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
v.	:	ON APPEAL
	:	NO. 2730
MERCHANT MARINER CREDENTIAL	:	
Issued to: DENNIS LYNN BLAKE II	:	

APPEARANCES

For the Government:
LT Kristin D. Kam, USCG
CDR Christopher L. Jones, USCG

For Respondent:
Mr. Jonathan Michael Rowe, Esq.
Mr. Michael R. Yokan, Esq.

Administrative Law Judge:
Dean C. Metry

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

On March 19, 2019, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O), finding proved the Coast Guard's Amended Complaint against the Merchant Mariner Credential of Respondent Dennis Lynn Blake II, and ordering Respondent's credential suspended outright for twelve months.

The Complaint found proved alleged one count of violation of law or regulation and one count of misconduct. Specifically, the Coast Guard alleged that, on February 17, 2017,

Respondent possessed a loaded handgun onboard a documented vessel of the United States, without the permission of the vessel's master or owner. This was alleged to be a violation of both 18 U.S.C. § 2277 and the policies of Respondent's employer.

The Coast Guard appeals.

FACTS & PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued by the United States Coast Guard.

At the time of the proceedings below, Respondent had worked in the maritime industry for fourteen years: for the most recent eight years as a merchant mariner, and, prior to that, as a longshoreman. [D&O at 4; Tr. Vol. II at 69.] In February 2017, at the time of the charges alleged against him, Respondent held a valid concealed firearm license. [D&O at 4.]

On February 21, 2017, Respondent obtained an assignment to sail as a qualified member of the engine department (QMED) aboard the ISLA BELLA, departing that day. [D&O at 4.]

The ISLA BELLA is a documented vessel of the United States, operated by Tote Services Inc. (Tote), and powered by liquefied natural gas (LNG). [D&O at 4, 5.] LNG is a relatively new marine fuel, which carries an elevated risk of explosion. [*Id.* at 4; Tr. Vol. I at 145-47.] The discharge of a handgun could cause LNG to ignite. [D&O at 4.]

Respondent boarded the ISLA BELLA, at the Jacksonville secure port facility, on the afternoon of February 21. [D&O at 4.] Per shipboard protocol, Respondent's bags were inspected by a third-party security guard when he boarded the vessel, and no contraband was detected. [CG Ex. 2; Tr. Vol. I at 174-75.] Respondent then signed an acknowledgment of his receipt and understanding of various Tote company policies, including a prohibition of firearms onboard Tote vessels. [CG Ex. 1; Tr. Vol. I at 117-19.]

The ISLA BELLA completed a round trip to San Juan, Puerto Rico, as scheduled. On February 27, 2017, the vessel returned to Jacksonville's secure port facility, and was met by several Customs and Border Patrol (CBP) officers for an enforcement inspection. [Tr. Vol. I at 18.]

Respondent and another crew member were the first to disembark the ISLA BELLA, and were on the dock, near the vessel, as CBP approached. As part of their inspection, CBP officers interviewed Respondent and the other crew member on the dock, and inspected their bags. [Tr. Vol. I at 19-21.] In Respondent's backpack, CBP officers discovered a loaded 40 caliber handgun and two magazines. [*Id.* at 57-59; CG Ex. 6.] Respondent's backpack also contained a vial of urine, attached to an unused chemical hand-warmer by a rubber band. [D&O at 4.] Respondent and his belongings were turned over to local law enforcement, and CBP's inspection of the ISLA BELLA was otherwise uneventful.

On March 8, 2017, the Coast Guard filed its Amended Complaint (the Complaint) against Respondent's Merchant Mariner Credential. The Complaint alleged that Respondent possessed a handgun onboard the ISLA BELLA, in violation of both Tote policy and 18 U.S.C. § 2277, and charged Respondent with misconduct and violation of law, respectively, for those alleged violations.[1]

On September 19, 2017, Respondent pleaded *nolo contendere* to the criminal charge of introduction of a firearm onto seaport property, in Duval County Circuit Court. [D&O at 5.]

