

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

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UNITED STATES COAST GUARD

Complainant

vs.

DAVID WAYNE COLLARD

Respondent

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Docket Number 2017-0244  
Enforcement Activity No. 5740780

**DECISION AND ORDER**

**Issued: May 17, 2018**

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

**Appearances:**

**LT Elizabeth M. Stevens  
Sector Ohio Valley  
and  
Lineka N. Quijano, Esquire  
S&R National Center of Expertise**

**For the Coast Guard**

**Mark G. Hall, Esquire**

**For the Respondent**

## I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated this case on August 25, 2017, by filing a Complaint asserting a Kentucky state court convicted David Wayne Collard (Respondent) of violating a Class D Felony outlined in Kentucky Revised Statutes (KRS) § 531.100, prohibiting certain video voyeurism. The Complaint alleges Respondent's Felony conviction is "an offense that would prevent the issuance or renewal" of a Merchant Mariner's Credential, in accordance with 46 USC §7703(2). The Coast Guard seeks revocation of Respondent's MMC as a sanction for Respondent's violation.

On October 23, 2017, Respondent filed an Answer denying all jurisdictional allegations, admitting the factual allegation in paragraph two and three of the Complaint, and denying all others. Respondent also set forth six "affirmative" defenses, requested a hearing, and settlement discussions.

Thereafter, the Court convened several pre-hearing telephonic conferences. The general subject matter of those conferences was to discuss scheduling deadlines and other procedural matters.

On January 31, 2018, the Court convened the hearing in Louisville, Kentucky. Lineka Quijano, Esq. and LT Elizabeth M. Stevens represented the United States Coast Guard. Mark G. Hall, Esq., appeared on Respondent's behalf. During the hearing, the Coast Guard called two witnesses and offered seven exhibits, all of which were admitted. See Attachment A. Respondent called two witnesses (including himself) and offered two exhibits, both of which were admitted. Id. The Court also received and

admitted the parties' Joint Stipulation of Fact as Court Exhibit I. Id.<sup>1</sup> After the hearing, both parties filed post-hearing briefs in support of their positions on March 14, 2018.

This matter is now ripe for decision. After considering the entire record as a whole, the ALJ finds the Coast Guard **PROVED** the allegations in the Complaint by a preponderance of the evidence.

## II. FINDINGS OF FACT

After considering the record as a whole, including the hearing transcript and post-hearing briefs, the Court finds the following facts proved by a preponderance of the evidence:

1. Respondent currently holds MMC Number 0395829 and held this credential when he was convicted of violating KRS § 531.100. Court Exh. I
2. On February 7, 2017, Respondent entered a guilty plea and a Kentucky state court convicted him of violating KRS § 531.100,<sup>2</sup> video voyeurism, a class D Felony. Id.
3. Respondent's conviction resulted from his intentional use of a cell phone camera to film his girlfriend's minor daughter (the victim) while she undressed in the bathroom. Tr. at 66-68;
4. Kentucky law enforcement officials apprehended Respondent after viewing the cell phone video recorded by Respondent and learning the victim was Respondent's girlfriend's minor daughter of approximate age 13 or 14. Id.
5. After his conviction, a Kentucky court sentenced Respondent to five years in prison, probated on the condition Respondent would serve a shortened sentence of six months in a Kentucky county jail. Tr. at 84-85, 96-98; CG Exhs. 2, 3, and 5.<sup>3</sup>
6. The Kentucky court permitted Respondent to complete the six month sentence through a work-release schedule. Specifically, Kentucky permitted Respondent to work at sea for approximately 21 days followed by 19 days

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<sup>1</sup> The Transcript's Table of Contents inaccurately reflects Respondent called four witnesses.

<sup>2</sup> A copy of KRS § 531.100 is attached as Attachment B.

<sup>3</sup> The Kentucky court also fined Respondent \$1,000.00.

confinement while ashore in a Kentucky facility. CG Exh. 2, 3, 5; Tr. at 96-98.

7. The Kentucky court also ordered Respondent be placed on the sex offender registry. CG Exh. 3 and 5.
8. As of the date of the hearing, approximately one year lapsed since Kentucky convicted Respondent. CG Exh. 4.
9. At the time of the hearing, Respondent was still participating in the work-release schedule permitted by the Kentucky court. Tr. at 97.
10. Under the terms of his work release program Respondent will complete six months incarceration in June 2018. Id.

