UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE and MERCHANT MARINER DOCUMENT	:	NO. 2663
Issued to: GEORGE L. LAW, JR.	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated July 8, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, suspended the merchant mariner credentials issued to Mr. George L. Law, Jr. (hereinafter "Respondent") for six months upon finding proved a charge of *misconduct*. The misconduct charge alleged that while performing official matters associated with his mariner credentials (applying for renewal of his merchant mariner license, issuance of a duplicate merchant mariner document and issuance of an original Seafarer's Training, Certification and Watchkeeping certificate), Respondent failed to disclose a criminal conviction in his application package in violation of 46 C.F.R. § 10.201(h). Although the Coast Guard asserted that revocation was the mandatory sanction in cases involving fraud in the procurement of a mariner credential, the ALJ imposed a sanction of six months suspension.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent on January 11, 2005. The Complaint included a "Proposed Order" seeking a six-month suspension of Respondent's mariner credentials. Respondent filed an Answer to the Complaint on January 21, 2005. Thereafter, the Coast Guard filed a "Motion to Amend Complaint" on March 23, 2005 (one week prior to the hearing). The motion sought to amend the initially filed Complaint to reflect that revocation was the only appropriate sanction in a case involving fraud in the procurement of a license. The ALJ determined that the change sought by the Coast Guard's "Motion to Amend Complaint" would be a material change that broadened the issues presented in the case without giving Respondent adequate time to reply. [D&O at 3] As a result, the ALJ denied the Coast Guard's "Motion to Amend Complaint." In so doing, however, the ALJ noted that the applicable regulations provide guidance to the ALJ with respect to the selection of an appropriate order and, as such, instructed the parties to be prepared to present aggravating or mitigating arguments in support of the suggested sanction at the hearing. [Order Denying Coast Guard's Motion to Amend Complaint at 2]

The hearing in the matter convened in Houma, Louisiana, on March 30, 2005. Respondent appeared personally and elected to represent himself. At the hearing, in addition to denying all of the factual allegations alleged by the Coast Guard, Respondent also denied that he was acting under the authority of his merchant mariner credentials when he conducted the licensing activities giving rise to the charge at issue herein. The Coast Guard Investigating Officers introduced two exhibits into evidence and did not call

any witnesses. Although Respondent failed to offer any exhibits into evidence, he testified on his own behalf and actively participated in the hearing.

The ALJ issued his D&O on July 8, 2005. Thereafter, on July 11, 2005, the Coast Guard filed both the required Notice of Appeal and Appellate Brief. Respondent did not file a Reply Brief. Accordingly, this appeal is properly before me.

APPEARANCES: Respondent appeared *pro se.* The Coast Guard was represented by Mr. Jim Wilson and ENS Timothy Tilghman of U.S. Coast Guard Marine Safety Office Morgan City, Louisiana.

FACTS

At all times relevant herein, Respondent served under the authority of Coast Guard issued merchant mariner credentials. [D&O at 6; 46 C.F.R § 5.57(b)]

On October 18, 2002, Respondent signed and submitted an application package for issuance/renewal of merchant mariner credentials to the Coast Guard by filing application materials at Regional Examination Center New Orleans. [D&O at 2; Investigating Officer (hereinafter "IO") Exhibit 2; Complaint at 2] In his application package—which sought renewal of Respondent's merchant mariner license, the issuance of a duplicate merchant mariner document and the issuance of an original Seafarer's Training, Certification and Watchkeeping certificate—Respondent certified that the information he provided on the application form was correct. [*Id.*] In addition to providing the requisite information as to his education and qualifications, Respondent was asked to provide information as to whether he had been convicted of an offense other than a minor traffic violation. [*Id.*] To that end, the application, CG Form No 719B (Rev. 7/01), stated:

> Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation? Conviction means found guilty by judgment or by plea and includes cases of deferred adjudication (NOLO CONTENDERE, adjudication withheld, etc.) or where the court required you to attend classes, make contribution of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of a trial court finding? Expunged convictions must be reported unless the expungement was based upon a showing that the court's earlier conviction was in error.

To answer this inquiry, Respondent initialed the "no" block on the application, thus indicating that he had never been convicted by any court of any offense other than a minor traffic infraction. [*Id.*] The next question on the application asked Respondent:

> Have you ever been convicted of a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on the highway or operating a motor vehicle while under the influence of, impaired by, alcohol or a controlled substance?

To answer this question, Respondent initialed the "yes" block and included an amplifying statement that described the circumstances surrounding a DUI arrest.