The hearing in this matter was convened by the ALJ on June 13 and 14, 2018. At the conclusion of hearing, the ALJ found that Respondent and the Coast Guard had agreed, by stipulation, to the elements of both offenses—Respondent had brought a firearm onto a U.S. vessel, without the knowledge or consent of the vessel's master or owner, and in violation of Tote policy. [D&O at 3.] Therefore, the ALJ found both charges proved, but did not assign a

[1] § 2277 provides, in relevant part, "Whoever brings, carries, or possesses any dangerous weapon . . . on board of any vessel documented under the laws of the United States . . . without previously obtaining the permission of the owner or the master of such vessel . . . shall be fined under this title or imprisoned not more than one year, or both."

sanction, as the parties wished to submit post-hearing briefs. The Coast Guard moved for Respondent's credential to be retained at the close of hearing, pursuant to 33 CFR § 5.521, and the ALJ granted that motion. [Tr. Vol. II at 119-20.]

The parties submitted post-hearing briefs on the question of sanction, and the ALJ issued his D&O on March 19, 2019. In determining a sanction, the ALJ considered factors in aggravation and mitigation, as offered by the parties. As to aggravating factors, the ALJ gave weight to both the enhanced safety risk of carrying a firearm on an LNG-powered vessel, and Respondent's possession of the urine vial onboard, with the admitted intention of defeating drug testing. [D&O at 6-7.] In mitigation, the ALJ gave weight to Respondent's fourteen-year history in the maritime industry, unblemished by any prior disciplinary infractions. [*Id.* at 7.] Taking into consideration these factors, and the two charges proved, the ALJ assessed a sanction of twelve months outright suspension, considered to have commenced on June 14, 2018, when Respondent tendered his credential at the close of hearing. [*Id.* at 8.]

The Coast Guard filed notice of appeal from the D&O, and perfected its appeal by brief of June 10, 2019. Respondent filed a brief in opposition on August 21, 2019. This appeal is properly before me

BASIS OF APPEAL

The sole basis of the Coast Guard's appeal is that the ALJ's consideration of Respondent's fourteen-year work history as a mitigating factor was contrary to 33 CFR § 20.1315(a), a regulation defining a mariner's prior disciplinary record as limited to certain criminal and disciplinary actions during the ten years preceding an alleged offense.

OPINION

The question on appeal is one of regulatory interpretation. The Coast Guard asserts that 33 CFR § 20.1315(a) bars consideration of any maritime service more than ten years old. The Coast Guard argues that Respondent's proffered evidence of an unblemished fourteen-year maritime career was offered as evidence of a "prior disciplinary record," and the ALJ's consideration of Respondent's prior service, more than ten years old, was in violation of

§ 20.1315(a)'s limitation on the items properly considered as prior disciplinary record.

The Coast Guard's interpretation of § 20.1315 is contrary to both public policy and administrative precedent. This opinion will first consider the text of § 20.1315, then address agency policy and precedent.

The formal structure of § 20.1315 is, admittedly, confusing. Ambiguity arises from the structure of subsection (a), defining the elements of a respondent's "prior disciplinary record." Paragraphs (1) through (5) precisely identify admissible criminal and administrative sanctions. Paragraph (a)(6) is not like the others—it first provides that "official commendatory information concerning the respondent of which the Coast Guard representative is aware" shall be admissible as part of the disciplinary record, then continues: "The Coast Guard representative may offer evidence and argument in aggravation of any charge proved. *The respondent may offer evidence of, and argument on, prior maritime service,* including both the record introduced by the Coast Guard representative and any commendatory evidence." (Emphasis added.) The Coast Guard now argues that, because the provision allowing a respondent to offer evidence of prior maritime service is part of subsection (a), any evidence offered as prior maritime service must be strictly limited to the preceding ten years.

The Coast Guard's restrictive interpretation applies the ten-year disciplinary record bar to the broader category of a respondent's "prior maritime service." This novel interpretation is not supported by the regulatory history of § 20.1315.

