

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

UNITED STATES COAST GUARD

Complainant

vs.

BILLY JIM SWANN

Respondent

Docket Number 2018-0340
Enforcement Activity No. 5757111

DECISION AND ORDER

Issued: May 19, 2020

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.

Suspension and Revocation National Center of Expertise

CWO Patricia A. Murphy

Marine Safety Unit Portland OR

For the Coast Guard

BILLY JIM SWANN, Pro se

For the Respondent

Pursuant to 46 U.S.C. § 7703(2), the United States Coast Guard (Coast Guard) initiated this administrative action to revoke Billy Jim Swann's (Respondent) Merchant Mariner's Credential (MMC). The Coast Guard issued its original Complaint on September 20, 2018, charging Respondent with 46 USC § 7703(2), a conviction that would preclude the issuance of his MMC. Specifically, the Complaint alleged Respondent was convicted under: 1) 18 U.S.C. § 1343 for Wire Fraud; 2) 42 U.S.C. § 408(a)(4) for Social Security Fraud; and 3) 18 U.S.C. § 1621(a)(2) for Perjury. All three violations are felonies, and the United States District Court for the Western District of Washington sentenced Respondent to twelve months and one day incarceration.

On January 15, 2019, Respondent filed an Answer. On the Answer form, he neither admitted nor denied the jurisdictional and factual allegations. However, he also included a handwritten note stating, "I believe that the allegations brought before me are false and request a hearing!" At the time, Respondent was in federal detention and estimated he would be released in November 2019.

On September 10, 2019, the Coast Guard filed a Motion for Summary Decision under 33 C.F.R. § 20.901. Respondent did not file a response to the Coast Guard's Motion, therefore I issued an order granting the Coast Guard's motion with respect to the facts of the violation but reserving for further consideration the issue of an appropriate sanction.

On March 19, 2020, I conducted a prehearing conference. Both parties were aware of the time and date of the conference. While the Coast Guard's attorney and investigative officer appeared, Respondent did not. Pursuant to the regulations, I issued an Order to Show Cause on March 30, 2020, giving Respondent thirty (30) days to show "good cause" as to why he did not appear at the teleconference.¹ As of this date, Respondent has not filed a response to the Show

¹ The Order was sent to the address Respondent provided to my staff on February 20, 2020, but was returned by the U.S. Postal Service marked, Not Deliverable As Addressed, Unable to Forward, Attempted – Not Known,

Cause Order.

When my staff was attempting to set a time for the prehearing conference, Respondent indicated that he has no interest in pursuing a hearing in this matter and no longer considers his MMC to be valid. Respondent then ceased engaging with my staff and failed to dial in for the conference call. To the extent that Respondent was asserting that I have no jurisdiction over this matter, I disagree. Respondent's MMC expired on August 9, 2019, but was valid on August 24, 2018, the date Respondent was convicted of the offenses described above. Under 46 U.S.C. § 7703(2), the relevant issue is whether a mariner held the MMC at the time of the conviction, not whether the MMC is currently valid. Moreover, Respondent is currently still within the one-year grace period during which he could seek renewal rather than having to reapply for a new MMC. See 46 C.F.R. § 10.227(h). Accordingly, jurisdiction is established.

I have already granted summary decision as to the violation in this matter, and incorporate by reference the February 4, 2020 Order Partially Granting Coast Guard's Motion for Summary Decision. The only issue that remains is to determine the appropriate sanction for the violation. 33 C.F.R. § 20.902(a)(2).

The Coast Guard seeks to revoke Respondent's MMC. The appropriate sanction in a suspension and revocation proceeding depends on the type of offense and circumstances surrounding it. 46 C.F.R. § 5.569. While revocation is the only appropriate sanction for some offenses, the Coast Guard may seek revocation for other types of offenses which would normally result in a lesser sanction if the Investigating Officer believes "the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline." 46 C.F.R. § 5.61.

Under 46 U.S.C. § 7703(2), the violation found proved here, a mariner's MMC may be

either suspended or revoked. Since no particular sanction is mandated, “[t]he selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review.” 46 C.F.R. § 5.569(a). The investigating officer and the respondent may argue for or against a suggested sanction, but the ALJ has “wide discretion to formulate an order adequate to deter the [a mariner’s] repetition of the violations he was found to have committed.” Appeal Decision 2475 (BOURDO) (1988). Accordingly, I am not bound by the Coast Guard’s recommendation of revocation. However, the Respondent has not availed himself of his opportunity to be heard as to an appropriate sanction.

Since a violation of 46 U.S.C. § 7703(2) does not automatically result in revocation, I must consider the nature of the underlying convictions to determine whether they warrant suspension or, as the Coast Guard argues, revocation. The record shows that the fraud involved money and was not directly related to his actions as an MMC holder, and the perjury conviction was related to those crimes.

Under the table at 46 C.F.R. § 10.211, which provides guidance on assessment periods for mariners with criminal convictions who apply for an MMC or a renewal, crimes against property are considered only for purposes of officer endorsements. They do not affect the ability of a mariner to hold a basic MMC. The crimes here would qualify as “other crimes against property,” which do not have a specified minimum and maximum assessment period but are instead “reviewed by the Coast Guard to determine the minimum and maximum assessment periods depending on the nature of the crime.” See 46 C.F.R. § 10.211 n. 2.

