

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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	
	:	NO. 2721
MERCHANT MARINER CREDENTIAL	:	
	:	
<u>Issued to: JAMES RAY TOWNSEND</u>	:	

APPEARANCES

For the Government:
Mr. Eric A. Bauer
Mr. Andrew J. Norris, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent:
Mr. Anthony J. Staines, Esq.
Mr. James A. Crouch, Esq.
STAINES & EPPLING

Administrative Law Judge: Bruce Tucker Smith

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On May 21, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard issued an Order of Dismissal With Prejudice, Order Denying Motion for Continuance, Order Disapproving Settlement Agreement (ALJ Orders), finding that the Coast Guard lacked jurisdiction to maintain its suspension and revocation action against the Merchant Mariner

Credential (MMC) of Respondent James Townsend after the National Maritime Center denied his request to renew his MMC, imposing a one-year assessment period from the date of Respondent's conviction for battery, and following the subsequent expiration of Respondent's MMC.

The Coast Guard appeals.

I will grant the appeal because the ALJ erred in finding a lack of jurisdiction.

BACKGROUND

Respondent was the holder of an MMC issued to him by the United States Coast Guard, which had been renewed on April 18, 2012. [ALJ Orders at 4¹] Typically, an MMC is issued for five years, and Respondent's MMC would have been expired on April 19, 2017. [Tr. at 10-11] In this case, Respondent's MMC expired on September 30, 2017, because of a nation-wide automatic extension applicable to all credentials expiring after December 1, 2016. [*Id.* at 10; Tr. at 19; Coast Guard Complaint²]

The Coast Guard alleged that on February 21, 2017, Respondent was convicted of simple battery, a crime that would prevent issuance or renewal of an MMC. The Coast Guard further alleged that Respondent committed misconduct on or about May 11, 2017: in that he, without authority, produced a false identification document by altering his MMC; possessed the altered MMC that was produced without authority, knowing that it was produced without authority; and transmitted the false identification document to his marine employer, knowing the document was produced without lawful authority; all in violation of federal laws. [Coast Guard Complaint]

On February 23, 2017, Respondent applied for renewal of his MMC. [ALJ Orders at 2, 4] The National Maritime Center denied the request for renewal on March 17, 2017, because of his conviction for simple battery, imposing a one-year assessment period from the date of

¹ The single document has thirteen unnumbered pages.

² Respondent admitted, in his answer, the Complaint's statements concerning the issuance and expiration of his MMC.

conviction before Respondent would be eligible to apply for renewal. [*Id.*; Tr. at 27] Respondent requested reconsideration of his application for renewal, which was denied. [ALJ Orders at 2, 4] Respondent then appealed the National Maritime Center's actions on his application for renewal to Coast Guard Headquarters. [*Id.* at 3, 4]

While that appeal was pending, on September 6, 2017, the Coast Guard filed its Complaint seeking revocation of Respondent's MMC. [ALJ Orders at 3, 5] Respondent's appeal of the National Maritime Center's actions on his application for renewal was denied on December 15, 2017. [*Id.*] By that time, Respondent's MMC was expired. Denial of the appeal was final agency action, leaving undisturbed the National Maritime Center's denial of Respondent's application for renewal during a one-year assessment period, which would end February 21, 2018. [*Id.*; Tr. at 27]

On October 27, 2017, Respondent filed an Answer to the Complaint wherein he denied most of the factual allegations supporting the Complaint. The parties and the ALJ then took steps toward scheduling a hearing or otherwise resolving the issues raised by the Complaint. Before any hearing was conducted, on January 26, 2018, the ALJ issued an order requiring the Coast Guard to show cause why the matter should not be dismissed for lack of jurisdiction. The ALJ also wrote to a law professor inviting an *amicus* brief on the jurisdictional issue.

Thereafter, Respondent and the Coast Guard filed opposing briefs on the jurisdictional issue, an *amicus* brief was filed in response to the ALJ's invitation, and a telephonic evidentiary hearing was conducted in April 2018 to take the testimony of a National Maritime Center official concerning the processes involved in the Coast Guard's denial of Respondent's application to renew his MMC in 2017.

In May 2018, Respondent and the Coast Guard entered into a settlement agreement to resolve the Complaint, and the Coast Guard moved for an order approving the settlement agreement and the entry of a consent order. On May 21, 2018, the ALJ issued his orders denying

the Coast Guard's Motion for Approval of Settlement Agreement and Entry of Consent Order and dismissing the Complaint with prejudice.³

The Coast Guard filed a Notice of Appeal on May 23, 2018, and perfected its appeal by filing an Appeal Brief on May 25, 2018. Respondent filed a brief in response to the Coast Guard's appeal in which he did not oppose the Coast Guard's position on jurisdiction, but requested that the matter be returned to the ALJ with instructions to approve the parties' settlement agreement. This appeal is properly before me.

BASES OF APPEAL

The Coast Guard essentially asserts that the ALJ erred by finding a lack of jurisdiction and accordingly dismissing the Complaint with prejudice.⁴

OPINION

The question of continuing jurisdiction in a Suspension and Revocation proceeding that was initiated before the MMC expired, if the MMC expires while the proceedings are pending, was raised and settled in *Appeal Decision 2712 (MORRIS)*, 2016 WL 692747. In *MORRIS* it was the Coast Guard that moved for dismissal of the complaint, when the respondent's MMC expired after the proceedings had commenced. The ALJ denied the motion to dismiss for lack of jurisdiction but went on to dismiss the complaint after finding that the allegations were not proved. The Coast Guard appealed the denial of its motion to dismiss for lack of jurisdiction because the MMC had expired, and its appeal was denied.

The holding in *MORRIS* was reached after considering holdings or *dicta* from prior Commandant's Decisions on Appeal (CDOAs). The circumstances and issues in those prior cases were so far removed from the issue presented in *MORRIS* that they were found to "shed little or no light on this case." Rather, the holding in *MORRIS* was based on general principles

³ The ALJ also denied a motion for a continuance related to the settlement agreement.

⁴ The Coast Guard also asserts that the summary denial of the motion to approve the settlement agreement is an abuse of discretion; also, Respondent requests that I instruct the ALJ to approve the parties' settlement agreement. I will not decide this issue that the ALJ did not actually consider because of his erroneous ruling on jurisdiction.

set forth in federal and state court decisions. For example, “Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events.” *MORRIS*, quoting *Steensland v. Alabama Judicial Inquiry Commission*, 87 So.3d 535, 542 (Ala. 2012).

The ALJ in this case criticizes *MORRIS* because the cases it cites were cases *in personam*, whereas, he states, a suspension and revocation proceeding against an MMC (S&R proceeding) is a case *in rem*. [ALJ Orders at 6 (notes 5 & 6)]⁵ He notes that *Morris* “fails to recognize or address” *Community Bank of Lafourche v. Lori Ann Vizier, Inc.*, 541 Fed. Appx. 506, 2013 AMC 2946 (5th Cir. 2013). [*Id.* at 8] That case cites *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992), in which the Supreme Court held that jurisdiction *in rem* does not depend on continued presence of the *res*, so long as the *in rem* proceeding was properly initiated. The Court quoted with approval earlier caselaw to the effect that continuance of possession was not necessary to maintain jurisdiction over an *in rem* action, based on the general principle that jurisdiction, once vested, is not divested, even if a situation should arrive in which original jurisdiction could not have been exercised. *Republic National Bank*, 506 U.S. at 85. This is not different from the rule cited in *MORRIS*. Hence I need not decide whether S&R proceedings are *in rem*.