### III. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings are remedial and not penal in nature and are intended to promote safety at sea. See 46 U.S.C. § 7701; 46 C.F.R. § 5.5. Pursuant to 46 C.F.R. § 5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. § 7703.

#### 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 Decision 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

In this case, Respondent initially denied all the jurisdictional allegations in the Complaint. However, at the hearing, Respondent and the Coast Guard submitted a Joint Stipulation of Fact acknowledging Respondent held an MMC on February 7, 2017, the date of the Kentucky conviction. See Court Exh. I. Furthermore, Respondent raised no

objection to the Court's jurisdiction during the hearing and presented his MMC to the ALJ at the hearing for verification as required by 46 C.F.R. § 5.521. Tr. at 5.

Title 46 U.S.C. § 7703 makes clear “[a] . . . merchant mariner’s document . . . may be suspended or revoked if the holder . . . is convicted of an offense that would prevent the issuance or renewal. . . .” Because Respondent stipulated he currently holds an MMC, and held that MMC when the state of Kentucky convicted him, jurisdiction is proper in this case.

### **B. Burden of Proof**

In Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts required to establish a violation under 46 U.S.C. §7703, and 46 C.F.R. Part 5 and Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§ 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 U.S.C. § 556(d). The Coast Guard bears the burden of proof to establish the charges by a preponderance of the evidence. 33 C.F.R. §§ 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 C.F.R. §§ 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 & Prod. 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 U.S.C. § 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 renewal of an MMC. Therefore, the Coast Guard must prove by a preponderance of the evidence that Respondent was convicted of a criminal offense that would have prevented the issuance of an MMC.

### **C. Title 46 United States Code 7703**

Pursuant to Title 46 U.S.C. § 7703(2), “A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder . . . is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document. . .” To help interpret § 7703(1), the Coast Guard promulgated numerous regulations addressing criminal history checks and issuance of Merchant Mariner Credentials (MMC). See 46 C.F.R. Part 10, Subpart B, including 46 C.F.R. § 10.211 and Table 1 to 10.211. However, these regulations focus on applications for new credentials or renewal of credentials and do not provide specific guidance for a violation charged under 46 U.S.C. § 7703(2). They are, however, instructive.

A review of some Commandant Decisions on Appeal (CDOA) provides limited information for charges under this provision (e.g. Appeal Decision 1440 (HANDLEY) (1964); Appeal Decision 2717 (Chesbrough) (2017)). There are recent ALJ decisions concerning this issue, which provide persuasive authority. USCG v. Blackwell, Docket No. 2011-0047 (ALJ Smith 2011); See USCG v. Mitchell, 2016-0315 (ALJ Smith 2017). With these authorities in mind, the ALJ turns to the case at bar to determine whether Respondent's criminal conviction constitutes an "offense which would prevent the issuance or renewal of a license."

**D. Whether Respondent's Kentucky Conviction Qualifies as an Offense Contemplated in 46 U.S.C. § 7703(2)**

The facts of this case were largely uncontested at the hearing. The parties agreed Kentucky convicted Respondent of violating Ky. Rev. Stat. § 531.100, a state law prohibiting certain video voyeurism and a Class D Felony. Court Exh. I. In general, the Coast Guard argues the Kentucky conviction qualifies under 46 U.S.C. § 7703(2), because it shows Respondent is an unsafe and unsuitable mariner, and indicates he is unwilling to conduct himself lawfully. Respondent primarily argues the conviction is not one that should affect his MMC because he does not work with children. Respondent also argues the facts in the record show he is a low risk of recidivism and therefore the sanction of revocation is not warranted.

In support of its case, the Coast Guard produced two witnesses during the hearing: Mr. James Crouse and Officer Chad Keen. Mr. Crouse, the Chief of the Safety and Suitability Evaluation Branch at the National Maritime Center, testified that Respondent's conviction was of a criminal "offense that would prevent the issuance or renewal of" an MMC. Tr. at 33, 40, 46. Officer Keen, the state law enforcement officer

who signed the citation leading to Respondent's prosecution, testified concerning the facts surround Respondent's arrest. See CG Exh. 7; Tr. at 64.

The gravamen of the criminal prosecution, based on a plea bargain, stemmed from Respondent using his cell phone to record his girlfriend's daughter, a child of 13 or 14 years of age, while she undressed in the bathroom. Tr. 68. After his conviction, Kentucky fined Respondent \$1,000.00, sentenced him to five years' incarceration, but probated the incarceration sentence, limiting it to six months of actual confinement. CG Exh. 3. The state court allowed Respondent to serve the six months' incarceration on a work-release schedule, and directed his designation on the sex offender registry. CG Exh. 4.

