent of Child Abuse. (CG Ex. 4).

IV. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. *See* 46 USC §7701. Pursuant to 46 CFR §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 USC §7703.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the

evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. *Id.*; Appeal Decision 2639 (HAUCK) (2003).

A. Jurisdiction

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). "Where an Administrative forum acts without jurisdiction its orders are void." Appeal Decision 2025 (ARMSTRONG) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

In this case, Respondent admitted all of the jurisdictional allegations in the Complaint and he raised no objection to the court's jurisdiction at the hearing. Respondent presented his MMC to the court at the hearing; a tacit admission that he is a credentialed mariner subject to the court's authority. (ALJ Ex. I). The Coast Guard did not, by contrast, present any affirmative evidence in support of the jurisdictional allegations in the Complaint. (Query the significance of these events in light of GREEN, *supra*.)

B. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by 46 USC §7703, and 46 CFR Part 5 and Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act (APA), 5 USC §§551–559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof

in asserting any affirmative defense by a preponderance of the evidence. 33 CFR §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988) (citing *Steadman v. SEC*, 450 U.S. 91, 107 (1981)).

The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (brackets in original)).

Title 46 USC §7703(2) specifies that a mariner's credential may be suspended or revoked if that mariner was convicted of a criminal offense that would have prevented the original issuance or re–issuance of an MMC.

Therefore, at hearing, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more–likely–than–not was convicted of a criminal offense that would have prevented the issuance of an MMC.

C. Evidence

The facts of this case are straightforward, simple and uncontested. The Coast Guard proved that on September 29, 2016, Respondent was convicted of a violation of Florida Statutes Annotated §827.03(c), "child abuse," a third–degree felony, by the Circuit Court, Seventh Judicial Circuit, Volusia County, Florida. (CG Ex. 3). [5] The gravamen of the criminal prosecution was that Respondent "knowingly used a computer, the Internet and a cell phone to

solicit a child whom the Defendant believed to be a thirteen (13) year old girl with the intent to engage in some form of unlawful sexual activity with that child." (CG Ex. 2). The facts revealed that Respondent had been the subject of a law–enforcement "sting" operation and the "thirteen (13) year old girl" was, in reality, a law–enforcement officer. After his conviction, Respondent was sentenced to five years' probation and was made subject to an "Order of Conditions of Sex Offender Probation 948.30." (CG Ex. 5).

The Coast Guard produced two witnesses who testified that Respondent's conviction was of a criminal "offense that would prevent the issuance or renewal of" an MMC.

Respondent offered neither testimony nor evidence at the hearing.

D. Law

The central focus of this court's inquiry is one of statutory interpretation.

Two phrases in Title 46 USC §7703(2) are fraught with uncertainty, particularly as applied to the facts at bar. The statute provides that a mariner's MMC "may be suspended or revoked if the holder is convicted of an offense that would prevent the issuance or renewal of" that MMC. (emphasis added).

Neither the Coast Guard nor the Commandant have promulgated regulations or issued appellate decisions which provide specific interpretive guidance in cases brought under 46 USC §7703(2).[6] Thus, the court here resorts to the classic rules of statutory interpretation for instruction.

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[5] Respondent was also convicted of two violations of Florida Statute Annotated §934.215.3, "unlawful use of a two-way communication device," both third-degree felonies. The court took official notice of all relevant Florida criminal statutes.

[6] Normally, an agency's interpretation is entitled to deference, if Congress has empowered that agency with that authority. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In Appeal Decision 2678 (SAVOIE) (2008), the Commandant interpreted his duty under "Chevron Deference," saying: "when a reviewing court considers an agency's construction of a statute which it administers, the court is confronted with two questions: (1) whether 'Congress has directly spoken to the precise question at issue;' and (2) if 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible reading of the statute.'" Id. Because neither the Coast Guard, nor the Commandant, have provided guidance in this area, the court must sail these waters alone.

"When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *See* *United States v. Gonzales*, 520 U.S. 1 (1997) (emphasis added); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson*, 503 U.S. 393, 401(1992) ("To begin, we note that appeals to statutory history are well taken only to resolve statutory ambiguity."); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.").

