

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD,)	Docket No. 01-0452
)	
Complainant,)	CG Case No. PA 01 001227
)	
vs.)	
)	
KEITH W. ELLIOTT,)	
)	
Respondent.)	
)	

DECISION AND ORDER

Respondent has been charged in an Amended Complaint of November 30, 2001, with one count of Negligence and one count of Misconduct, with four specifications.

The Negligence count alleged that Respondent, on June 25, 2001 while serving as the Operator of the vessel SHARON BRUSCO at Bartlett Landing on the North Shore of Government Island on the Columbia River, a navigable waterway of the United States, he committed an act or failed to perform an act that contributed to the allision of the Barge ZAG-501 (while under the control of the tug SHARON BRUSCO) and the recreational vessel INDEPENDENCE and the dock located at Bartlett's Lansing.

The first Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Search and Rescue Coordination Officers in the course of their official duties all in violation of 18 USC § 1001.

The second Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Boarding Officers in the course of their official duties all in violation of 18 USC § 1001.

The third Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Marine Casualty Invest all in violation of 18 USC § 1001.

The fourth Misconduct specific:
vessel or tug SHARON BRUSCO by fe

OPTIONAL FORM 99 (7-90) *1-29-02*

FAX TRANSMITTAL		# of pages ▶ <i>10</i>
To <i>MISO Portland, IT Regan</i>	From <i>Judge Leaden</i>	
Dept./Agency <i>Marc Blackman</i>	Phone #	
Fax #	Fax #	

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

wheelhouse at or about 0410 hours on June 25, 2001 as required by Inland Navigation Rule of the Road No. 5.

Respondent by his legal counsel, answered the complaint in which he admitted all jurisdictional allegations, admitted the Columbia River is a navigable waterway of the United States, and that he is a licensed operator of the SHARON BRUSCO. He specifically denied each of the remaining factual allegations and specifications.

In turn Respondent demanded a hearing on the matter together with settlement discussions.

After a pre-trial conference, the parties arrived at a stipulation of the facts, which included six documentary exhibits (A to F).

A prehearing conference was held in Portland, Oregon on December 20, 2001, which included settlement discussion between the parties, which was followed by a hearing. An oral decision was rendered at the hearing, which found the Coast Guard had proven each of the counts of the complaint. The parties then offered statements in lieu of witness testimony in mitigation and aggravation for purposes of this judge determining the sanction to be imposed. A formal written decision finding the facts, conclusions of law and sanctions now follows.

Findings of Fact

The stipulation of facts is accepted and the facts are found to be as follows:

1. Mr. Keith W. Elliott (Respondent) was aboard the tug SHARON BRUSCO (O.N. 511361) on June 25, 2001.
2. Respondent was the duly licensed and assigned operator of the SHARON BRUSCO on June 25, 2001.
3. Respondent was responsible for the movement and control of the SHARON BRUSCO on June 25, 2001.
4. Respondent was acting under the authority of his U.S. Coast Guard issued license (No. 906064) on June 25, 2001.
5. Brusco Tug and Barge employed respondent on June 25, 2001.
6. The SHARON BRUSCO was pushing ahead barge ZAG-501, loaded with gravel on June 25, 2001.
7. At approximately 0400 of June 25, 2001, Respondent left the operation station of the SHARON BRUSCO unattended for the purpose of using the bathroom.
8. At approximately 0400 of June 25, 2001, Respondent left the port engine engaged and left the operating station of the SAHRON BRUSCO for the purpose of using the bathroom.
9. There was one other person aboard the SHARON BRUSCO on June 25, 2001 and he was not called to the operating station at or about 0400 for the purpose of relieving the Respondent to go to the bathroom.