It is clear if the conviction had occurred prior to renewal of his credentials Coast Guard regulations would require consideration of any felony conviction under 46 C.F.R. § 10.211. Section 10.211(g) expressly provides that Table 1 of that section "lists major categories of criminal activity and is not to be construed as an all-inclusive list. If an offense does not appear on the list, the Coast Guard will establish an appropriate assessment period using the list as a guide." Considering this authority, I find the Coast Guard proved Respondent was convicted of an "offense" within the meaning of 46 U.S.C. § 7703(2).

However, under the statute and regulations, not all offenses qualify as one that prevent the issuance of renewal of an MMC. Therefore, the Coast Guard still bears the burden of proving Respondent's Kentucky conviction was one that would prevent the issuance or renewal of his MMC. Toward that end, the Coast Guard relied on Mr. Crouse to explain the Coast Guard criminal record review process.



Mr. Crouse serves as the Chief of the Coast Guard's Safety and Suitability Branch. Tr. At 28-29. In his position, Mr. Crouse supervises the Coast Guard's decision-making function in regard to the issuance of Coast Guard credentials for merchant mariners. Mr. Crouse explained that the Coast Guard decision to grant or deny issuance or renewal of an MMC depends, in part, on whether an applicant is a "safe and suitable mariner." Tr. at 34-36.<sup>4</sup>

As stated in 46 C.F.R. § 10.211(g), there is no all-inclusive list of crimes that the Coast Guard will consider in the criminal record review process. When reviewing MMC applications, Mr. Crouse testified that his office relies on the definition of a "safe and suitable person" found in 46 C.F.R. § 10.107(b). Tr. at 30. That regulation provides that "safe and suitable person" means a person whose prior record, including but not limited to criminal record and/or National Driving Register (NDR) record,<sup>5</sup> provides no information indicating his or her character and habits of life would support the belief that permitting such a person to serve under the MMC and/or endorsement sought 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. See 46 C.F.R. §§ 10.211 and 10.213 for the regulations associated with this definition. Id. This definition provides the requirement that the Coast Guard demonstrate a connection between the individual's record including a criminal conviction and the interests of the United States in good order and discipline and safety at sea when determining whether a conviction is one that would prevent the issuance of an MMC.

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<sup>4</sup> See 46 U.S.C. §§ 7101 – 7705.

<sup>5</sup> 46 U.S.C. § 7703(3) addresses convictions reported under 46 U.S.C. § 30304. See also 46 C.F.R. § 10.213.

Application of the above regulations is clear when a person is applying for a new credential or renewal of an existing credential. The situation before the court arises when an individual is convicted of an offense during the five-year period that an MMC is valid. Although the Coast Guard could provide additional guidance to the public through modifying its regulations,<sup>6</sup> it appears that 46 U.S.C. § 7703(2) and 46 U.S.C. § 7703(3)<sup>7</sup> are self-executing. Merchant mariner credentials are valid for a five-year period. These statutes are used by the Coast Guard when a mariner holding a valid credential is convicted of an offense that may be considered disqualifying in the application process.

When the Coast Guard initiates cases under 46 U.S.C. § 7703(2), it undertakes a analysis of whether the respondent would have been granted or denied an MMC, had the respondent been convicted of the criminal offense at the time he/she applied for the original issuance or renewal of that MMC.

In evaluating whether Respondent's conviction would have prevented the issuance or renewal of an MMC, Mr. Crouse also reviewed and considered, in part, the categories of convictions listed in 46 C.F.R. § 10.211, and the factors described in the Coast Guard's Marine Safety Manual, Volume III, (Marine Industry Personnel). Tr. at 29-31.<sup>8</sup> Mr. Crouse testified that Chapter 3 of the Marine Safety Manual identifies seven criteria to evaluate a respondent's criminal conduct. The fifth of the seven criteria upon which Mr. Crouse relies also addresses the concern that the Respondent's offense affects

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<sup>6</sup> E.g., In implementing statutory authority for the Transportation Worker Identification Credential (TWIC) Transportation Security regulations provide for surrender of a TWIC when a worker is disqualified. See 49 C.F.R. § 1572.19(c) and (d).

<sup>7</sup> Under 46 U.S.C. § 7703(3), the Coast Guard may charge a mariner and seek suspension or revocation of an MMC for a person convicted of a driving under the influence offense. See also 46 C.F.R. § 10.213.