"an offense"

In regard to the phrase "an offense," does the statute mean "this particular conviction for child abuse by this particular Respondent" or does the statute mean "any and all convictions for child abuse by any mariner?" Applying the guidance of *Gonzales, supra,* the court believes Congress plainly intended the Coast Guard to examine the particular facts and circumstances unique to this Respondent's conviction *vis a vis* his safety and suitability for maritime service. This is certainly consistent with the procedure employed by the Coast Guard in its internal administrative decision–making about a mariner's application for a credential, *infra*. Thus, the court interprets the phrase "an offense" to mean "this particular conviction for child abuse by this particular Respondent."

"would prevent"

Of even greater concern in this case is the phrase: "would prevent" — because it is upon the interpretation and application of this phrase that the Coast Guard's case succeeds or fails.

Applying the guidance in *Gonzales, supra,* the court reads "would" to mean that which is affirmative, unconditional and directive. Webster's Third New International Dictionary supports

this interpretation; explaining that "would" is the past tense of "will." The term does not mean "might, should, or could." Thus, the term "will" and "would"
describe an absolute and permanent condition.

Likewise, Webster's defines "prevent" as "that which deprives of power or hope of acting, operating, or succeeding in a purpose; to keep from happening; make impossible through advance provisions." There are no conditions subsequent which ameliorate the operation of the word. This court believes the plain meaning of "prevent" is to permanently stop, preclude, forbid or deny.

Accordingly, the phrase "would prevent," then, does not mean "might prevent;" it does not mean "could prevent;" it does not mean "should prevent." It means it "will" prevent. Neither does the phrase mean "would delay, or slow, or condition, or retard." The statutory phrase plainly describes a criminal conviction that permanently precludes the issuance or reissuance of an MMC.

Query: Does the phrase "would prevent" mean "in this particular case?" Or, does the phrase mean "in every such case?" Given that this court has previously adopted an interpretation that looks at the unique facts and circumstances of the instant case, the court interprets and interlineates the entire phrase to read a conviction that "would prevent issuance in this particular case."

It is against these definitions that the Coast Guard's witness testimony is measured.

In this case, the Coast Guard was obliged to prove that Respondent's criminal conviction was one that would prevent the issuance or renewal of Respondent's MMC. Toward that end, the Coast Guard relied principally upon the testimony of Mr. James Crouse.

Mr. Crouse serves as the Chief of the Coast Guard's Safety and Suitability Branch. In his job, Mr. Crouse supervises the Coast Guard's decision–making function in regard to the issuances of Coast Guard credentials. Mr. Crouse explained that the decision to grant or deny

original issuance of an MMC depends, fundamentally, on whether an applicant is a "safe and suitable mariner." (Tr. at 94).[7]

Mr. Crouse's testimony is essential to the Coast Guard's case, because there is no definitive list of crimes that prevent issuance or reissuance of a credential to be found in any regulation or statute. Instead, cases brought under 46 USC §7703(2), essentially call for a hypothetical, somewhat speculative, retrospective analysis of whether a given respondent would have been granted or denied an MMC, had the Coast Guard known of his criminal conviction at the time he/she applied for an original issuance or re–issuance of that MMC.

Mr. Crouse cited the definition of a "safe and suitable mariner" found in 46 CFR §10.107(b). (Tr. at 95). That regulation asks in part, whether the person "would clearly be a threat to the safety of life or property, detrimental to good discipline, or adverse to the interests of the United States." *Id*. The regulation establishes the requirement that the Coast Guard establish a nexus, or connection, between the criminal act and safety at sea.