10. The barge ZAG-501 under the control of the SHARON BRUSCO did leave the navigation channel and allided with the recreational vessel INDEPENDENCE and the docks at Bartlett's Landing, Oregon.
11. ZAG-501 under the control of the SHARON BRUSCO caused damage to the INDEPENDENCE.
12. On June 25, 2001, prior to the allision a family (comprised of a man, a woman, and three children ranging from 10 years old to 4 years old) was on board the INDEPENDENCE.
13. The owner of the INDEPENDENCE awoke of his own accord and was able to get his family off the INDEPENDENCE just prior to the allision with the barge ZAG-501.
14. The SHARON BRUSCO did not use an sound signals as a warning to other vessels on or about 0400 June 25, 2001.
15. ZAG-501 under the control of the SHARON BRUSCO caused damage to the docks at Bartlett's Landing. The damage included broken pilings, broken dock structures and portions of the dock moving approximately 20 feet shoreward.
16. Respondent departed the scene of the allision without contacting or notifying any potential victims, search and rescue agencies or law enforcement agencies.
17. Respondent had turned down the volume of his VHF radio and was not monitoring Channel 16.
18. When Respondent did answer, the Coast Guard Search and Rescue VHF radio call he had an exchange with the Coast Guard Search Rescue Coordination Officers that is transcribed and is Exhibit A.
19. At around 0530 on June 25, 2001, the Coast Guard Boarding Officers boarded the SHARON BRUSCO. One of the boarding officers, BM2 Benjamin Myers, had an exchange with Respondent that is accurately reported in Myers' report, which is Exhibit B.
20. After the interview with the Coast Guard Boarding Officers but before being interviewed by the Multnomah County Sheriff's Marine Patrol, the Coast Guard Marine Safety Accident Investigating Officer who responded to the allision, Officer Boucher, interviewed Respondent. During that interview, Respondent made the statements reported by Officer Boucher in his report, the relevant portion of which is Exhibit C.
21. At approximately 0930 on June 25, 2001, the Multnomah County Sheriff's Marine Patrol Deputy who responded to the allision, Deputy Hefferman, interviewed Respondent. During that interview Respondent made the statements reported by Deputy Hefferman in his report, the relevant portions of which are Exhibit D.
22. Following the interview referenced in paragraph 21, while Deputy Hefferman was returning to the Willamette Patrol Office, he received a page from Mark Guinn, Respondent's superior at Brusco Tug and Barge. The deputy responded to the page and Mr. Guinn advised him that Respondent wanted to tell him "what really" happened.

23. At approximately 1100 on June 25, 2001, LT Regan and PS3 Sawyer interviewed Respondent at Respondent's request. During that interview, Respondent made the statements reported by PS3 Sawyer in his report, which is Exhibit F.
24. Respondent did not post a lookout when he departed the wheelhouse of the SHARON BRUSCO to go to the bathroom.

Based on the various exhibits the following additional facts are found.

The following conversation took place between Respondent and the Coast Guard Search and Rescue Coordination Officers on June 25, 2001:

CG: Brusco We have a report of tug pushing a gravel barge that struck a dock and a vessel in the vicinity of Bartlett Island and we're just trying to confirm what that vessel's name is, over

KE: I didn't get the name of it. I didn't get the name of it, it was a tugboat and it pulled right out in front of me. I had to go full astern to keep from ramming him. He came right out of uh, that moorage and we had to ah, I don't know how we ever missed him but and he went over on the other side of the river.

CG: Roger sir, do you see that vessel right now.

KE: No we don't we're drawing 15 feet of water we can hardly get in that place we're ah, we ah, when the vessel came out of there, well, he just backed right out on front of us and we had, we had to really dog it to get around him.
(Exhibit A)

Respondent represented to BM2 Benjamin B. Myers, a Coast Guard Petty Officer in connection with the investigation of the allision at Bartlett's Island dock on June 25, 2001, the following: That he had not allided with any piers or boats on his trip up the river. (Exhibit B)

Respondent represented to Samuel Boucher when asked if he knew of an allision he said "no, but a small vessel had ran out in front of him, but he couldn't remember what it was and could not tell where it went." He further represented to Mr. Boucher that he had not hit any pier or small vessel.

Discussion and Conclusions of Law

Negligence

Respondent's stipulation of facts is tantamount to an admission that he was negligent when he left the wheelhouse of the SHARON BRUSCO at or about 0400 hours on June 25, 2001 to go to the bathroom. No other person was left to operate the vessel. He left the engine engaged. Simply put, to leave the bridge of the tug SHARON BRUSCO that morning unattended, with no lookout, no one navigating the vessel is conduct which a reasonable person (operator of an uninspected towing vessel) of similar station and circumstance would not commit. This is negligence *per se*. The negligence count is proven.

Misconduct

Misconduct is defined in the Coast Guard regulations as follows:

Misconduct is human behavior, which violates some formal, duly established rule. [46 CFR § 5.27]

Respondent is alleged to have engaged in three distinct acts of misconduct by making three false statements in violation 18 USC § 1001.

The first Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Search and Rescue Coordination Officers in the course of their official duties all in violation of 18 USC § 1001.

The second Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Boarding Officers in the course of their official duties all in violation of 18 USC § 1001.

The third Misconduct specification alleged Respondent made a false, fictitious and fraudulent representation of the facts regarding the allision between the barge ZAG-501, the recreational vessel INDEPENDENCE and the dock located at Bartlett's Landing to Coast Guard Marine Casualty Investigating Officer in the course of his official duties all in violation of 18 USC § 1001.

The facts demonstrate there was an allision between the barge ZAG-501 which was under the control of the tug SHARON BRUSCO, and which tug was operated (or supposed to be operated) by Respondent and the dock at Bartlett's Landing and the recreational vessel INDEPENDENCE.

The facts also demonstrate that Coast Guard Search and Rescue Coordination Officers asked Respondent about that allision in the course of their official duties.

The questions asked of Respondent required specific answers, which he gave. All of which were objectively false.

A formally established rule governing human behavior is found in the federal false statement statute, 18 USC § 1001. In order to violate that statute the Respondent had to knowingly and willfully made a material false statement or representation in any matter within the jurisdiction of the executive branch of the United States.

The Coast Guard is, of course, a part of the Department of Transportation an executive branch department. It is within the jurisdiction of the Coast Guard to conduct investigations into matters, which involve safety of life and property at sea including ports and waterway safety. See, *e.g.*, 33 USC § 1221 *et. seq.* 46 USC § 2103; 46 CFR Subpart 4.01 *et. seq.*

The first alleged false statement: "I didn't get the name of it. I didn't get the name of it, it was a tugboat and it pulled right out in front of me. I had to go full astern to keep from ramming him. He came right out of uh, that moorage and we had to ah, I don't know how we ever missed him but and he went over on the other side of the river", was very material to the Coast Guard's inquiry regarding an allision, a matter of safety of life and property at sea. It was clearly false, and Respondent knew it was false. I, thus find he made that statement knowingly and willfully.

The second alleged false statement: Respondent represented to BM2 Benjamin B. Myers (a Coast Guard Petty Officer) in connection with the investigation of the allision at Bartlett's Island dock on June 25, 2001 the following: That he had not allided with any piers or boats on his trip up the river. (Exhibit B)

This statement was very material to the Coast Guard's inquiry regarding an allision, a matter of safety of life and property at sea. It was clearly false, and Respondent knew it was false. I thus find he made that statement knowingly and willfully.

The third alleged false statement: Respondent represented to Samuel Boucher (a Coast Guard Petty Officer) when asked if he knew of an allision he said "no, but a small vessel had ran out in front of him, but he couldn't remember what it was and could not tell where it went." He further represented to Mr. Boucher that he had not hit any pier or small vessel. It was clearly false, and Respondent knew it was false. I thus find he made that statement knowingly and willfully.

I, therefore, conclude Respondent engaged in three separate acts of misconduct as defined in 46 CFR § 5.27 by knowingly and willfully making three separate false statements which involved material information essential to the Coast Guard's investigation of an allision between the barge ZAG-501 under the control of the

SHARON BRUSCO and the recreational vessel INDEPENDENCE and the docks at Bartlett's Landing, Oregon on June 25, 2001.

Finally, the fourth Misconduct specification alleged Respondent wrongfully operated the vessel or tug SHARON BRUSCO by failing to post a lookout when he departed the wheelhouse at or about 0410 hours on June 25, 2001 as required by Inland Navigation Rule of the Road No. 5.