<sup>8</sup> 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); COMDTINST M16000.8B.

the determination of whether Respondent is a safe and suitable person to be in charge of the safe and legal operation of a vessel. Id.

Mr. Crouse also discussed how he considered Table 1 of 46 C.F.R. § 10.211(g), entitled “Guidelines for Evaluating Applicants for MMCs Who Have Criminal Convictions.” Tr. at 33-34. Section 211(g) of the regulations expressly notes that the Table lists major categories of criminal activity, and is not to be construed as an all-inclusive list. The Table also provides for minimum and maximum assessment periods for each of the listed offenses. The Table does not list “video voyeurism” as one of the offenses. However, Mr. Crouse testified that he reviewed the judgment from Kentucky that described the charge as a criminal offense against a victim who was a minor and required sex offender registration for twenty years. Therefore, Mr. Crouse considered the conviction in this case was comparable to “crimes against a person”. Tr. 33-34.

In applying these rules and regulations, Mr. Crouse testified he reviewed various documents surrounding Respondent’s conviction, including: 1.) a Kentucky indictment; 2.) a Commonwealth of Kentucky final judgment; 3.) a Kentucky Judgment of Registration; 4.) and an Order Modifying Sentence. Tr. at 33. After reviewing these materials, Mr. Crouse determined Respondent’s conviction was one that would have prevented the issuance of an MMC. Tr. 33, 41. In Mr. Crouse’s view, Respondent’s violation rendered him unable to be “entrusted with the duties and responsibilities of the master of a vessel.” Tr. at 41. Mr. Crouse explained:

The master of a vessel is the one person that's designated on that vessel as enforcing all of the civil laws that they are operating in, Coast Guard regulation, Coast Guard laws and company policies for operating a vessel and is responsible

for any crew members or passengers embarked on that vessel. And if he can't be entrusted with a person's safety and right to privacy, then what other potential betrayal of trust would he practice for his own gratification or benefit.

Id.

After concluding the conviction would have prevented the issuance of a credential to Respondent, Mr. Crouse also explained the Coast Guard would normally then employ an "assessment period" as a tool to evaluate that mariner's suitability, in light of the regulatory criteria. Tr. 31. This assessment period begins to run from the date of the applicant's criminal conviction or from the date the applicant is released from incarceration, whichever is later.<sup>9</sup> Tr. at 42. Mr. Crouse further explained that the Coast Guard evaluates the applicant's record and conduct during the assigned assessment period. Tr. at 33-42. Given the offense in this case was akin to a "crime against a person" Mr. Crouse opined the normal assessment period would have been between one and five years. Id.

However, at the time of the hearing, January 31, 2018, Mr. Crouse concluded the Coast Guard would not consider the assessment period to have commenced because the record shows Respondent was still serving an active sentence of incarceration. Under the work release schedule, Respondent serves 19 days' incarceration followed by 21 days of release. Tr. at 42-43. In other words, the fact Respondent was still incarcerated would mean that the assessment period has not been initiated for consideration of Respondent's fitness until after he was released from incarceration. Respondent admitted he would be on the work release schedule until June 2018. Tr. at 97.

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<sup>9</sup> Although only tangentially related, the Court observes TSA has similar regulations concerning the issuance of a Transportation Workers Identification Credential, as noted in 49 C.F.R. § 1572.

Upon reviewing this evidence, the materials cited in Mr. Crouse' testimony, and the testimony provided by Officer Keen, the Court finds the Coast Guard proved by a preponderance of the evidence that Respondent's conviction would have prevented the issuance of an MMC. The undersigned Judge agrees Respondent's conviction, which invaded the privacy of a minor child, renders him an unsafe and unsuitable mariner. See USCG v. Mitchell, 2016-0315 (ALJ Smith 2017) (finding an attempt to meet a minor child for sexual activity sufficient to revoke credential, even where no contact had been made).

Even working vessels such as tugboats may have restroom facilities and other areas such as sleeping quarters where passengers or crew may expect privacy to undress. Respondent's offense against a minor child living in his own home raises a concern that he may engage in criminal conduct in the absence of the constraints of incarceration, even if it includes work release. Accordingly, I find Respondent's conviction constitutes an offense that would prevent the issuance of an MMC. Where a Respondent has engaged in criminal conduct that shows a disregard for the law, allowing him to retain an MMC that places him in control of vessels and their operation and compliance with the law including the safety of the crew and any passengers, he is not a safe and suitable person to hold an MMC.

