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

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD<br><br>vs.<br><br>MERCHANT MARINER'S<br>LICENSE NO. 758960,<br>AND<br>MERCHANT MARINER'S<br>DOCUMENT NO. redacted<br><br>Issued to Douglas E. Aries | : | DECISION OF THE<br><br>COMMANDANT<br><br>ON APPEAL<br><br>NO. 2607 |

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

By an order dated October 3, 1996, the Chief Administrative Law Judge of the United States Coast Guard at Washington, D.C., revoked Appellant's 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 Mr. Aries, while acting under the authority of the captioned documents, wrongfully made false statements on his Merchant Mariner's License renewal application. The specification for the charge of *violation of law* alleged that Mr. Aries, while serving as the master of the M/V CAPT DOUG, being the holder and serving under the authority of the captioned documents, anchored the M/V CAPT DOUG in a narrow channel in violation of 33 U.S.C. § 2009(g).

The hearing was held on July 8, 1996 at the Nassau County District Court in Freeport, NY. Appellant entered a response denying both charges and the specifications thereunder.

The Coast Guard Investigating Officer introduced into evidence the testimony of two witnesses and twelve exhibits. At the close of the Coast Guard's case, the Appellant moved to dismiss the charges. The Administrative Law Judge denied the motion without prejudice. In defense, Appellant introduced into evidence his own testimony and the testimony of two witnesses. Appellant also introduced seven exhibits into evidence. Both parties submitted proposed findings of fact and conclusions of law.

The Administrative Law Judge issued a written Decision and Order ("D&O") on October 3, 1996. It concluded that the charge of *misconduct* and the supporting specification were proved and the charge of *violation of law* and the supporting specification were proved. The Administrative Law Judge revoked Appellant's license and document.

The D&O was served on Appellant on October 4, 1996. Appellant filed a timely notice of appeal on October 9, 1996. Appellant requested, and the Administrative Law Judge granted, an extension for filing the appeal brief. The expiration date for the filing of the appeal was March 1, 1997. The appeal was perfected on February 27, 1997.

APPEARANCE: Mr. Victor Mevorah, Esq., 100 Garden City Plaza, Suite 400, Garden City, New York, 11530

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the above captioned documents. See TR at 18, 93, 124, 126; Investigating Officer ("I.O.") Exhibit 3, 7. Appellant's license authorized him to serve as master of near coastal steam or motor vessels not more than 100 gross tons. See I.O. Exhibit 12. Appellant had held this license for 17 years. See TR at 122.

On April 5, 1996 Appellant signed his license renewal application certifying that the information contained on the form was correct. See I.O. Exhibit 7. This renewal application was submitted to the U.S. Coast Guard Regional Exam Center in New York, NY. This renewal application was for Appellant's fourth issuance of the license. See TR at 123. On this renewal application, Appellant answered "no" to question 24 on the renewal form, which asked, "Has any Coast Guard document or license held by you ever been revoked, suspended, or voluntarily surrendered?" See I.O. Exhibit 7.

On June 9, 1992 Appellant appeared before an Administrative Law Judge of the U.S. Coast Guard to answer to charges of *negligence* and *misconduct*. The *negligence* charge was for operating an unseaworthy vessel; alleging that the required watertight bulkheads were not watertight. The charge of *misconduct* alleged that Appellant carried children for hire without the required children's personal flotation devices onboard. Appellant admitted to both charges and specifications. On July 1, 1992 the Administrative Law Judge issued a twelve-month (12) suspension, but on probation for thirty-six (36) months, provided there were no further infractions during the probationary period. See I.O. Exhibit 8. Suspension of the license, but on probation for a period of time is a permissible sanction authorized by 46 C.F.R. § 5.567(c)(3).

In October of 1993, during the probationary period, Appellant was charged by the U.S. Coast Guard with *violation of a law or regulation*. The charge was supported by two specifications alleging that Appellant anchored in a narrow channel and negligently operated his vessel. On December 9, 1993, Appellant appeared before an Administrative Law Judge of the U.S. Coast Guard to answer to the charge and two specifications.

Appellant answered no contest to the charge and both specifications thereunder. In a D&O dated January 28, 1994 the Administrative Law Judge imposed a sanction to include: a twelve (12) month suspension, which would not be effective, provided there were no further infractions during the probationary period of thirty-six (36) months. See I.O. Exhibit 9. This incident of anchoring in a narrow channel also lead to the imposition of a marine violation civil penalty action.

Section VI of the renewal application is titled, "NARCOTICS, DWI/DUI, AND CONVICTIONS RECORD." In section VI of the renewal application, Appellant answered "no" to the question, "Have you ever been convicted of a traffic violation arising in connection with a fatal accident, reckless driving or racing on the highway or operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance?" See I.O. Exhibit 7. On November 3, 1983, in the First District Court of Nassau County, Appellant pled guilty to a single charge of driving under the influence of alcohol. Appellant was fined $250.00. See I.O. Exhibit 10.

In section VI of the renewal application, Appellant answered "no" to the question, "Have you ever been given a Coast Guard letter of warning or been assessed a civil penalty for violation of maritime or environmental regulations?" See I.O. Exhibit 7. On July 2, 1993 Appellant was issued a civil penalty and fined for anchoring his vessel in a narrow channel. See I.O. Exhibit 11. This is the same incident of anchoring in a narrow channel that Appellant pled no contest to at the December 9, 1993 suspension and revocation hearing.

The M/V CAPT DOUG is a small passenger vessel certified for passenger service on a coastwise route in the Atlantic Ocean, not more than 20 miles from a harbor of safe refuge between Block Island, RI and Cape May, NJ. The vessel must be under the control of a first class pilot or master when operating on the navigable waters of the United States, or all inland waters and offshore waters to a distance of three nautical miles. See I.O. Exhibit 2. Appellant was the master of the M/V CAPT DOUG on April 13, 1993. See TR at 21; I.O. Exhibit 3.

The M/V CAPT DOUG was anchored in Bellmore Creek on April 13, 1993. See TR at 126; I.O. Exhibit 3. Most of the vessel traffic in Bellmore Creek is comprised of pleasure craft transiting the Creek. See TR at 46. The section of Bellmore Creek in which Appellant had anchored is approximately 150-180 feet wide.

The specification for the charge of violation of law incorrectly stated the location as Elmont, NY. See TR at 105. The Boarding Report (CG 4100) correctly states the location as Bellmore Creek, Bellmore, NY. See I.O. Exhibit 3. After the Coast Guard rested its case, Appellant moved to have the case dismissed because, among other things, the location on the specification was incorrect. See TR at 105. The Administrative Law Judge verbally corrected the specification to conform to the evidence and the error was cured. See TR at 115-117.

## BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

> The Administrative Law Judge erred in finding the charge of *misconduct* proved: the Coast Guard was not deprived of the ability to fully consider Appellant's qualifications for a Merchant Mariner's License; the misconduct is not of a nature that should invoke the policy of safety concerns which lead to revocation; the misrepresentations were not knowing and willful representations, rather the misrepresentations were caused by ambiguous questions; and Appellant did not possess the required element of intent for a finding of misconduct.
>
> The sanction of permanent revocation is unduly harsh and must be modified.
>
> The finding of proved for the charge of violation of law, for anchoring in a narrow channel, should be reversed: the case should have been dismissed based on jurisdictional defects and applying both law and facts leads to the determination that Bellmore Creek is not a narrow channel.
>
> The prior record of Douglas Aries must be carefully scrutinized before any judgment is made.

OPINION

I

The Administrative Law Judge did not err in finding Misconduct proven. The Administrative Law Judge found that Appellant committed an act of misconduct when he submitted a signed application for a license renewal certifying that the information was true, when in fact, it was not.