Republic National Bank recognized a narrow exception, where the release of the property would render a judgment useless because “the thing could neither be delivered to the libellants, nor restored to the claimants.” *Id.* However, this “useless judgment” exception “will not apply to any case where the judgment will have any effect whatever.” *Id.*

The ALJ in this case declares that this proceeding is moot and any order he might render against Respondent’s MMC would be useless [ALJ Orders at 8-9], distinguishing *MORRIS*, because the Coast Guard Headquarters December 2017 denial of Respondent’s appeal concerning his license renewal (renewal appeal decision) in effect permanently revoked the MMC [ALJ Orders at 7-8]. In this finding the ALJ was mistaken. The renewal appeal decision of 15 December 2017, found in the record with the Coast Guard’s Motion for Summary Decision

⁵ To the extent that the ALJ declined to follow *MORRIS*, he failed to comply with 46 C.F.R. § 5.65.

dated 10 January 2018, decided only that the “assessment period” of one year following Respondent’s conviction, ending on 21 February 2018, remained in effect. By its terms, the decision is final agency action, but only as to the assessment period, not as to whether the MMC may ever be renewed.⁶ According to 46 CFR § 10.211(j), if an applicant re-applies for renewal after the assessment period, the Coast Guard will grant the application unless there are offsetting factors (discussed in the same section). Thus, on its face, the renewal appeal decision clearly contemplated allowing Respondent to renew his MMC after the one-year assessment period and did not effectively revoke Respondent’s MMC, contrary to the ALJ’s finding.

A full understanding of the potential effect of the renewal appeal decision requires consideration of the regulations governing MMC renewals as well as revocations. Generally, renewal applications may be presented “at any time during [a credential’s] validity and for 1 year after expiration.” 46 CFR § 10.227(b). *See also* 46 CFR § 10.227(h), reiterating that a credential “may be renewed up to 12 months after expiration.” An applicant applying for renewal (“re-issuance”) more than twelve months after the MMC’s expiration is subjected to additional requirements beyond those for renewal earlier than twelve months after expiration. 46 CFR § 10.227(i). However, to forestall those additional requirements, an applicant may, before the twelve-month period has passed, obtain a Document of Continuity, which maintains the individual’s eligibility for renewal. 46 CFR § 10.227(g). In short, it appears that an expired MMC, including Respondent’s MMC even after the renewal appeal decision, still provides valuable rights to the holder and cannot accurately be described as void.⁷

On the other hand, “no credential will be renewed if it has been suspended without probation or revoked.” 46 CFR § 10.227(c). Further, after revocation, “any MMC subsequently requested must be applied for as an original,” and, beyond the basic requirements of 46 CFR

⁶ The term “assessment period” is somewhat misleading. From the regulation, 46 CFR § 10.211(i), it appears to be a period during which renewal will be (temporarily) denied unless the applicant provides extraordinary evidence supporting suitability for service in the merchant marine that overcomes the evidence of unsuitability inherent in the applicant’s criminal record. After the conclusion of the assessment period, it appears from 46 CFR § 10.211(j) that an assessment of suitability will still be made upon an application, but that there will be a presumption in favor of granting the application.

⁷ *Appeal decision 1566 (WHITE)*, 1966 WL 87831, refers to a surrendered document as void. The ALJ quotes this case and later states that “the Commandant has previously ruled that no valid proceedings could be held against a voided document.” [ALJ’s Orders at 6, 12]

§ 10.225, the procedures of 46 CFR §§ 5.901-5.905 must be followed. 46 CFR 10.235(b). Thus an order against Respondent's MMC would either delay or prevent renewal. It cannot be said that an order against the expired MMC will not "have any effect whatever," in the words of *Republic National Bank*, and hence such an order would not be useless. Accordingly, even if S&R proceedings were considered to be *in rem*, there would be no reason to find a lack of jurisdiction here.

CONCLUSION

The ALJ's finding that Respondent's MMC had been revoked is not supported by substantial evidence; his conclusions that the proceeding was moot and that any sanction would be useless is contrary to law and the evidence. Accordingly, dismissal was error. The appeal is granted and the ALJ's Orders are SET ASIDE.

ORDER

The ALJ's Orders dated May 21, 2018, are SET ASIDE. This case is remanded to the Chief Administrative Law Judge for further action consistent with this decision.

Signed at Washington, D.C., this 27 day of DECEMBER, 2018.

 ADM, USCG, VICE COMMANDANT