Respondent's conviction indicates he was willing to break the law for his own purposes. Mr. Crouse testified Respondent's conviction shows a breach of trust and forms the basis of his determination that Respondent's conviction would have prevented the issuance of a credential. As the master of the vessel, Respondent wields considerable authority, and, ironically, is entrusted with the responsibility to safeguard those aboard

his ship. Conviction of an offense involving a minor child calls Respondent's moral character into question, and indicates he is not a safe and suitable person to be entrusted with MMC responsibilities.

Ultimately, the Court finds the Coast Guard showed a clear connection between Respondent's conviction and that it raises concerns that he is not a "safe and suitable person" to hold an MMC, and follow law and regulations necessary for safety at sea. The Coast Guard proved the voyeurism conviction is one that would have prevented the issuance of his MMC.

#### **E. Respondent's Defenses**

Respondent argues the Kentucky video voyeurism conviction is not one that would have prevented the issuance of his MMC, and that he is not a risk to safety at sea. See Resp. Brief at 8. Respondent contends Mr. Crouse's testimony is insufficient proof to satisfy the Coast Guard's burden in this case, and does not show a nexus between Respondent's conduct and safety at sea. In support of his argument, Respondent relies on his own testimony, the testimony of Deborah Gonzalez, and a written statement from his employer. Tr. at 81; Tr. at 109; Resp. Exh. B.

Respondent's testimony primarily recounted his work and disciplinary history in the maritime industry, and presented his version of facts surrounding the video recording of the victim while she undressed in the family's bathroom. Tr. at 95. When Respondent's counsel asked him to explain to the Court why the video of the victim was on his phone, he testified, under oath, to the following:

Well, it's an embarrassing and stupid mistake that I made. Being a tow boater, you're gone 21 days at a time, that gives your girlfriend or people that you leave behind to make choices that don't always involve you. I suspected my former girlfriend of cheating on me. I

had set the camera up in the bathroom as Chad, the detective had testified to. But in the process that he admitted that I was setting up the camera, I was actually turning it off. When I found out what the camera was catching, I immediately got rid of it. And I thought that the videos and all of that stuff had been erased and deleted.

Tr. at 95. Respondent's testimony is inconsistent with his guilty plea and the evidence presented by Officer Keen. Respondent's testimony confirms he intentionally set up his phone to record in the bathroom of his home. The implication that his recording of the minor child in his house was unintentional is not consistent with his guilty plea and not credible in view of the record as a whole.

Officer Keen, an Allen County Deputy Sheriff, testified that during his investigation he discovered "numerous videos" of the victim, some of which were edited versions of an original video. Tr. at 74. Officer Keen also testified the videos were broken down to "still frames that were taken of portions of where [the victim] was actually pointing toward the camera, you could see full frontal nudity and those were actually still shots." Id. Moreover, Officer Keen also explained the videos and still shots were found in different devices such as "key fobs," "several different storage devices, micro SD – his USB port, USB drives and that sort of thing." Tr. at 75. Respondent admitted to having the video in his yahoo email account. Tr. at 105. I find Officer Keen's testimony credible.

Officer Keen's testimony shows there were multiple locations of the footage and the still shots. Respondent's guilty plea and the existence of the material on multiple storage devices, including his email, and the video showing him setting up the camera immediately before the victim walks in shows the recording was not an inadvertent action. Tr. at 75. Testimony also showed Respondent edited the footage he captured. Tr

at 74. These acts are not consistent with Respondent's assertion that he inadvertently captured the footage and then sought to eliminate it from his camera. To the contrary, these acts indicate he intended to capture the footage of the victim, and edited the footage to his liking.

Respondent also indicated during the hearing that he does not encounter families or passengers when working on his vessels. Tr. at 90. Mr. Crouse also testified that he would consider the fact that minors were not aboard the vessel, but in this situation, the breach of trust was the issue, and that "[i]f he's willing to betray that trust, then he is willing to betray others." Tr. at 46. The Court's research reveals no authority or rule restricting a current MMC holder's activities to any types of vessels. Respondent may not currently work on passenger vessels with minor children, but there are no guarantees he will not have contact with children.

Respondent's conviction raises a clear concern of whether he a safe and suitable person to be entrusted with merchant mariner credentials. All mariners are bound to follow the laws and comply with regulations for the safety of others. The Merchant Marine industry is highly regulated for the benefit and safety of the public. Failure to comply with the law or regulations raises the risks of collisions, allision or other problems, which may cause substantial harm to persons, property or the environment. E.g., In re Complaint of the City of New York, As Owner and Operator of M/V Andrew J. Barberi, 534 F.Supp.2d 370 (E.D.N.Y. 2008) (allision of the Andrew J. Barbieri in New York); Exxon Shipping Company v. Baker, 128 S.Ct. 2605 (2008) (describing 1989 grounding which resulted in \$507.5 million punitive damage award). While Respondent's crime occurred on land, it demonstrates his disregard for the rights of other



persons and an intentional breaking of the law for his own desires. Therefore, Respondent's conviction is within the scope of 46 U.S.C. § 7703(2), and is an offense which would have precluded the issuance or renewal of an MMC.

Having determined the Coast Guard met its burden to prove the charge, the Court now turns to the appropriate sanction in this case.

#### **IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Court has subject-matter jurisdiction over this suspension and revocation proceeding alleging a violation of 46 U.S.C. §7703, because Respondent is the holder of an MMC, and held this credential at the time of the Kentucky conviction, Id.
2. Respondent's Kentucky conviction for violating Ky Rev. Stat. 531.100, video voyeurism, a Class D Felony, constitutes "an offense" within the scope of 46 USC § 7703(2).
3. Respondent's invasion of privacy of a minor child—evidenced by the Kentucky conviction and probation—has a clear connection to the regulations requirement that mariners holding credentials be a safe and suitable person with a duty to promote safety at sea. 46 C.F.R. § 10.107(b).
4. Respondent's Kentucky conviction is an offense that "would prevent" the issuance or renewal of an MMC, as described in 46 U.S.C. §7703(2).
5. Respondent's work release sentence is a form of incarceration, which he has not yet completed.
6. Based on the evidence presented at the hearing including Respondent's Kentucky conviction and current sentence to incarceration, I find that Respondent's record shows he is not a safe and suitable person for service under merchant mariner credentials.
7. The assessment period in the regulations cannot begin until incarceration is complete.

## V. SANCTION

Title 46 U.S.C. § 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. Having found the charge proved, the Judge must now determine an appropriate sanction and 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 C.F.R. §§ 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this remedial, non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. § 7701; 46 C.F.R. § 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: 1.) any remedial actions undertaken by a respondent; 2.) respondent's prior records; 3.) and evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b)(1)-(3).

In addition to contending lack of nexus to maritime safety, Respondent asks this Court to consider USCG v. Blackwell, Docket No. 2011-0047 (ALJ Smith 2011), wherein another USCG ALJ concluded the Coast Guard showed a connection to an incest charge would have prevented the issuance of an MMC, but adjudicated a three-month suspension.

As explained below, the considerations set forth in 46 C.F.R. § 5.569 are considered in determining an appropriate sanction. Respondent references Blackwell, *supra*, a non-binding decision.

### **A. Remedial Action Undertaken Independently by the Respondent**

Respondent asserts he has received various courses concerning maritime vessel operations. Respondent also admits he cannot undergo the Sex Offender Treatment Program ordered by the Kentucky court because of the work-release incarceration he is currently serving. Respondent stated he was ready and willing to undergo that treatment when he completes the incarceration sentence in June 2018. Tr. 97. But other than Respondent's projection as to what he will do once he completes the work release portion of his sentence, Respondent showed no evidence that he has independently undertaken any remedial action since being convicted by the Kentucky court.

The Coast Guard highlights that Respondent remains under incarceration, and therefore he cannot show he is compliant with his probationary terms because he remains in incarceration. Probation does not begin until incarceration is completed. The Coast Guard also distinguishes the Blackwell case because Respondent has not presented remedial evidence here.

In contrast, Blackwell's evidence included multiple notations of remedial action, including psychiatric and psychological counseling, and change in sobriety.

Having found no evidence concerning Respondent's independent remedial actions, the Court concludes this consideration does not support a mitigated sanction.

### **B. Respondent's Prior Record**

The Coast Guard did not provide any evidence of adverse incidents in Respondent's record before his 2017 conviction. However, Respondent's own testimony raised a single incident related to a grounding in 2009, which did not apparently result in any type of administrative action by the Coast Guard. The Court concludes this incident

does not constitute an adverse prior incident, groundings may be excused under maritime law where a sufficient explanation is provided. See The Stirling Tomkins, 56 F.2d 740 (2d Cir. 1932).<sup>10</sup>

The record shows Respondent has not had any violations with the Coast Guard within ten years. Lack of prior instances is considered in Respondent's favor when determining an appropriate sanction. 46 C.F.R. § 5.569(b)(2).

**C. Mitigation or Aggravation:**

Neither party specifically argues nor cites to aggravating or mitigating evidence in this case. Respondent argues, however, that this case aligns with Blackwell, infra. Respondent further asserts since the arrest he has operated under his mariner's credential, serving his employer well, taking care of his crew and employees and has continually been "entrusted with the duties and responsibilities of the master of a vessel." The Court considers Respondent's evidence of performance as a factor in favor of mitigation.

Respondent's mitigation argument is limited. As pointed out by the Coast Guard, Respondent remains in Kentucky's custody up and until he completes his six (6) month's incarceration sentence through the work release schedule permitted by the Kentucky Court. The undersigned finds that any good behavior during this period should be given limited weight because Respondent remains under the constraints of incarceration. After Kentucky releases Respondent from incarceration sometime in June 2018, he will remain under probationary terms and answer to a Kentucky court for any violations.

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<sup>10</sup> Stirling Tomkins, 1932 A.M.C. 447 (2d 1932) ("The grounding of the tow called for an explanation. The attempted explanation was the presence of a dense fog, but the tug had to meet the prima facie proof of fault occasioned by grounding her tow by showing not only that she was in a troublesome fog, but that her master did everything a skillful navigator should have done while in a fog to keep the tow in line and to keep it from sagging into the shore as it rounded the bend in the river and was subjected to the impact of an ebb tide.")

Respondent argues Blackwell should guide this Court's conclusion that the purposes of these proceedings, being non-criminal, should lend toward a suspension and not revocation. Specifically, Respondent relies on Blackwell's conclusion that,

The criminal prosecution and sentence of Respondent—indeed, the vindication of the public's outrage—were, and are, the sole province of the state of Alabama. It is not for this court, or any other, to supplant its wisdom for that of the Alabama criminal court. Rather, this court's hand must be guided entirely by the applicable law and not by human passions that certainly arise, given the circumstances underlying Respondent's conviction.

Blackwell, at 15-16.

Although the ALJ in that case correctly points out it is for the state court to address the criminal aspects of conduct within the confines of its jurisdiction, the United States Coast Guard, when considering whether to revoke or suspend an MMC, may consider other factors including safety at sea, an entirely different inquiry. The Coast Guard regulates the Maritime Industry on behalf of the people of the United States and public safety. Accordingly, to the extent the Coast Guard pursues the revocation of the license in this case, its revocation request, and this Court's judgment whether to impose the sanction, the focus is on applicable federal law and regulation regarding the effect of a criminal conviction on a federal licensing credential.

The question of whether to suspend or revoke that credential is the sole province of this Court, the Commandant on Appeal, and the NTSB, before reaching the federal judiciary. In short, a state court is free to show lenience; however, this Court is not limited by that judgment.

Respondent also argues he is a low risk for recidivism as reflected in the Report submitted by Deborah Gonzalez, a Social Service Clinician with the Kentucky

Department of Corrections who interviewed Respondent for approximately thirty minutes to an hour. Tr. at 118. Ms. Gonzalez testified at the hearing that acceptance of responsibility is necessary to get into the sex offender program. Tr. at 121. Respondent's testimony that he inadvertently filmed his girlfriend's daughter when attempting to catch his girlfriend shows a lack of candor and reduces the weight given to Ms. Gonzalez' testimony. Accordingly, to the extent that Ms. Gonzalez' assessment considers Respondent a low risk, it is given limited weight because the report appears to be based on a thirty to sixty minute interview and acceptance of responsibilities. Tr. at 118-121. Resp. Exh. A at 3.

Respondent's testimony at the hearing that he was not intending to capture the footage of the victim was inconsistent with his guilty plea and not persuasive. Respondent's attempted explanation to the Court demonstrates he has not yet accepted his own responsibility. As Ms. Gonzalez testified, before an offender is ever accepted into the Sex Offender Treatment Program, he/she must accept responsibility for what they have done. Tr. at 121. In her view, if they have not accepted responsibility, it makes the offender less amenable to treatment. Id See Appeal Decision 2628 (VILAS 2002) (noting refusal to accept responsibility is an aggravating factor).

For the foregoing reasons, I find the Coast Guard has **PROVED** the allegations in the Complaint. Respondent's conduct resulting in his criminal conviction demonstrates he is not a safe and suitable person. After considering all of the evidence, and the parties' arguments, I find the appropriate sanction is **REVOCATION**.