In 1999, the Coast Guard consolidated the rules of procedure for hearings before agency ALJs. *See* "Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard," 64 Fed. Reg. 28054 (May 24, 1999). The agency had previously maintained two separate sets of procedural rules, one for class II civil penalty proceedings—at 33 CFR Part 20—and one for S&R proceedings—at 46 CFR Part 5. The 1999 consolidation, to a single set of rules at Part 20, aimed to standardize and streamline these procedures. *Id.* at 28054-55.

As part of the 1999 consolidation, 33 CFR § 20.1315 replaced 46 CFR § 5.565. § 5.565,

effective until June 23, 1999, which defined a respondent's "prior disciplinary record" (limited to the ten years preceding an allegation) at subsection (a). The language was substantially the same as that of the current 33 CFR § 20.1315(a)(1)-(5) and the first sentence of (a)(6). The separate subsection (c) provided, "The respondent is allowed to comment on or offer evidence regarding prior maritime service including the prior record introduced by the investigating officer and any commendatory information." As noted, the structure of § 20.1315 includes the respondent's right to offer evidence of prior maritime service as part of the same subsection (a) that contains the definition of a respondent's "prior disciplinary record" (including the ten-year time bar). This condensed structure might allow for the Coast Guard's suggested regulatory interpretation, applying the ten-year time bar to both prior disciplinary records and a respondent's evidence of prior maritime service. But the language and structure of § 20.1315 does not demand that interpretation.[2]

Where a revision or recodification renders a regulation newly ambiguous, an absence of regulatory history indicating an intent to change the meaning of the predecessor regulation leads to a reasonable inference that no such change was intended. This is the logic underlying the "recodification canon" of statutory interpretation: "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." *Fulman v. U.S.*, 434 U.S. 528, 538 (1978) (quoting *U.S. v. Ryder*, 110 U.S. 729, 740 (1884)). *See also, e.g., Hale v. Iowa State Bd. Assessment & Review*, 302 U.S. 95, 102 (1937) ("in later compilations of the statutes, the sections have been rearranged, though with substance unaffected. . . . There can be little doubt that the meaning remains what it was before."). Application of the recodification canon is only appropriate where the revised language

[2] It is better, reading § 20.1315 as a whole, to read the language following the first sentence of paragraph (a)(6) as independent from subsection (a)'s ten-year limitation on items in the "past disciplinary record." This language, "The Coast Guard representative may offer evidence and argument in aggravation of any charge proved. The respondent may offer evidence of, and argument on, prior maritime service . . .", is grammatically and conceptually parallel to the remaining two subsections of § 20.1315: "(b) The respondent may offer evidence and argument in mitigation of any charge proved. (c) The Coast Guard representative may offer evidence and argument in rebuttal of any evidence and argument offered by the respondent in mitigation." Contrast this to the structure of paragraphs (a)(1)-(5): "*Any* written warning . . . . *Final* agency action . . . on any [suspension and revocation (S&R)] proceeding . . . . *Any* agreement for voluntary surrender . . . . *Any* final judgment of conviction . . . . *Final* agency action . . . resulting in . . . any civil penalty or warning . . . ." (Emphases added.) The first sentence of paragraph (a)(6) matches this structure: "*Any* official commendatory information concerning the respondent of which the Coast Guard representative is aware." (Emphasis added.) It may be that such commendatory information should likewise be limited by the subsection (a) ten-year bar. However, this question is not presented.

can reasonably be construed as consistent with the prior policy: "Of course a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law." *McDonald v. Hovey*, 110 U.S. 619, 629 (1884).

Here, there is no indication that, in replacing 46 CFR § 5.565 with 33 CFR § 20.1315, the agency intended to place a new limit on the scope of admissible prior maritime service evidence. Nothing in the regulatory history supports the interpretation now offered by Coast Guard counsel, that the 1999 consolidation of procedural rules served to modify the longstanding distinction between a "prior disciplinary record," that may be introduced by the Coast Guard, and "prior maritime service," that includes, but is not limited to, the elements of the prior disciplinary record, and may be introduced by the respondent.[3] Nor does the 1999 regulation contain a change in phraseology. Given the lack of stated intent to apply a new ten-year limit to admissible prior maritime service, and consistent with agency policy and precedent, respondents retain the right, under 33 CFR § 20.1315, to provide evidence and argument as to prior maritime service, without time restrictions.

