U N I T E D S T A T E S O F A M E R I C A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	COMMANDANT
	:	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 638361	:	NO. 2613
Issued to Jeffrey A. Slack	:	

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By Decision and Order ("D&O") dated May 3, 1996, an Administrative Law Judge ("ALJ") of the United States Coast Guard at Houston, Texas, revoked Mr. Jeffrey A. Slack's ("Appellant") license based upon finding proved one specification of *misconduct* and one specification of *violation of law*. The specification for the charge of *misconduct* alleged that Appellant, while acting under the authority of the above captioned license, wrongfully made fraudulent statements on his Merchant Mariner's license renewal application. The specification for the charge of *violation of law* alleged that Appellant, while being the holder of the above captioned license, was convicted of an offense described in Section 205(a)(3)(A) of the National Driver Registration Act of 1982.

The hearing was held on February 27, 1996 in Toledo, Ohio. Appellant entered a response denying each charge and specification.

The Coast Guard Investigating Officer introduced into evidence the testimony of three (3) witnesses and six (6) exhibits. In defense, Appellant entered into evidence his own testimony, the testimony of three (3) witnesses, and twelve (12) exhibits. The ALJ entered into evidence eight (8) procedural exhibits.

The ALJ issued a Decision and Order ("D&O") on May 3, 1996. The ALJ found the *misconduct* charge and supporting specification proved and the *violation of law* charge and supporting specification proved. Upon a finding of proved, the ALJ revoked Appellant's license.

The D&O was served on Appellant on May 6, 1996. Appellant, through his attorney, filed a timely notice of appeal on May 29, 1996. Appellant requested a transcript which was received on August 8, 1996. The appeal was perfected on October 7, 1996. Therefore, this appeal is properly before me.

APPEARANCE: Mr. Thomas A. Sobecki, 520 Madison Avenue, Suite 811, Toledo, Ohio 43604.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of and acting under the authority of the above captioned license. See hearing transcript ("TR") at 36; D&O at 3-4; Investigating Officer's Exhibits ("I.O. Ex.") 1 and 2. Appellant's license authorized him to serve as Master of Great Lakes or Inland Steam or Motor Vessels of not more than 25 gross tons and also contained a commercial assistance towing endorsement. See I.O. Ex. 1. Appellant has held a license since 1986. See I.O. Ex. 2.

Appellant signed and submitted a license renewal application in which he certified that the information contained on the form was correct. See TR at 38; I.O. Ex.

2. On August 28, 1995, MSO Toledo's Regional Examination Center ("REC") received Appellant's license renewal application. See I.O. Ex 2.

On August 29, 1995, Mr. Bibee, a license evaluator for the REC, advised Appellant that his license renewal application was being returned as incomplete because he did not complete blocks #20, 21 and 22, which request information on prior criminal convictions other than minor traffic violations. See Respondent's Exhibit A; TR. 120. Before answering items 20, 21, and 22, Appellant contacted the Coast Guard Marine Safety Office in Toledo, Ohio to inquire as to what types of convictions needed to be included on the application. See TR. 123. Appellant testified that a lady with the Coast Guard whom he did not identify informed him that they were especially interested in information concerning Driving Under the Influence (DUI) convictions. Id.

On his resubmitted license renewal application, Appellant answered "yes" to question 20 which reads, "Have you ever been convicted by any court – including military court – for other than a minor traffic violation? (If 'YES', complete Item 22 Below.)." Appellant placed his initials in this block to certify that he answered the question. Item 22 reads: "Particulars of conviction/use or addiction (State place, date, and particulars)." Appellant listed a May 29, 1995 conviction for DUI in block 22. He listed no other convictions on his license renewal application.

Contrary to what he stated on his license renewal application, Appellant has an extensive list of prior convictions other than minor traffic violations. In 1984 and again in 1993, Appellant was convicted of reckless operation of a motor vehicle. See I.O. Ex 3. In 1986, Appellant was convicted after a plea of no contest to a charge of aggravated menacing. *Id.* In 1987, Appellant was found guilty of resisting arrest. See I.O. Ex. 5. In

1991, Appellant was convicted of Operating a Motor Vehicle while Intoxicated ("OMVI"). In 1995, Appellant was convicted of Driving While Intoxicated ("DWI"). See I.O. Ex. 4.

On November 13, 1995, Mr. Bibee wrote to the Appellant advising him that his application would be held pending the outcome of a hearing into the propriety of his license renewal application and advised that the hearing would be scheduled for December 13, 1995. See Respondent's Exhibit C. On November 17, 1995 the Appellant was formally served with the charges and specifications. The formal charges advised appellant that the hearing was scheduled for January 23, 1996. See Respondent Ex. E. On January 9, 1996, the ALJ changed the date, time and location of the hearing. The date was changed from January 23, 1996 to February 27, 1996. The time was changed from 1000 to 0900. The location was changed from the Federal Building in Toledo to the Toledo Municipal Court. See Respondent Ex. D.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the ALJ:

1. Appellant was denied a timely hearing.
2. The definition of misconduct is unconstitutionally vague.
3. The charge of misconduct and the supporting specification were not proved.
4. The ALJ did not fairly consider all options in imposing sanctions.

