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D E P A R T M E N T O F T R A N S P O R T A T I O N

U N I T E D S T A T E S C O A S T G U A R D

UNITED STATES OF AMERICA :  
UNITED STATES COAST GUARD :  
: DECISION OF THE  
: VS.  
: VICE COMMANDANT  
:  
: ON APPEAL  
MERCHANT MARINER'S LICENSE :  
NO. 639033 : NO. 2563  
AND :  
MERCHANT MARINER'S DOCUMENT :  
NO. (REDACTED):  
:  
Issued to: Mark R. Emery, :  
  
Appellant. :

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

By an order dated May 12, 1993, an Administrative Law Judge of the United States Coast Guard at Detroit, Michigan suspended Appellant's license and merchant mariner's document, upon finding charges of "Misconduct" and "Violation of Law" proved. The single specification of the charge of Misconduct alleged that on August 4, 1992, Appellant reported to his place of employment, in anticipation of operating a passenger vessel, while being wrongfully intoxicated. The single specification supporting the charge of Violation of Law alleged that on or about September 20, 1991, Appellant was convicted in Michigan State Court of driving while intoxicated.

A hearing was held at Detroit, Michigan on April 1, 1993.

Appellant entered an answer of "No Contest" to the charge of Misconduct. As to the charge of Violation of Law, the Appellant admitted the facts asserted and that they constitute a violation of law under 205(a)(3)(A) of the National Drivers Register Act of 1982 (23 U.S.C. 401 note), an offense described in 46 U.S.C. 7703(3) as a basis for suspension or revocation of a merchant mariner's license or document. However, the Appellant contended that 46 U.S.C. 7703(3) was unconstitutional and asked the court to note his position for purposes of appeal. The Administrative Law Judge stated he had no jurisdiction to rule on constitutional issues, and noted the issue for appeal. The Investigating Officer introduced seven exhibits into evidence.

The Administrative Law Judge found the charges and the supporting specifications proved by the Investigating Officer's exhibits and by the Appellant's answers of "No Contest" and "Admit". On May 12, 1993, the Administrative Law Judge issued a written Decision and Order that conformed with the proposed settlement agreement entered into by the Appellant and the United States Coast Guard. The order provided for suspension of Appellant's Merchant Mariner Document No. 370-70-1102 and License No. 639033 for twenty four months, eight months outright effective August 4, 1992, with the remaining sixteen months remitted on twenty four months probation for each charge, and the sanction for each charge and specification to run concurrently. It was further ordered that the Appellant would submit to an evaluation by a court designated physician and pursue treatment if so recommended.

After timely notice, Appellant, through his counsel, submitted a completed appeal in accordance with 46 C.F.R. 5.703(c). Therefore, this matter is properly before the Vice Commandant for review.

#### **FINDINGS OF FACT**

At all relevant times, Appellant was the holder of the above captioned license and document issued by the U.S. Coast Guard. Appellant's merchant mariner's document authorized him to serve as Able Seaman - Unlimited, Wiper and Stewards Department. Appellant's license authorized him to serve as Mate of Great Lakes or inland steam or motor vessels of not more than 1600 gross tons and operator of uninspected towing vessels upon the Great Lakes or inland waters (exempting waters subject to the 1972 International Regulations for Preventing Collisions at Sea).

Appellant was at all relevant times serving aboard the passenger vessel FRIENDSHIP in the capacity of Third Mate, under the authority of his duly issued license. Passenger vessel FRIENDSHIP, official no. 649026, is an inspected U.S. documented vessel.

Appellant was fully advised of the consequences of his

answers of "No Contest" and "Admit" to the charges and underlying specifications. Appellant entered answers voluntarily, intelligently and knowingly. Appellant's answers are sufficient in and of themselves to support a finding that the charges and specifications were found proved. There was no need for the Coast Guard to establish a **prima facie** case. **See** 46 C.F.R. 5.527(c).

On or about September 20, 1991, the Appellant was convicted by the Wyandotte 27th District Court, Wyandotte, Michigan of driving while intoxicated, on or about July 17, 1991. Appellant's conviction of driving while intoxicated constitutes a Violation of Law as described by 205(a)(3)(A) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), an offense described in 46 U.S.C. 7703 as amended by the Oil Pollution Act of 1990 (Public Law 101-380, August 18, 1990) as a basis for suspension and revocation of a license or merchant mariner's document.

Respondent entered into a proposed settlement with the U.S. Coast Guard which the Administrative Law Judge adopted into his order.

#### **BASIS OF APPEAL**

This appeal has been taken from the Administrative Law Judge's suspension of Appellant's license and merchant mariner's document. The Appellant does not contest the Administrative Law Judge's conclusion that the charges and specifications were proved. The Appellant contends that suspension of his maritime license and merchant mariner's document for a conviction in Michigan State Court for driving while intoxicated is a violation of the United States Constitution. On appeal, the Appellant argues that there is no rational basis for imposition of a conclusive presumption that intoxication on land foreshadows danger at sea; 46 U.S.C. 7703 sweeps too broadly and must be invalidated.

Appellant was represented by Mr. Leonard C. Jaques, Esq., of the Jaques Admiralty Law Firm, P.C., Detroit, Michigan.

#### **OPINION**

Appellant contends that the loss of his right to work as a licensed mariner stemming from shore based conduct distant in both time and place is a violation of his Fourteenth Amendment right to equal protection of the law.

These proceedings are governed by statute and regulations and are remedial in nature intended to maintain standards for competence and conduct essential to the promotion of safety at sea. **See** 46 U.S.C. 7701 and 46 C.F.R. 5.5. Neither the Administrative Law Judge, nor I as Vice Commandant, are vested with the authority to decide constitutional issues. That is

exclusively within the purview of the federal courts. **See**, 4 Davis, **Administrative Law Treatise**, 26.6 (1983); **Appeal Decisions Nos. 2433 (BARNABY)**, **2202 (VAIL)** and **2546 (SWEENEY)**.

Appellant next argues that 46 U.S.C. 7703 creates an irrebuttable presumption of fact that is a violation of his due process rights. I disagree with Appellant that 46 U.S.C. 7703 has "the effect of imposing a conclusive or irrebuttable presumption that a seaman who has [illegally] consumed alcohol on land will likely do so at sea at some far distant time and place." Brief of Appellant p. 7. If violated, 46 U.S.C. 7703(3) as enacted by Congress clearly allows for the suspension or revocation of a license or mariner's document. The Administrative Law Judge's Decision and Order was made pursuant to 46 U.S.C. 7703(3). No presumption was created at the hearing level denying the Appellant his due process rights. If Appellant wishes to contest the validity of the statute he should pursue such relief in an appropriate forum.

There being no clear error in the record, there are no additional issues for my review.

#### **CONCLUSIONS**

The findings of the Administrative Law Judge are supported on the record by substantial evidence of a reliable and probative nature.

#### **ORDER**

The decision of the Administrative Law Judge dated May 12, 1993, is **AFFIRMED**. The order of the Administrative Law Judge is **AFFIRMED**.

A. E. HENN  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C., this 28th day of February, 1995.

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