A

Appellant contends that the Coast Guard was not deprived of the ability to fully consider his qualifications for a merchant license because the Coast Guard could obtain the information through other sources. The fact that the information is obtained elsewhere and available to the Coast Guard is irrelevant. See Appeal Decision 2456 (BURKE). "The misconduct charged was complete when Appellant submitted the signed application certifying the information as true, when in fact it was not." See Id. at 4. The Coast Guard is required by law to assess the qualifications of merchant mariners applying for a license or certificate. See 46 U.S.C. §7101. An applicant who withholds information prohibits the Coast Guard from properly assessing a mariner's qualifications and poses a serious threat to maritime safety. See Appeal Decision 2570 (HARRIS).

B

Appellant further contends that providing untrue answers is not the type of offense that threatens the safety of passengers or others at sea. As stated above, withholding information on a license application or renewal form deprives the Coast Guard of the ability to properly assess a mariner's qualifications. This poses a serious threat to maritime safety.

Appellant claims that "Information concerning a 'DWI' that occurred almost twenty years ago surely poses no threat, and answers that pertain to previous violations or suspensions of which the Coast Guard is already aware also does not present a threat to the welfare of others at sea." In support of this, Appellant compares the offense and resultant sanction in Appeal Decision 2062 (O'CALLAGHAN)[1] to his own. Appellant asserts that the offense in O'CALLAGHAN poses a greater threat to safety than the false statements made by Appellant, yet the sanction in O'CALLAGHAN was considerably less than Appellant's sanction. I disagree with Appellant's rationale. The sanction imposed is not based solely on the act that constitutes the misconduct. The Administrative Law Judge looks to the totality of the circumstances.

The Administrative Law Judge took into consideration the violations, the acts that constituted the violations, and the potential impact on safety. He found that the misconduct was intentional and not inadvertent. The decision specifically states, "that had the violation in this case been anchoring in a narrow channel, the sanction would not have been outright revocation. However, the false certification while on probation evidences a reckless disregard for public safety that cannot be tolerated." D&O at 11. In aggravation, the Administrative Law Judge took Appellant's extensive prior record into consideration. In mitigation, the Administrative Law Judge considered statements from Appellant's passengers stating that they never felt in danger or that Appellant posed a threat to safety. In addition, he took into consideration the fact that both Appellant and his wife are employed by Appellant's charter business and the resulting financial impacts of the decision. In the case at bar, the Administrative Law Judge carefully weighed the testimony, the record, the violation itself, the Appellant's prior record, and evidence in mitigation or aggravation in determining the severity of the misrepresentation and its impact on safety. The Administrative Law Judge followed the proper methodology and reached a valid, rational, and proper decision.

C

Appellant contends that the misrepresentations were caused by ambiguous questions, rather than knowing and willful misrepresentations. The issue of ambiguity was never raised at hearing[2], nor was it discussed in the memorandum of law submitted for the Administrative Law Judge's consideration before issuing the Decision and Order. The matters that will be considered on appeal are "(1) Rulings on motions or objections which were not waived during the proceedings; (2) Clear errors on the record; and (3) Jurisdictional questions." 46 C.F.R §5.701(b). Affirmative defenses must be raised at the hearing and cannot be considered for the first time on appeal. See Appeal Decisions 2345 (CRAWFORD), 2186 (ASCIONE), 2184 (BAYLESS), 1723 (TOMPKINS).

Regardless, the Administrative Law Judge concluded that the Appellant acted willfully, not inadvertently. To reverse the Administrative Law Judge's finding would require a showing that the finding was clearly erroneous, arbitrary, capricious, unsupported by law, or based on inherently incredible evidence. See Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182; Appeal Decision 2474 (CARMIENKE). The Administrative Law Judge has broad discretion in making determinations regarding the credibility of witnesses and resolving inconsistencies in the evidence. The Administrative Law Judge can observe the response, character, and demeanor of the witness. See Appeal Decisions 2519 (JEPSON), 2474 (CARMIENKE). Nothing has been shown, nor does the record reflect that the Administrative Law Judge committed a clear error in reaching his conclusion.

D

Appellant claims that the required element of intent was not proven.[3] The case law is well settled on the issue of intent. Specific intent is not an essential element of the charge of misconduct in these remedial, administrative proceedings. See Appeal Decisions 922 (WILSON), 2286 (SPRAGUE). The specification charged that the Appellant "did wrongfully make false statements." D&O at 2. I have previously made it clear that "the use of the word 'wrongfully' in the specification does not necessitate the proof of an intent." Appeal Decision 489 (JONES); Appeal Decision 2037 (SABO) *aff'd* NTSB Order No. EM-55. There is no requirement that the Coast Guard prove specific intent, therefore, Appellant's claim is without merit.

II

Appellant asserts that the sanction of revocation is unduly harsh.[4] I disagree. The sanction imposed at the conclusion of a case is the responsibility of the Administrative Law Judge. See 46 C.F.R. §5.569(a). The Administrative Law Judge, as required by 46 C.F.R §5.569(b), took into consideration the violation itself, the Appellant's record, and evidence in mitigation or aggravation in determining the appropriate sanction. Also, the Administrative Law Judge considered the potential economic impacts resulting from the fact that Appellant's wife is also employed by her husband's (Appellant) charter business.

After a weighing of the seriousness of the violation, the threat to safety, and the consequences of the sanction, the Administrative Law Judge concluded that revocation was an appropriate and just sanction. The order imposed at the conclusion of the case will only be modified on appeal if clearly excessive or an abuse of discretion. See Appeal Decision 2456 (BURKE). In light of Appellant's record of prior offenses and the severity of this offense, the sanction is not excessive.

III

A

Appellant contends that the charge of violation of law for anchoring in a narrow channel should have been dismissed for lack of jurisdiction. This assertion is based on an argument that the Coast Guard did not put forward any testimony pertaining to the county or state where the offense occurred. Brief at 18. Under 14 U.S.C. § 2, the Coast Guard is required to enforce all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States. The investigating officer introduced the boarding report indicating that the vessel was in Bellmore Creek, Bellmore, NY. at a latitude of 073º 39' and longitude of 40º 31' on chart 12352. See I.O. Exhibit 3. The Coast Guard has the authority under 14 U.S.C. § 89 to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." The M/V CAPT DOUG is a U.S. vessel that was operating on the navigable waters of the United States on the date of the alleged violation; therefore, the Coast Guard had jurisdiction to conduct the boarding.

B

Appellant also argues that the specification contained an error and, therefore, the case should be dismissed. I disagree. The specification for the charge of violation of law stated the violation occurred in "Elmont, NY" when Bellmore, NY was the actual location. Under 46 C.F.R §5.25(b), "The Administrative Law Judge may . . . amend the charges and specifications to correct harmless errors by deletion or substitution of words or figures as long as the legal charge and specification remains." Even without a formal amendment, "the pleadings will be considered as amended to conform to the proof, provided that no party is surprised or injured by such course." See Appeal Decision 1574 (STEPKINS). Only if there is prejudice, lack of notice or no fair opportunity to litigate, does the Administrative Law Judge exceed his discretion. See Appeal Decisions 2209 (SIEGELMAN), 2393 (STEWART). In this instance, the Administrative Law Judge did not make a formal amendment to the specification. However, in ruling on Appellant's motion to dismiss, the Administrative Law Judge established for the record that the actual location of the violation was Bellmore, NY. See TR at 115-116. Further, the Administrative Law Judge found that Appellant was not prejudiced by the error. See TR at 116-117. It is clear from the record that Appellant and his counsel were aware of the nature of the Government's case and prepared to defend against it. There may be no subsequent challenge of issues that are actually litigated, if there was actual notice and adequate opportunity to cure surprise. See Appeal Decision 2386 (LOUVIERE) citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950); Appeal Decisions 2166 (REGISTER), 1792 (PHILLIPS). Appellant had notice of the charge, knew the location in question based upon the boarding report issued at the time of the offense, and both parties were prepared to and did fully litigate the issue. Therefore, I find the Appellant's argument concerning the specification to be without merit.