OPINION

I

Appellant's first argument is that he did not receive a timely hearing. Specifically, Appellant contends he was originally informed in a letter that his hearing would be held on December 13, 1995, but because the hearing was not held until February 27, 1996, it was not timely. 46 C.F.R. § 5.509 allows an ALJ to change the "time and place of opening the hearing" as long as it is "consistent with the rights of the respondent to a fair, impartial and timely hearing and the availability of the witnesses." The record indicates that the delay was due to logistical issues involved with using an out of state judge. See TR. 12-13. The Coast Guard also kept Appellant well informed of the changes through correspondence and phone calls. See TR. 10. Whether a hearing is held in a timely manner is decided based on a standard of reasonableness under the circumstances and whether the respondent is prejudiced by the alleged delay. In this case I am not convinced that the "delay" between initial notification that charges would be preferred and the hearing thereon was, in fact, a "delay". But, for purposes of this appeal I will assume that two and a half months is a "delay".

In U.S. v. Jackson, 504 F. 2d 337 (8th Cir. 1974), the court held that the due process clause of the Fifth Amendment of the U.S. Constitution requires a balancing of the reasonableness of a delay against any resultant prejudice. Appellant has not argued that he was prejudiced by the "delay". Nor has he made any showing that the "delay" was unreasonable. There is no indication that the "delay" had any affect on locating witnesses or their ability to testify. Nor is there any indication the "delay" substantially

altered Appellant's or any witnesses' ability to recall facts or events. See Appeal Decisions 2253 (KIELY); 2064 (WOOD). This contention is without merit.

II

Appellant's second argument is that the definition of misconduct in 46 C.F.R. § 5.27 is unconstitutionally vague.

Administrative proceedings do not present a proper forum for Constitutional challenges to duly enacted regulations. See generally: Public Utilities Comm. v. U. S., 355 U. S. 534 (1958); Engineers Public Service Co. v. S. E. C., 138 F.2d 936 (1943); Decisions on Appeal Nos. 2135(FOSSANI), 2049(OWEN) and 1382(LIBBY). "An agency charged with administration of an act of Congress lacks the authority to pass upon the constitutionality of that act, even were it so inclined. Thus the proper forum for such an objection lies before a court of record and not an administrative proceeding." See Appeal Decision 2202 (VAIL).

This is not the proper forum to determine the constitutionality of the definition of misconduct in 46 C.F.R. § 5.27. See Appeal Decision 1862 (GOLDEN), where I stated [I]f appellant wishes to complain about my [regulatory] definitions, he is free to do so. But this is not the forum in which he will obtain the relief he seeks." Such an issue needs to be addressed in a court of record.

III

Appellant's third argument is that it was error for the ALJ to have found proved the first charge and accompanying specification, and therefore, the charge should be dismissed for being insufficient. Appellant contends that the specification was inaccurate because it alleged that the misstatements on the license application, in this case

omissions, were in block 22 and not block 20, as the charge and supporting specification indicate. Alternatively, Appellant argues that even if the specification is found to be sufficient, he lacked fraudulent intent, and therefore, the incorrect filing did not constitute misconduct.

The specification supporting the charge of misconduct stated that Appellant "initialed block 20 of [his] license application stating that [he] had only one conviction." Appellant did answer block 20 correctly by answering "yes" to the question: "Have you ever been convicted by any court – including military court – for other than a minor traffic violation? *If 'yes,' complete item 22, below* [emphasis added])." However, it is apparent that block 20 and block 22 go hand in hand. Block 22 is an extension of block 20 where the individual describes in detail a "yes" answer to block 20. It was block 22 that Appellant answered inaccurately but to claim that he was not charged with this is without merit. Findings that lead to the suspension or revocation of a license can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, (D.C. 1950); Appeal Decisions 2545 (JARDIN); 2422 (GIBBONS); 2416 (MOORE); 1792 (PHILLIPS); 2578 (CALLAHAN). When the record clearly indicates that the parties understand exactly what the issues are, the parties cannot afterward make a claim of surprise, lack of notice, or other due process shortcoming. See Appeal Decision 2545 (JARDIN); 2512 (OLIVO); Kuhn, *supra*.

Clearly, Appellant knew what issues were to be litigated. Appellant knew that he was being charged with fraudulently applying for a license renewal because he did not disclose all of his convictions on that form. That the specification indicated block 20 instead of block 22, while slightly inaccurate, is not grounds for dismissal of the

specification and reversal of the decision. If anything, it was a harmless error. In this instance, there was no prejudice to Appellant. Appellant had notice of the charge, was able to put forward a defense, and fully litigated the issue.