## **VI. Order**

**IT IS HEREBY ORDERED**, the Merchant Mariner's Credential issued by the U.S. Coast Guard to David W. Collard is hereby **REVOKED**. Upon receipt of this order,

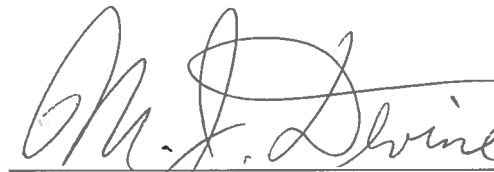
Respondent shall **IMMEDIATELY** deposit his credentials with the Coast Guard, Sector Ohio Valley, 600 Martin Luther King Jr. Place, Louisville, Kentucky 40202-2230

Attention: LT Elizabeth M. Stevens.

**IT IS FURTHER ORDERED**, Respondent David W. Collard is hereby prohibited, commencing on the date of this order, from serving under the authority of the Merchant Mariner's Credential issued by the U.S. Coast Guard.

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

**IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "Michael J. Devine", written over a horizontal line.

Michael J. Devine  
Administrative Law Judge  
United States Coast Guard

## **ATTACHMENT A: LIST OF WITNESSES & EXHIBITS**

### **Coast Guard Exhibits**

1. Kentucky Circuit Court Judgment entered February 8, 2017
2. Allen Circuit Court Plea Agreement filed on February 7, 2017
3. Kentucky Circuit Court Final Judgment entered May 25, 2017
4. Kentucky Circuit Court Order Modifying Sentence entered July 11, 2017
5. Judgment of Registration Designation entered May 25, 2017
6. Memorandum from James Crouse dated August 2, 2017
7. Commonwealth of Kentucky Uniform Citation dated August 13, 2013

### **Respondent's Exhibits**

- A. Facsimile Transmission dated April 25, 2017 to the Honorable Janet Crocker from Debbie Gonzalez.
- B. Statement from Michael S. Kidd

### **Court Exhibits**

- I. Joint Stipulation of Fact

### **Official Notice**

Ky. Rev. Stat. § 531.100

### **Coast Guard's Witnesses**

1. James Crouse
2. Officer Chad Keen

### **Respondent's Witnesses**

1. David Collard
2. Deborah Gonzalez



## ATTACHMENT B

### KRS § 531.100

#### 531.100 Video voyeurism

(1) A person is guilty of video voyeurism when he or she intentionally:

(a) Uses or causes the use of any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, or nipple of the female breast of another person without that person's consent; and

(b) Uses or divulges any image so obtained for consideration; or

(c) Distributes any image so obtained by live or recorded visual medium, electronic mail, the Internet, or a commercial on-line service.

(2) Video voyeurism is a Class D felony.

#### Credits

HISTORY: 2002 c 149, § 1, eff. 7-15-02

## **ATTACHMENT C: 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.

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

ADDRESS OF ADMINISTRATIVE LAW JUDGE:  Administrative Law Judge Office Baltimore United States Coast Guard U.S. Customs House 40 S. Gay Street, Room 412 Baltimore, MD 21202-4022 ADMINISTRATIVE LAW JUDGE: Michael J Devine TELEPHONE: 410-962-5146	FOR DOCKETING CENTER USE ONLY
COMPLAINANT: <b>UNITED STATES COAST GUARD</b>	
RESPONDENT: DAVID WAYNE COLLARD	DOCKET NUMBER 2017-0244
<b>Certificate of Service</b>	COAST GUARD ENFORCEMENT ACTIVITY NUMBER 5740780

**Certificate of Service for Decision and Order**


I hereby certify that I have served the foregoing document upon the following parties (or their designated representatives) to this proceeding at the addresses indicated by Electronically and by U.S. Mail to:

Mark Hall  
119 South Seventh, 4th Floor  
Louisville, KY 40202  
Primary Counsel for: DAVID WAYNE COLLARD

I hereby certify that I have filed the foregoing documents with LT Elizabeth M. Stevens, Sector Ohio Valley, electronically.

I hereby certify that I have filed the foregoing documents with Lineka Quijano, Esq., S&R NCOE, electronically.

I hereby certify that I have filed the foregoing documents with the ALJ Docketing Center electronically.

 <b>Tommy Cantrell</b> <b>Attorney Advisor</b> <b>For the Administrative Law Judge</b> <b>Administrative Law Judge Office Baltimore</b>
Date: May 17, 2018