During the Coast Guard's review of Respondent's application package, contrary to Respondent's signed and dated application materials, a criminal records check revealed that in 1999 Respondent pleaded *Nolo Contendre* to a battery/domestic violence charge that occurred in Escambia County, Florida. [D&O at 5, 7; IO Exhibit 1] As a result of his plea, Respondent was ordered to pay court costs and to participate in ten hours of an anger management course. [D&O at 5; Tr. at 31; IO Exhibit 1]. Sometime after Respondent entered his plea, an Escambia County judge waived the requirement that Respondent attend anger management classes [D&O at 5; Tr. at 31, 42, 45-47, 52-53] Therefore, Respondent's only punishment for the battery charge was the payment of court costs. [D&O at 5; Tr. at 31, 42, 45-47, 52-53] The record shows that Respondent

mistakenly believed that the judge's waiver of the anger management course resulted in the dropping of the battery charge, despite his obligation to pay court costs. [D&O at 6; Tr. at 48-51] As a result, Respondent concluded that he was not required to report the incident in his mariner credential application package. [*Id.*] The instant suspension and revocation was initiated as a result.

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of *misconduct*. On appeal, the Coast Guard did not delineate specific bases of appeal. However, a careful review of the Coast Guard's Appellate Brief shows that only one basis of appeal is presented:

> *The ALJ erred in imposing a sanction of suspension because case law precedent, established by past Commandant Decisions on Appeal, requires that, in cases where a misconduct charge is predicated on a mariner's submission of a fraudulent mariner credential application, revocation is the mandatory sanction.*

OPINION

The sole issue presented in this case is whether the ALJ, upon finding that Respondent had engaged in misconduct when he failed to report a prior conviction on his mariner credential application, erred in imposing a sanction less than revocation. The Coast Guard argues, citing several prior Commandant Decisions on Appeal, that when a misconduct charge based on a Respondent's failure to disclose a prior conviction on his mariner credential application is found proved, the only appropriate sanction is revocation. However, in his D&O, the ALJ distinguished between cases involving misconduct based on the presence of a false statement on a mariner application and cases involving misconduct based on a fraudulent statement on an application. Past

Commandant Decisions on Appeal show that there is a distinction between cases involving misconduct predicated on the submission of a fraudulent application, for which the mandatory sanction is revocation; and those involving a false statement, for which the sanction may be less than revocation.

> The Coast Guard argues that the ALJ erred, as a matter of law, when he
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> ...substituted his judgment, concerning the appropriate sanction, for the Commandant's judgment, concerning the appropriate sanction. The ALJ determined the Respondent had not submitted a **fraudulent** application but instead submitted a **false** application. Using this false/fraudulent distinction, he gave the Respondent six months suspension vice the required revocation. [Coast Guard Appeal Brief at 1]

The Coast Guard avers that there is no "specific intent" element for a charge of misconduct, and therefore, there is no legal distinction between a factual allegation of failing to disclose information on an application, fraud on an application, a false statement on an application, or "any other form of such statement." [*Id.* at 2] The Coast Guard's focus on specific intent in this context is misplaced. The essential inquiry is whether Respondent knew the application he submitted to the Coast Guard was false.

Previous Commandant Decisions on Appeal, including those the Coast Guard cited for their position, have recognized that there is a distinct difference between a fraudulent and a false statement. *See* Appeal Decisions 2608 (SHEPHERD), 2456 (BURKE), 1381 (CLINTON), and 809 (MARQUES). In the *Shepherd* case, the Coast Guard substituted "false statement" for "fraudulent statement" in one of the specifications for misconduct. [*Id.*] On the issue, the decision expressly found that submission of a "false application" is a lesser included offense of submitting a "fraudulent application." [*Id.*] The import of this decision is to clearly acknowledge that there is, in fact, a

difference between a false and a fraudulent statement on a merchant mariner credential application. [*E.g. Id.*]

A false statement is made if there is no actual or constructive knowledge that the statement is false. *See* Appeal Decision 809 (MARQUES). If the statement is made with the knowledge that it is false, or it is intended to be misleading, then it may be considered a fraudulent statement. [*See Id.*] In addition, a statement recklessly made without knowledge of its truth or falsity may be considered a false statement knowingly made. *See* Cooper v. Schlesinger, 111 U.S. 148 (1884).

Fraud is a knowing concealment of the truth or a material fact aimed at inducing another to act. Blacks Law Dictionary 685 (8th ed. 2004). In order for a statement to be considered fraudulent, the ALJ must find proven that the Respondent made the statement knowing that it was false, or that he reasonably should have known it was false. *See* Appeal Decision 2456 (BURKE); Cooper v. Schlesinger, 111 U.S. 148 (1884). To decide whether the statement is false or fraudulent, the ALJ can consider both the credibility of the proponent of the statement and the context of the statement. Appeal Decisions 2654 (HOWELL) and 2279 (LEWIS). The trier of fact, by virtue of his unique opportunity to observe witnesses and weigh their testimony, is assigned the duty of assessing the evidence adduced and making credibility determinations. [*Id.*] His conclusions on the weight to be given any particular evidence and ultimate findings of fact deserve a degree of deference. Appeal Decision 2214 (CHRISTENSEN).

Actual or constructive knowledge that a statement is false is crucial to a finding that the statement is fraudulent. *See* Appeal Decision 2456 (BURKE). Actual knowledge may be described as a person possessing "specific knowledge" of some material fact. *See*

Warner v. Armco, 1993 WL 771048 (D. Minn 1993). In a case involving whether a mariner knew there was marijuana in a personal bag, a past Commandant Decision on Appeal described actual knowledge as a "conscious possession" of specific facts. Appeal Decision 1081 (JAKOBSEN). If a mariner inadvertently or unintentionally omitted a particular fact on an application, it cannot be said that the mariner has necessarily committed a "fraud." [*Id.*]

In this case, if Respondent had reason to know that the representation he made on the license application was false, then he may be considered to have constructive knowledge of the falsity of the statement made. *See* Appeal Decision 809 (MARQUES). There is no requirement of "specific intent" to make a fraudulent statement; the focus is on whether the actor has knowledge of the falsity of the statement. [*Id.*] Whether Respondent had reason to know, or should have known, that the statement was false, is a determination driven by the specific facts of the case. *See* Lijeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988); Appeal Decision 809 (MARQUES). Whether it was reasonable for Respondent to *not know* the truth of the statement is also a question of fact. [*Id.*]

The ALJ, as the trier of fact, is in the unique situation to judge the credibility of witnesses testifying before him. Appeal Decisions 2654 (HOWELL) and 2279 (LEWIS). In this case, Respondent testified under oath that he spoke with the clerk of the county court and understood that the anger management course requirement was waived. [Tr. at 47] Respondent also testified that he never intended to commit a fraud inasmuch as he forgot about the charges and only had to pay court costs. [Tr. at 31, 34-35] Finally, Respondent testified that he did not believe he had been convicted. [Tr. at 47]

The ALJ must decide how much deference, or weight, should be given to each piece of evidence he considers. Appeal Decisions 2654 (Howell) and 2214 (Christensen). The record shows that, in this case, the ALJ determined the Respondent did not intend to commit a fraud on his license application and gave deference to Respondent's sworn testimony. [D&O at 12-13] Findings of the ALJ need not be consistent with all evidentiary material in the record as long as sufficient evidence exists in the record to justify the finding. *See*, *e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2546 (SWEENEY); 2519 (JEPSON), 2492 (RATH), 2424 (CAVANAUGH) and 2282 (LITTLEFIELD). Furthermore, conflicting evidence will not be reweighed on appeal where the ALJ's determinations can be reasonably supported. *See* Appeal Decisions 2584 (SHAKESPEARE), 2504 (GRACE), 2468 (LEWIN) and 2356 (FOSTER). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See*, *e.g.*, Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE) and 2584 (SHAKESPEARE).

The Coast Guard argues that the ALJ "put himself in the shoes of a trained and qualified [Regional Examination Center] evaluator" when he issued a sanction of suspension rather than revocation in this case. [Coast Guard Appeal Brief at 3] In this case, however, the ALJ did not issue or renew the mariner's credentials; the ALJ simply decided which sanction was necessary, required, or mandated under the circumstances. The appropriate sanction to be given for a particular offense is dependent on the type and circumstances of the offense. 46 C.F.R. § 5.569. Some offenses mandate a particular

sanction whereas other offenses give the ALJ discretion in crafting the appropriate sanction. [*Id.*] Offenses which either require revocation, or require revocation to be sought, include Violent Acts Against Other Persons (injury); Drug Use, Sale or Association; Rape; Murder; Sabotage; Perversion; *et. al.* 46 C.F.R. § 5.59. In addition, at least one prior Commandant Decision on appeal has made clear that when fraud in the procurement of a license is proven, revocation is the only appropriate sanction. Appeal Decision 2205 (ROBLES).

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which governs Coast Guard Suspension and Revocation hearings, requires that a sanction may only be imposed if the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. § 551. The U.S. Supreme Court has equated the "reliable, probative and substantial evidence" standard with the "preponderance of the evidence" standard. Steadman vs. Securities and Exchange Commission, 450 U.S. 91, 101 S. Ct. 999 (1981). In order to satisfy the preponderance of the evidence standard, the ALJ needs to be convinced that the existence of a fact is more probable than its nonexistence. *See* Appeal Decision 2477 (TOMBARDI); *See also* Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring).

In this case, the ALJ found that there was not substantial evidence to prove that Respondent committed a fraud in the procurement of his license. Instead, the ALJ found that Respondent made a false statement on his application. [D&O at 13] As a result, the ALJ was not bound by Appeal Decision 2205 (ROBLES), and did not err in assigning a sanction less than revocation.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find that the Coast Guard's appeal to be without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on July 8, 2005, is **AFFIRMED.**

Signed at Washington, D.C. this 6th of August, 2007.