Mr. Crouse also relied, in part, upon COMDTINST M16000.8B, Marine Safety Manual, Volume III, Marine Industry Personnel (Manual). (Tr. at 95, 97). The court notes specifically that the Manual is not a duly-promulgated Coast Guard regulation subject to public notice and comment prior to promulgation, and therefore lacks the force of law. *Perez v. Mort Bankers Ass'n*, 575 U.S. ___ (2015). Nevertheless, Chapter 3 of the Manual identifies seven criteria against which a respondent's criminal conduct is to be evaluated. The fifth of the seven criteria upon which Mr. Crouse relies also seeks a nexus between the underlying offense and the safe operation of a vessel, requiring the Coast Guard to evaluate: "The extent of the connection between the crime and the MMC and the safe and legal operation of a vessel." *Id.*

Mr. Crouse testified that if an applicant's record reveals a criminal conviction, the Coast Guard employs an "assessment period" as a tool to evaluate that mariner's suitability, in light of

[7] See 46 USC §§7101 – 7705.

the regulatory criteria. (Tr. at 115, 129). Mr. Crouse explained that an assessment period is a period of time that begins to run forward from the date of the applicant's criminal conviction. (Tr. at 117). Mr. Crouse further explained that the Coast Guard evaluates the applicant's record and conduct during the assigned assessment period. (Tr. at 116 – 117). Mr. Crouse also testified that the Coast Guard frequently awards an applicant a credential if, during the assessment period, there are no other adverse factors bearing on a mariner's suitability for sea service. (Tr. at 117 – 118).

Mr. Crouse also testified that the nature of the criminal conviction dictates the length of the assigned assessment period. (See generally, Tr. at 118).

Thus, the Coast Guard uses the assessment period as a decision–making tool in deciding who is a "safe and suitable mariner," by examining the applicant's criminal past and looking for a nexus, or connection, between that applicant's criminal conviction(s) and safety at sea.

Mr. Crouse also relied on Table 1 of 46 CFR § 10.211(g), entitled "Guidelines for Evaluating Applicants for MMCs Who Have Criminal Convictions." (Tr. at 96). The Table, which is not all–inclusive, lists major categories of criminal activity, along with the minimum and maximum assessment periods for each. (Tr. at 96). Moreover, the Table does not list "child abuse" as a potentially disqualifying offense; whereas the Table does list "assault" as a potentially disqualifying offense. (Tr. at 103). [8]

Mr. Crouse testified that in the instant case, he reviewed Florida criminal court orders pertaining to Respondent's conviction, a probation order, a charging affidavit, and copies of the Florida criminal statutes Respondent violated. (Tr. at 100). Mr. Crouse testified that he specifically reviewed Coast Guard Exhibits 2, 3, 4, and 5. (Tr. at 101).

[8] The underlying facts of the instant case do not reveal any actual assault or battery. Respondent's conduct was, at most, an attempted assault or an attempted battery.

Mr. Crouse further testified, hypothetically, that had Respondent (bearing the same conviction for child abuse) applied for an original issuance or re–issuance of a credential, a one–year assessment period would have been assigned, commencing on September 29, 2016. (Tr. at 103 – 107, 120).[9]

Mr. Crouse then explained that as of the date of the hearing, Respondent was still within the one–year assessment period assigned to his conviction and, moreover, Respondent is not a safe and suitable person to serve as a merchant mariner. (Tr. at 104 – 107). Mr. Crouse specifically pointed to the Florida court's Order that Respondent complete the state's sex offender program and that he be prohibited from being in contact with or near a child under the age of 18. (Tr. at 105).

The Coast Guard asserts that because Respondent's one–year assessment period has not expired…Respondent would be prevented from receiving a credential. The Coast Guard also asserts that because there is a nexus between Respondent's predatory conduct and the safety of children at sea, Respondent would have been denied issuance of a credential, as per Coast Guard regulator guidelines.

The Coast Guard also called LT Israel Parker as a witness. LT Parker testified that he currently serves as Chief of the Investigations Division for Coast Guard Sector Jacksonville, Florida since June 2015. (Tr. at 22 – 23). LT Parker has served more than eighteen years on active Coast Guard duty, including eight years' service in the field of marine safety investigations, where he has conducted nearly 500 personnel investigations. (Tr. at 22 – 23, 85). In his current job, he oversees marine casualty investigations and suspension and revocation

[9] Mr. Crouse explained that although child abuse is not specifically listed as an offense in Table 1 of 46 CFR § 10.211(g), "assault" (which is listed in the Table) he felt "child abuse" is a sufficiently analagous crime and bears a one-year assessment period. The court notes that the Table does list "Sexual assault (rape, child molestation)" and assigns a minimum five-year assessment period for offenses like the one for which Respondent was convicted. Mr. Crouse did not explain why the facts of the instant case were more analagous to simple "asault" than the more-appropriate "child molestation." Thus, the Coast Guard's decision-making process is subject to criticism that it is arbitrary and entirely subjective.

investigations. (Tr. at 23). Thus, LT Parker's insights concerning maritime safety are of particular value to the court. LT Parker testified that he investigated the facts and circumstances which led to Respondent's criminal conviction. (Tr. at 24 – 30). LT Parker testified that was present at Respondent's criminal sentencing hearing on September 29, 2016, and personally witnessed Respondent enter his plea and accept the conditions of the sex offender probation. (Tr. at 25). Thereafter, LT Parker testified that, in his opinion, Respondent was not a "safe and suitable mariner." (Tr. at 61). LT Parker drew a nexus between the facts underlying Respondent's conviction and his unsuitability for credentialed maritime service, saying:

> …his credential is specifically designed to take passengers out on the waterway, and with that you're entrusting these, you know, merchant mariners, deputizing them, if you will, to carry out, you know, U.S. laws and protect the safety and well–being of, you know, our mothers and grandmothers and our children. Based on the evidence that I saw surrounding Mr. Mitchell, I would not feel comfortable sending, you know, children out into that environment His operation is, again, passengers, you know…You know, in my opinion, based on Mr. Mitchell's actions, I would not, I don't trust him to be out there with children or adults even, and to make sound decisions.

(Tr. at 61, 77 – 78).

Thus, the court is satisfied that the Coast Guard proved that there is a clear connection between Respondent's conduct and a risk to children at sea. Moreover, the Coast Guard proved that Respondent was convicted of a criminal offense that would have prevented the original issuance of an MMC.

E. Obiter Dictum

It is important to note for the appellate record that Mr. Crouse also testified that if Respondent been convicted of "child abuse" three years ago and if he had been assigned the same one–year assessment period and if he had committed no other offense within that one–year

assessment period, Respondent would have been issued or re–issued an MMC. (Tr. at 120 – 122). If a higher appellate authority interprets 46 USC §7703(2) to mean a criminal conviction that "would prevent" issuance of a credential "in every case" where a respondent is convicted of child abuse, then Mr. Crouse's testimony unravels the contention that such a conviction is one that "would prevent the issuance or renewal" of an MMC. 46 USC §7703(2).

Frankly, Mr. Crouse's testimony reveals that there is no absolute or definitive answer whether a given conviction "would prevent the issuance or renewal" of an MMC. The best that can ever be said about such a charge is: "It depends on a wide variety of subjective factors." Thus, depending upon how 46 USC §7703(2) is interpreted, the instant charge and all such future charges are inherently subject to challenges for arbitrariness, capriciousness or that they are void for vagueness.[10] Respondent's post-hearing Memorandum raises these concerns. Respondent also notes that the Coast Guard Marine Safety Manual blurs the lines of distinction between offenses that require prevention of issuance and suggest prevention of issuance.

V. SANCTION

Title 46 USC §7703 provides that a mariner's credential may be suspended or revoked if the holder is convicted of an offense that would prevent issuance or re-issuance of a credential. Thus, the question obtains whether to suspend or revoke Respondent's MMC in this case.

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 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 Coast Guard seeks revocation of Respondent's credential. In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider:

[10] *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The Coast Guard's post-hearing Memorandum at fn.5 presents a thorough discussion of the issue of "vagueness."

any remedial actions undertaken by a respondent; respondent's prior records; and evidence of mitigation or aggravation. See 46 CFR §5.569(b)(1)-(3).

Remedial Action: Respondent did not provide any evidence of independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 CFR §5.569(b)(1).

Respondent's Prior Records: The Coast Guard did not provide any adverse information from Respondent's prior records.

Mitigation or Aggravation: The Coast Guard did not provide any appropriate evidence in aggravation arising from Respondent's conviction of a crime contemplated by 46 USC 7703(2).

VI. ULTIMATE FINDNGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent's Florida conviction for violating Florida Statues Title XLVI, section 827.03(c), Child Abuse, a third degree felony, constitutes "an offense" under 46 USC §7703(2).

2. Respondent's predatory conduct—evidenced by the Florida conviction and probation—has a clear connection to his duty to promote the safety of children at sea.

3. Respondent's Florida conviction is an offense that "would prevent" the issuance or renewal of an MMC, as described in 46 USC §7703(2).

4. Given the nature of Respondent's Florida conviction and current probation restrictions, the Court concludes Respondent is a demonstrable threat to the safety of passengers under his potential supervision.

5. After considering the record in its entirety, the court concludes **REVOCATION** is the proper sanction.

VII. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** the allegations in the Complaint. Respondent's conduct underlying his criminal conviction poses a demonstrable

threat to the safety of passengers under his potential supervision and is more than sufficient to warrant **REVOCATION**.

VIII. ORDER

IT IS HEREBY ORDERED, that the Merchant Mariner's Credential issued by the U.S. Coast Guard to BROOKS McLEAN MITCHELL is hereby **REVOKED.**

IT IS FURTHER ORDERED, that Respondent BROOKS McLEAN MITCHELL is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Credential issued by the U.S. Coast Guard commencing upon the date of this Decision and Order.

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

IX. POST SCRIPT

On June 6, 2017, Respondent again presented the court with an *ex parte* communication via e-mail (ALJ Ex. II) containing what appears to be a "journal entry" or a "calendar entry" from the Volusia County Court. (ALJ Ex. III). The document does not appear to be a signed and certified Order from a court of competent jurisdiction; it is merely an uncertified collection of "documents" which appear to reflect that Respondent's underlying plea and conviction were vacated. The "documents" also appear to set a new trial date for the week of August 28, 2017. More importantly, the "documents" specifically impose as a condition of bail (?) that Respondent is to have "No unsupervised contact with minors." The court has no way of knowing whether these "documents" are valid.

On June 7, 2017, Respondent again attempted an *ex parte* communication with the court, this time in the form of a second e-mail, informing the court that he was "no longer a convicted felon." (ALJ Ex. IV). Once again, the court is concerned about Respondent's propensity for *ex*

parte communications, despite the court's several warnings to the contrary. The court's concerns are particularly amplified, given that Respondent is clearly the beneficiary of ongoing assistance from an attorney. (It is patently obvious that Respondent's post-hearing brief was written by an attorney.) Thus, the court need not, in this instance, be solicitous of the interests of a *pro se* litigant, as suggested in GREEN, *supra*.

To the extent Respondent's post-hearing *ex parte* communications are intended as a Motion before this court (Respondent's *ex parte* e-mails and attachment do not comport with the requirements of 33 CFR §§20.309, 602, 904), that Motion is **DENIED**. 46 CFR §5.51. The court's reasons are specific:

1. Respondent has not filed any legally appropriate Motion, supported by any citation to legal authority, seeking cognizable relief;

2. Respondent has not presented the court with any Order from a civilian court of competent jurisdiction indicating whether Respondent's plea or conviction have been vacated or the legal effect thereof;

3. Even assuming that Respondent's criminal plea and conviction have been vacated, the court, guided by the overarching principles of "safety at sea," cannot ignore the factual evidence adduced at trial which clearly established that Respondent demonstrates a predilection for sexually predatory conduct toward minor children. Thus he is not a safe and suitable mariner. 46 CFR §§5.5, 10.107.

4. Even assuming the Volusia County journal entry is valid, the very terms of that entry specify Respondent is to have "No unsupervised contact with minors." On its face, this condition is strikingly similar to the court's previous Probation Order, precluding Respondent's contact with minor children. (Tr. at 25). The evidence adduced at trial strongly indicates that the return of Respondent's MMC would likely place Respondent in direct contact with minor children, thus posing a clear and direct threat to safety of Respondent's passengers at sea. 46 CFR §10.107 "safe and suitable mariner."

IT IS SO ORDERED.

Bruce Tucker Smith
US Coast Guard
Administrative Law Judge

Date: June 07, 2017