The Inland Navigation Rules, Rule 5 [33 USC § 2005] "Look-out" provides as follows:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision.

Respondent left the bridge or wheelhouse of the SHARON BRUSCO to go to the lavatory. No one was left on the bridge – no one. The tug and barge left the channel and allided with the recreational vessel INDEPENDENCE and the docks at Bartlett's Landing. The fault of the SHARON BRUSCO and the barge was due to a most serious defect of lookout on board her, amounting to a complete abdication of responsibility by her master, the Respondent, who was absent from the bridge for however short a period. This is a clear violation of Rule 5. Compare to *The Sea Star* [1976], 2 Lloyd's Reporter 478; Farwell's, Rules of the Nautical Road, p. 237.

SANCTION

I am concerned when the Coast Guard conducts investigations and seeks information from persons who are involved in serious marine incidents, such as the allision here, that the officers receive truthful information. And, to the extent that persons don't tell the Coast Guard investigators the truth, the ability of the Coast Guard to effectively do their job protecting the safety of our waterways is undermined.

I am also concerned that merchant mariners not believe that misleading or lying to a Coast Guard officer or investigator is something that can be lightly tolerated, because there are serious implications that flow from making false statements in the course of an investigation.

And I am also concerned about the ethics of merchant mariners. Whether or not they believe or think leaving a bridge totally without anyone at the helm, let alone anyone as a lookout, is something that can be tolerated. How do we cure that? A message has to be sent that no one will lie or mislead a Coast Guard officer in the course of an investigation or engage in such serious misconduct.

But, vindication of the public's interest here is not necessarily revocation. That does not necessarily achieve the education of the merchant mariner community, or vindicate the public's interest in the integrity of Coast Guard investigations, as well as compliance with the rules of the road.

If Respondent has learned from this experience, and I believe he has, removing him does not achieve the further goal of education of the mariner community to know the implications of misconduct of this type.

Moreover, the table of suggested or recommended sanctions or orders, 46 CFR Table 5.569 shows that failure to comply with U.S. law or regulation only has a recommended sanction of a one to three month suspension.

Here however, a family nearly missed potential serious injury. They escaped the seconds before the barge allied with the INDEPENDENCE. Fortunately, no one was injured. This factor suggests an enhancement of the sanction.

Consequently, I will suspend Respondent's license for a period of two [2] years with a one year probation included. During the one year period, I will expect that Respondent will educate the mariner community, other licensees, other tug operators, mates and the like about what occurred.

I direct that Respondent appear before other captains, masters, pilots and operators in the geographic area covered by the Portland Oregon Coast Guard Marine Safety Office to inform them about the implications of what he had done in this matter. I direct that a minimum of six [6] such appearances be made during this one year period. For further explanation see Transcript of Proceedings, December 20, 2001 pp. 32 ff.

I further direct that Respondent report to the Coast Guard Marine Safety Office, Portland on the progress of these appearances.

NOW THEREFORE IT IS ORDERED Respondent's License No. 906064 currently in the possession of the Coast Guard Marine Safety Office, Portland is suspended for a period of two [2] years commencing on December 20, 2001 together with a period of one year probation to run concurrently with the suspension.

IT IS FURTHER ORDERED, Respondent shall arrange for and appear a minimum of six [6] times during a one year period before other licensed or documented captains, masters, and operators for the purposes of explaining the circumstances of this matter and the implications and sanctions involved. Respondent shall report to the Coast Guard on the progress of these efforts so ordered.

Service of this s Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

Dated: January 29, 2002.



Edwin M Bladen
Administrative Law Judge

Certificate of Service

I hereby certify that I have this day delivered the foregoing Order upon the following parties and limited participants (or designated representatives) in this proceeding, at the address indicated as follows:

MSO Portland, Oregon
Attn: LT Sean Regan
Telefax: 503-240-9345

Mr. Marc D. Blackman
Attorney at Law
Telefax: 503-227-5984

ALJ Docketing Center, Attn: George Jordan
E-mail

Dated at Seattle, WA this 29th day of January, 2002.



MARY PURFEERST
Legal Assistant to
Administrative Law Judge