In the alternative, Appellant asserts that even if the specification is found to be sufficient, Appellant lacked fraudulent intent; therefore, the incorrect filing did not constitute misconduct. Appellant cites Rechany v. Roland, 235 F. Supp. 79 (S.D.N.Y. 1964) for the proposition that "an error of judgement, no matter how serious, which is not accompanied by fraudulent intent, does not constitute misconduct." (See Appellant's Brief page 4). The same argument was unsuccessful in Appeal Decision 2433 (BARNABY). In BARNABY, I stated:

> Appellant contends that misconduct was not proven because his failure to reveal the fact of his conviction at the time of his license renewal application was not wrongful. . . . He argues that poor judgment is not wrongful, citing Recahny [sic] v. Roland, 235 F Supp. 79 (S.D.N.Y. 1964). Recahny [sic], however, is inapposite to the facts here. The issue in that case was whether Plaintiff's conduct - using a passkey to open a passenger's stateroom - was wrongful. The court distinguished between wrongful conduct and errors in judgment. Here, Appellant was not charged with not fully informing himself, but rather with misrepresentation. His answer on the application concerning his prior conviction . . . was clearly false and in violation of pertinent statutes and regulations. His conduct was wrongful and does not fall within the ambit of a mere error of judgment."

Appeal Decision 2433 (BARNABY) (citations omitted). Appellant's actions clearly amounted to wrongful conduct as enunciated in the quoted passage from Appeal Decision 2433 (BARNABY). Appellant admitted that he contacted the Coast Guard to inquire as to what information was required in block 22 of the application. He knew the Coast Guard wanted information regarding DUI's because, by Appellant's own admission, the Coast Guard told him so. See TR. 123. Notwithstanding this information, Appellant

decided not to record his 1991 DUI conviction on his application because he "didn't think it was relevant being that long ago." See TR. 123. The record reflects that appellant had reportable convictions in 1984, 1986, 1987, 1991, 1993 and 1995. On his license applications he reported only the 1987 and the 1995 convictions. He admitted omitting the others (including one involving a DUI), notwithstanding that he knew the license renewal form sought information regarding convictions from all courts. TR. 139-141. This wrongful conduct clearly exceeds a "mere error of judgment."

Appellant also contends that the word "conviction" was used on block 22, and therefore, Appellant was reasonable in thinking that he only had to report his most recent conviction because the word "conviction" on block 22 is singular, and not plural. This argument is completely without merit. There is nothing on the application which would indicate that the applicant only had to report his most recent conviction. In addition, as stated earlier, Appellant knew the form contemplated information from all *courts. He admitted* that he was informed by the Coast Guard to include DUI *convictions* [emphasis added]. See TR. 123, 139. Appellant' admissions at the hearing show he knew of the requirement that he include prior convictions and not just his most recent conviction on the license renewal application. Thus, by his own testimony, Appellant refutes this contention.

IV

Appellant's fourth argument is that the ALJ did not consider all options when he determined that a revocation order was required after finding the charges proved. Appellant contends that this is contrary to 46 U.S.C. §§ 7701 and 7703 because under these statutes revocation or suspension is not mandatory.

46 U.S.C. § 7701(b) states that "[l]icenses . . . may be suspended or revoked for acts described in section 7703 of this title." 46 U.S.C. § 7703 goes on to state that "[a] license. . . may be suspended or revoked if the holder – (1)(B) has committed an act of incompetence, misconduct, or negligence." The ALJ did not ignore these sections of the Code when he made his decision. Precedents dictate that the ALJ had only one option to follow when determining the appropriate disposition in this case. The ALJ followed those precedents correctly by revoking Appellant's license. I have previously stated that where fraud in the procurement of a license is proved in a suspension and revocation proceeding, revocation is the *only* appropriate sanction. See Appeal Decisions 2570 (HARRIS); 2346 (WILLIAMS); 2205 (ROBLES); 2569 (TAYLOR). Appellant was found to have fraudulently procured a renewal of his license.

It was proved at the hearing that on his original license application in August 8, 1986, Appellant stated that he did not have any convictions. Clearly, from the record developed at the hearing, this was false. Furthermore, Appellant's 1990 license renewal application listed only his 1987 conviction of BWI and conviction for resisting arrest. See I.O. Exhibit 2. Appellant's false statements on his original license application and his 1990 renewal application do not prove false statements on his 1995 license renewal application. However, once false statements in his 1995 license renewal application were proved, they are relevant to determining the appropriate disposition. I reiterate the rule that proof in a suspension and revocation proceeding of a single specification and charge of fraud in the procurement of a license is enough to require that license to be revoked. Where, as here, there were multiple instances of fraudulent procurement shown, this rule has even more application.

For all the foregoing reasons, the ALJ was correct when he revoked Appellant's license.

CONCLUSION

After reviewing the entire record and considering all of Appellant's arguments I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the ALJ. The hearing Appellant received was fair and in accordance with the requirements of the applicable regulations.

ORDER

The order of the Administrative Law Judge dated May 3, 1996 is AFFIRMED.

//S//

J. C. CARD
Vice Admiral, U. S. Coast Guard
Acting

Signed at Washington, D.C., this 23, of December, 1999.