C

Appellant contends that the Administrative Law Judge erred in finding that Bellmore Creek is a narrow channel. I disagree. The determination of a narrow channel is a mixed issue of law and fact. See Tempest v. United States, 277 F. Supp. 59, 63 (E. D. Va. 1967). In determining the existence of a narrow channel, one must look at the physical dimensions of the area and the character of navigating use to which the water is put. *Id*. Federal Courts have held that bodies of water up to 1000 feet wide may be considered a narrow channel. See Maritrans Operating Partners, L.P. v. M/T Faith I, 800 F. Supp. 133, 140 (D.N.J. 1992). A narrow channel does not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. See Tempest, 277 F. Supp. at 63. In the area where Appellant anchored, Bellmore Creek is approximately 150-170 feet wide. The Administrative Law Judge correctly found that the physical dimensions of Bellmore Creek are well within the standards for a narrow channel. In addition, the Administrative Law Judge found that Bellmore Creek is essentially a bay, surrounded by land on three sides. He further found that the character of navigating in Bellmore Creek is to transit in specific directions, not in every conceivable direction. The Administrative Law Judge correctly determined that Bellmore Creek is a narrow channel.

Appellant contends that the definition of narrow channels should be restricted to bodies of water largely used by commercial vessels. This argument is without merit. There are no cases that state or even intimate that the amount of commercial vessel traffic should be a consideration in the analysis of what constitutes a narrow channel. Appellant cites Maritrans Operation Partners L.P. v. M/T Faith I, 800 F. Supp. 133, 139-140 (D.N.J. 1992) and cases cited therein, to assert the claim that the presence of commercial vessels should be a determining factor in finding a body of water a narrow channel. The law is clear that the "character of navigating" and not the presence of commercial vessels determines what constitutes a narrow channel. *Id*.

IV

Appellant contends that his previous violations should be scrutinized before any judgment is made. In making this assertion, Appellant claims that the charge found proved in July 1993 is "obsolete" because "it was found that where he was anchored was not a narrow channel." Brief at 24. First, the Administrative Law Judge in his D&O did not make such a finding. See I.O. ex. 9. Second, Appellant pled no contest to that charge, yet now, Appellant requests that I review the facts as if they are on appeal. It would be inappropriate to review issues not properly before me. Appellant had the opportunity to appeal those decisions and chose not to. I will not accommodate such a request.

CONCLUSION

The Administrative Law Judge properly found the charge of misconduct, supported by one specification, proved by reliable, probative, and substantial evidence in accordance with 46 C.F.R. § 5.63. The Administrative Law

Judge properly found the charge of violation of law, supported by one specification, proved by reliable, probative, and substantial evidence in accordance with 46 C.F.R. § 5.63

The Administrative Law Judge concluded, and I concur, that the false certification, while on probation, evidences a reckless disregard for public safety that can not be tolerated.

ORDER

The D&O of the Administrative Law Judge dated October 3, 1996 is AFFIRMED.

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

Acting Commandant

Signed at Washington, D.C., this Tuesday, day of March 17, 1999.

[1] In O'CALLLAGHAN, a mariner's license was suspended for six months for obtaining an endorsement through the presentation of a false document.

[2] At the hearing, Appellant admitted to answering the questions incorrectly. Appellant's theory as to why the questions were incorrectly answered was based on the haste with which Appellant answered the questions. When asked why he answered "no" to the question regarding alcohol-related violations, the Appellant answered, "I take full credit. It was a mistake. I probably – I didn't read

the questions." [TR at 159].

[3] It is of note, however, that the Administrative Law Judge did find that Appellant acted willfully.

[4] In the appeal brief, Appellant continually refers to the sanction as "permanent revocation." This is inaccurate. The sanction is revocation. 46 C.F.R. § 5.901 fixes the time limitations that an individual must wait before applying for a license, certificate, or document after such a document has been revoked.