Thus, reading § 20.1315 as consistent with predecessor regulation § 5.565, subsection (a)'s ten-year limit applies only to the itemized elements of the prior disciplinary record, and not to the general and permissive language allowing respondents to offer evidence and argument on "prior maritime service." A respondent's "prior maritime service" is not synonymous with his or her "prior disciplinary record": § 20.1315 provides that a respondent may offer such evidence of prior service, "including both the record introduced by the Coast Guard representative and any commendatory evidence." This reading finds support in the caption of § 20.1315: "Submission of prior records *and* evidence in aggravation or mitigation." (Emphasis added.)

In this case, the evidence offered by Respondent in mitigation was not any of the specific items of a disciplinary record listed at § 20.1315(a)(1)-(6), but a simple attestation of prior maritime service. What Respondent offered was not his prior disciplinary record: it was not

[3] The regulatory history does show intent to make one significant revision to the admissibility of prior-record evidence—§ 20.1315 eliminates § 5.565's general prohibition on disclosure of disciplinary records prior to the ALJ's entry of findings of fact. *See* 64 Fed. Reg. 28054, 28060. *See also Appeal Decision 2657 (BARNETT)* at 26-27, 2006 WL 1519583 (explaining 1999 modification of appropriate time for disclosure of prior disciplinary record).

"official commendatory information," nor any of the other listed types of disciplinary record. These circumstances illustrate the distinction between a "prior disciplinary record" and "prior maritime service."

Further, Respondent's submission of prior maritime service evidence was made in mitigation, and the ALJ labeled it as such; this brings the submission under the rubric of § 20.1315(b): "The respondent may offer evidence and argument in mitigation of any charge proved." That subsection contains no time bar on the age of evidence (including evidence of prior maritime service) that may be offered.

Turning to policy considerations, to explain why the Coast Guard's interpretation of § 20.1315 is contrary to the public policy goals underlying these S&R proceedings, it will be worthwhile to take a step back and consider the larger evidentiary and procedural regulatory structure of which § 20.1315 is a small part.

In defining and limiting the elements of a respondent's "prior disciplinary record," § 20.1315(a), like 46 CFR § 5.565 before it, excludes stale prior record evidence, "since the probative value has diminished to the extent that it is substantially outweighed by the prejudicial effect . . . ." *Appeal Decision 2463 (DAVIS)*, 1987 WL 874524 at 2 (applying § 5.565), *aff'd*, NTSB Order No. EM-155, 1989 WL 267482. In *Commandant v. Davis*, NTSB Order No. EM-155, 1989 WL 267482 at 1-2, the National Transportation Safety Board (NTSB), applying 46 CFR § 5.565, the predecessor to § 20.1315, endorsed the Coast Guard's assertion that "the purpose of the regulations is to limit the use of evidence that may be too remote in time to be still probative * * * ensuring that sentencing decisions are not influenced by essentially stale offenses."[4]

Under both the currently effective 33 CFR § 20.1315 and its predecessor 46 CFR § 5.565,

[4] If a mariner, like Respondent here, offers, in mitigation, evidence of an unblemished maritime labor history of greater than ten years, the Coast Guard is then entitled to introduce evidence of older disciplinary records, otherwise excluded by § 20.1315(a), as impeachment evidence. "While the age of a prior incident may well be relevant to the formulation of an appropriate sanction, it is not a factor that ordinarily affects the probative value of such evidence in the context of assessing the truthfulness of testimony that places the record in issue." *Davis*, 1989 WL 267482 at 2. [*See also* Respondent Appellate Brief at 6.]

Coast Guard ALJs and reviews on appeal have routinely cited respondents' long maritime service as evidence in mitigation. *See, e.g., Commandant v. Pitts*, NTSB Order No. EM-98, 1983 WL 43372 at 3 ("both the law judge and the Commandant apparently found that appellant's spotless prior record spanning thirty years of maritime employment warranted a lesser sanction . . . . Consistent with their views on the matter . . . we believe that the proper sanction should be an order of admonition"); *Appeal Decisions 2706 (CHESBROUGH)* at 8, 2015 WL 525652 ("In mitigation, the ALJ considered the fact that Respondent had held a Merchant Mariner License for over thirty years without being subject to any other negative Coast Guard enforcement action"); *2624 (DOWNS)* at 16, 2001 WL 34080163 at 10-11 ("Appellant urges that consideration be given to 'an exemplary 30-year career . . . with no prior disciplinary action having been taken.' The record is clear that the ALJ took [that prior service] into consideration"); *1431 (WILLIAMS)*, 1963 WL 66560 at 1-2 ("Appellant has had no prior disciplinary record during twenty years of sea service. . . . The order which was imposed by the Examiner after consideration of the fact that Appellant has no prior record, is fair and it will be sustained."). There is no reason to prohibit acknowledgments of respondents' past service, nor to distrust ALJs' ability to properly consider such service.

As discussed, the underlying rationale for excluding disciplinary records more than ten years old is exclusion of evidence that tends to be more prejudicial against a respondent than probative. Consideration of a respondent's two or three decades (or fourteen years) of maritime service does not pose the same risk of prejudice. (It is not credible to assert that the presentation of a respondent's long career at sea would tend to "prejudice" the ALJ against the Coast Guard.) On the other side of the scale, a long, unblemished career at sea does carry some probative value. ALJs are entitled, within their discretion, to consider that a record of, say, thirty years of unblemished service gives more support to a respondent's argument in mitigation, that his act of misconduct or negligence was a one-time aberration, than the ALJ would give to a comparably charged respondent with only nine years of service.

The Coast Guard cites *Appeal Decision 2017 (TROCHE)* at 5, 1975 WL 171661 at 3, *aff'd*, NTSB Order No. EM-49, 1976 WL 19743, for the proposition that "while a previously unblemished history of sea duty may be an influencing factor for certain types of charges, it will

not affect determinations concerning certain serious offenses of misconduct[.]" [CG Appellate Brief at 4.] In *TROCHE*, the respondent mariner had stabbed a shipmate in the face, causing significant injury. The ALJ's order of revocation was affirmed on appeal, despite the respondent's lack of a prior disciplinary record. Under the presently effective regulations, it remains within an ALJ's sound discretion to impose the maximum sanction of revocation for a first offense notwithstanding a respondent's past sea service. Nothing in this opinion is to the contrary.

In this case, Respondent brought a firearm aboard a vessel of the United States, a violation of law and act of misconduct. In mitigation, Respondent offered evidence of fourteen years of prior maritime service, the most recent eight years working shipboard. The ALJ credited these fourteen years as "a significant mitigation factor." [D&O at 7.] Nevertheless, the ALJ assigned a sanction of twelve months outright suspension, significantly longer than the three to seven months of suspension suggested under 46 CFR § 5.569. Consultation of Table 5.569 confirms that twelve months outright suspension is a significant sanction for a non-violent first offense that does not implicate substance abuse. There is no reason to believe the ALJ gave inappropriate weight to any of the factors he considered in determining this sanction.

The sanction imposed in a particular case is exclusively within the authority and discretion of the ALJ, and a sanction will only be modified on appeal if it is clearly excessive or an abuse of discretion. *Appeal Decision 2680 (MCCARTHY)* at 12, 2008 WL 5765849 (citing 46 CFR § 5.569(a); *Appeal Decision 1998 (LEBOUEF)* at 3, 1974 WL 174990 at 2), *aff'd*, NTSB Order No. EM-205, 2008 WL 4898624. The ALJ's consideration of Respondent's prior maritime service, in mitigation, was not an abuse of discretion, and the sanction will stand.

CONCLUSION

The ALJ's findings and decision were based on correct interpretation of the law, consistent with public policy, and supported by the evidence. The Order imposed by the ALJ, suspending Respondent's credential for twelve months outright, was in accordance with applicable law and precedent, and was not an abuse of discretion.

ORDER

The ALJ's Decision and Order dated March 19, 2019 is AFFIRMED.

ADM, USCG

Signed at Washington, D.C., this 17 day of JULY, 2020.