However, the Coast Guard believes that the convictions for fraud and perjury show moral turpitude, which goes directly to Respondent’s suitability to hold an MMC. The Coast Guard also argued that Respondent is currently ineligible to hold a TWIC, meaning he is also ineligible to hold an MMC. 46 C.F.R. § 10.203. However, the record does not contain evidence that TSA has actually revoked Respondent’s TWIC or denied him a renewal TWIC. Under TSA’s

regulations, the agency has the discretion to grant waivers of ineligibility, thus the Coast Guard's view that Respondent is currently ineligible for a TWIC may not accord with any action TSA takes regarding Respondent's TWIC.

The Coast Guard argued that Respondent's fraud and perjury convictions should be considered as serious indications that Respondent is not a safe and suitable person to hold an MMC and cannot be entrusted with the duties and responsibilities of a credentialed mariner. Since none of the convictions are specifically listed in the table at 46 C.F.R. § 10.211, I must review each conviction to determine what an appropriate minimum and maximum assessment period would be, and use those findings to determine whether suspension or revocation is the appropriate sanction. See 46 C.F.R. § 10.211(g). Here, I find the fraud charges equivalent in severity to larceny (embezzlement), which carries a minimum assessment period of three years and a maximum of five years and applies solely to the officer endorsements.

Perjury, on the other hand, has no reasonable equivalent in the table. The question is whether the perjury conviction should result in an assessment against the entire MMC or just the officer endorsements, and what length of time is appropriate. I previously considered the application of 46 U.S.C. § 7703(2) in Coast Guard v. Chesbrough, Docket 2015-0139 (ALJ Decision, July 26, 2016). I noted that 46 U.S.C. § 7703(2) has been the law since 1990, but the Coast Guard has not yet issued any implementing regulations. The Coast Guard Marine Safety Manual (MSM) Vol. V, section A.2.b., provides that "46 U.S.C. § 7703(2) authorizes S&R action if the holder of a MMC was convicted of an offense that would prevent the issuance or renewal of the MMC." Section B.9 states that when the minimum assessment period is more than one year, the appropriate sanction is revocation, but when the minimum assessment period is less than one year, the IO "may propose a sanction of a reasonable number of months based on the overall conviction record of the mariner."

The legislative history of 46 U.S.C. § 7703(2) shows that Congress intended the Coast

Guard to be able to initiate suspension or revocation proceedings “if it is shown after an opportunity for hearing that the holder was convicted of a serious criminal offense that would reflect adversely on the offender's character and fitness to serve consistent with the interest of safety at sea; ...; or fails to meet the standards for issuance of the license or document.” H.R. CONF. REP. 101-653, 129, 1990 U.S.C.C.A.N. 779 at 807; see also id. at 809. Congress has not specifically detailed what convictions would prevent issuance of a credential, but 46 U.S.C. § 7101 grants the Coast Guard broad-based authority to promulgate regulations and requirements for credentialing mariners and for suspending or revoking credentials under 46 U.S.C. §§ 7701-7705. Although the statute does not specifically define the type of “conviction that would preclude the issuance or renewal of a credential and the Coast Guard has not promulgated regulations on point, they have made policy statements and issued rules at 46 C.F.R. Part 10 that address convictions and whether a mariner is a safe and suitable person who can be entrusted with the duties and responsibilities of the MMC. The Commandant has affirmed my finding that “offenses listed in table 1 of 46 C.F.R. § 10.211 are convictions that would preclude the issuance or renewal of MMCs.” Appeal Decision 2717 (CHESBROUGH) (2017) 2017 WL 6941489, 8.

As noted above, the purpose of 46 U.S.C. § 7703(2) is to permit the Coast Guard to suspend or revoke an MMC if it proves, after opportunity for a hearing, that the holder was convicted of a serious criminal offense that would reflect adversely on his or her character and fitness to serve consistent with the interest of safety at sea. Here, Respondent requested a hearing and was given the opportunity to be heard, but failed to appear at a prehearing conference.

I have considered the Coast Guard’s argument that fraud and perjury convictions demonstrate that Respondent does not have the moral character to be trusted with an MMC and I agree. I find the perjury charge warrants the same assessment period as larceny, but should be directed against the entire MMC rather than just the officer endorsements. A mariner’s willingness to make false statements under oath is extremely serious, and the Coast Guard

believes that it renders Respondent unfit to hold an MMC under 46 C.F.R. § 10.211(d). I find the Coast Guard's position reasonable and agree that the perjury charge warrants an aggravated sanction of revocation against the entire MMC rather than just a sanction against the endorsements.

Accordingly, I hereby find that the proposed sanction of REVOCATION is appropriate in this matter.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Billy Jim Swann's MMC and all other documents and certificates held by Respondent are **REVOKED**. Respondent is to surrender his MMC to the nearest Coast Guard facility immediately.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. Subpart J, § 20.1001 – § 20.1004. (Attachment A).



George J. Jordan
US Coast Guard Administrative Law Judge

Date: