

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

JOHN M. PANTOJA

Respondent.

Docket Number: CG S&R 04-0308
CG Case No. 2093485

DECISION AND ORDER

Issued: February 9, 2005

Issued by: Thomas E. P. McElligott, Administrative Law Judge

Appearances:

For Complainant

LT Michael C. Reed
Investigating Officer
U.S. Coast Guard
Chicago, IL

For Respondent

Julia Martin Pilliod, Esq.
Law Offices of Marwedel, Minichello and Reeb
10 South Riverside Plaza, Chicago, IL

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) Investigating Officers (IOs) presently stationed at the Marine Safety Office, Chicago, Illinois initiated this administrative action for a trial type Hearing seeking revocation of the U.S. Merchant Mariner's Captain's or Master's License issued to the captioned Respondent John M. Pantoja. This Hearing was brought pursuant to the legal authority contained in 46 U.S. Code Chapter 77, including 46 U.S.C. 7703, 46 Code of Federal Regulations (CFR) Part 5; and 33 CFR Part 20.

On June 14, 2004, the Coast Guard Investigating Officers (IOs) in Illinois filed and served on Respondent personally a Complaint against Respondent alleging Respondent's misconduct for failure to disclose a prior Criminal Court conviction in violation of 46 CFR 10.201(h). The jurisdictional allegations stated that Respondent was a holder of a Coast Guard issued license. The factual allegations alleged that Respondent failed to disclose a prior conviction on his completed and signed by Respondent license renewal application filed with the U.S. Coast Guard, Regional Examination Center Office in Toledo, Ohio. Respondent filed his written Answer to the IO's Complaint on June 28, 2004, denying factual paragraph two, and admitting all jurisdictional allegations, factual paragraph one and the language contained in the application in paragraph three. The Coast Guard amended the Complaint on July 7, 2004, adding factual paragraph number four, which alleged Respondent's signature was located on the license renewal application certifying that "the information on the application is true and correct." Respondent admitted in his Answer to this Amended Complaint, dated July 27, 2004, that the form so reads.

On September 14, 2004, the case and parties proceeded to pre-hearing telephone conference convened by Administrative Law Judge Thomas E. P. McElligott. During the

telephone conference the judge reserved ruling on Coast Guard's Motion for Summary Disposition, and scheduled the hearing for September 23, 2004, in a courtroom in Joliet, Illinois. At the hearing, the Coast Guard offered five exhibits into evidence, and two witnesses to testify under oath. See Attachment B. The Respondent offered one exhibit into evidence and called five witnesses to testify. Id. The Judge admitted into evidence all six (6) exhibits and swore all the seven (7) witnesses under oath and heard their complete testimony.

After the hearing, both parties filed post-hearing briefs by December 03, 2004. The case by then was ready for a decision. The IOs emphasized on the meaning of "conviction," as defined in the license renewal application. Since the definition includes "where a court required you to . . . submit to any manner of probation or supervision, . . ." the Coast Guard argued that Respondent's answer of "no" to the question regarding conviction amounted to misconduct. Coast Guard's Post-hearing Brief, p. 2. The Coast Guard IOs also attacked Respondent's credibility, stating that Respondent "lied to the court under oath on at least two occasions." According to the Coast Guard, these lies include Respondent's claim that he only interacted with the Chicago Police Department (CPD) in one case, where in fact, he was involved in six arrests by the CPD. Id. Respondent at the time of the hearing before this Administrative Law Judge and before had been a resident in or near Chicago, Illinois.

Respondent's primary argument was that he made a good faith effort in completing his signed application for renewal of his U.S. Coast Guard issued U.S. Merchant Mariner's Master's License. Respondent's Post-hearing Brief, p. 1. When completing the application, Respondent claimed he relied on information provided to him by his former attorney. Id. at 2. Specifically, Respondent claims that his prior attorney advised him that the period of court supervision increased from 2 to 3 years did not amount to a "conviction" until the supervision was court

ruled completed on or about March 25, 2003. Therefore as of the date of Respondent's signing and filing the renewal application, March 18, 2003, there was not a final decision in the Criminal Court case of Respondent. Id. Respondent had been placed in a period of court supervision and that period continued and had not expired when Respondent applied to renew his license on March 18, 2003. Id. As a result, without a final Criminal Court decision, Respondent claimed that he did not meet the given definition of "conviction" printed on the renewal application form. Id. at 4.

After carefully watching and listening to Respondent give his sworn testimony under oath at this hearing, I do not find his testimony credible.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has established by a preponderance of reliable, probative, substantial and credible evidence that Respondent engaged in misconduct when he failed to report a prior conviction and filed a false license renewal application with the U.S. Coast Guard Regional Examination Center.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses sworn under oath, and the entire hearing record considered as a whole.

1. Respondent is a holder of a U.S. Coast Guard issued U.S. Merchant Mariner's Captain's or Master's License. (Tr. 5).¹

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. __); Citations referring to Agency Exhibits are as follows: Government followed by the number (Gov't Ex. __); Respondent's Exhibits are as follows: Respondent followed by the letter (Resp. Ex. __).

2. On March 18, 2003, Respondent completed, signed and filed or submitted his application for renewal of this Coast Guard issued license. (Tr. 6; Gov't Ex. 2).
3. In Section Three (page 2 of 4) of his signed renewal application, Respondent answered "no" and wrote "x" in the no column and box answering the question asking "Have you ever been convicted by any court-including military court-for an offense other than a minor traffic violation? (If yes, attach statement)" (Gov't Ex. 2, Id.)
4. Contrary to his signed and dated license renewal application, Respondent had been convicted of domestic battery for assault and battery on his mother and brother and also two counts of resisting a peace officer on March 28, 2000. Id. Respondent assaulted and battered his mother by knocking her to the ground and striking his brother two or more times.
5. Respondent's initial sentence for the March 28, 2000 offenses was fifteen days community service and an additional two years supervision. (Tr. 7; Gov't Ex. 5).
6. Respondent's two years of supervision was extended to three (3) years and Respondent's 15 days community service was eventually increased to 60 days. Respondent claims these were only as the result of his absence in court on numerous hearing occasions and Respondent's failure to complete his Illinois Criminal Court ordered community service requirement. (Tr. 7, 60).
7. As of March 18, 2003, the date of his signed and completed by Respondent license renewal application for his Coast Guard issued license, Respondent had not properly yet completed the Criminal Court imposed period of three (3) years supervision. (Tr. 7, 96).

8. Respondent was scheduled to be discharged from court supervision on March 25, 2003, if Respondent satisfied all of the Criminal Court's rules and conditions. (Tr. 11-12, 23-24, 27, 95-96; Gov't Ex. 3).
9. Respondent's attorney in the Illinois or Chicago Criminal Court domestic battery case involving his brother and mother and two counts of resisting arrest by a peace officer previously explained to him that after Respondent completed the required period of court supervision, the conviction would only possibly be expunged if Respondent petitioned the court for it and it was granted by the Criminal Court; it was not automatic. (Tr. 58, 62-63, 69-70).
10. As of the date of this hearing, Respondent still had not taken any steps to have his Criminal Court period of three (3) years supervision expunged from his record. (Tr. 58).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent John M. Pantoja and the subject matter of this hearing are properly within the jurisdiction of the United State Coast Guard and the Administrative Law Judge in accordance with 46 U.S. Code Chapter 77, including 46 USC 7704, 46 CFR Part 5 and 33 CFR Part 20.
2. At all relevant times, Respondent was the holder and acting under the authority of a U.S. Coast Guard issued U.S. Merchant Mariner's Captain's or Master's License.
3. Respondent failed to disclose or report in his signed and dated license renewal application that he was under a period of court supervision at the time he submitted his application for license renewal.

4. Respondent had actual knowledge of his court supervision period of two years increased to three years, and failed to disclose it. As a result, Respondent made fraudulent written statements on his completed and signed application for license renewal.
5. The charge of “**MISCONDUCT**” against Respondent John M. Pantoja is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the record and considered as a whole. Respondent committed misconduct by choosing to hide and not disclose his Criminal Court conviction history on his license renewal application form completed, dated and signed by Respondent.

DISCUSSION

The U.S. Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs U.S. Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the (U.S.) Supreme Court.” Appeal Decision 2477 (TOMBARI) (1998). The burden of proving a claim by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in

original)). Under the substantive and procedural rules, the Coast Guard Investigating Officers bear the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable, substantial and probative evidence that Respondent more likely than not committed the violations charged.

Under 46 U.S.C. 7703, a mariner's license may be suspended or revoked if the holder of the license is acting under the authority of that license and the holder commits an act of misconduct. A mariner is considered to be acting under the authority of his license if the license is: (1) required by law or regulation; or (2) required by an employer as a condition of employment. See 46 CFR 5.57; see also Appeal Decision 2620 (COX) (2001). Furthermore, misconduct is defined as a "behavior which violates some formal, duly established rule. Such rules are found in . . . statutes, regulations, the common law, the general maritime law, . . . and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 CFR Part 5.27. Here, Respondent completed and filed a formal license renewal application on a U.S. Coast Guard form, CG-719B, signed and dated by Respondent on March 18, 2003. (Tr. 6; Gov't Ex. 2). Under 46 CFR 5.57(b), a person applying for a U.S. Coast Guard license renewal is considered to be then acting under the authority of that license. Respondent was requesting renewal of a Master's License for towing vessels weighing up to 100 gross tons. (Gov't Ex. 2, page 1 of 4).

In this case, Respondent checked the box marked "no" when asked on his license renewal application form whether he had ever been convicted, including being under a period of supervision, of a crime greater than a minor traffic violation. The Coast Guard charged Respondent with misconduct for failing to disclose his three years court supervision period for domestic battery and resisting arrest. Respondent was alleged to have assaulted and battered his

mother by knocking her to the ground and assaulting and battering his brother two or more times by hitting or striking his brother. Respondent following that was accused of resisting a peace officer's arrest on two counts all on the same day. Respondent failed to do what was required of him when, after reading the definition of "conviction" as defined on Respondent's Coast Guard's license renewal application form², he failed to check the box marked "yes", when clearly asked if he had ever been convicted of a crime. Since Respondent was still under the period of supervision and the term "supervision" was listed in the definition of "conviction" on this application form, Respondent was obligated to disclose and admit this information despite the lack of a final decision in the Criminal Court case. Failing to disclose, and thereby hiding or keeping this information from the U.S. Coast Guard was misconduct on the part of Respondent, and rises to the level of justifying revocation of his license.

"[W]here fraud in the procurement of a license is proved in a suspension and revocation hearing, revocation is the only appropriate sanction." Appeal Decision 2613 (SLACK) (1999). See also Appeal Decision 2570 (HARRIS) (1995) (revocation appropriate sanction where fraud is proved in procurement of license); Appeal Decision 2346 (WILLIAMS) (1984) (revocation affirmed for Respondent's wrongful and fraudulent application form signed and submitted to Coast Guard); Appeal Decision (ROBLES) (1980) (when Respondent's fraud in procurement of license is proved, revocation is the only appropriate disposition); Appeal Decision 2569 (TAYLOR) (revocation is the appropriate sanction for filing fraudulent application submitted for U.S. Merchant Mariner's Document (MMD)). A "fraudulent statement" is one made by the

² Section III, on the Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document explains Narcotics, DWI/DUI, and Conviction Record as follows: "Conviction means found guilty by judgment or by plea and includes cases of deferred adjudication (no contest, adjudication withheld, etc.) or where the court required you to attend classes, make contribution of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of a trial court finding. Expunged convictions must be reported unless the expungement was based upon a showing that the court's earlier conviction was in error." (emphasis supplied).

Respondent with either actual or constructive knowledge that the declaration is materially flawed or false. See 18 U.S.C. 1001; Appeal Decision 809 (MARQUES) (1955); and Appeal Decision 2456 (BURKE) (1987). Conversely, a “false statement” is an incorrect statement of material fact. Appeal Decision 1381 (CLINTON) (1963). As a result, the statements share the requirement of materiality, but only a fraudulent statement is made with knowledge of its falsity. It should be noted that there is no requirement that the statement be made intentionally or in bad faith; the statement is simply made despite Respondent’s knowledge that it is not true or accurate. Specific intent is not an element of misconduct partly because suspension and revocation hearings are remedial, not punitive, in nature. Appeal Decision 2608 (SHEPHARD) (1999).

Respondent knew that he was under a three years “period of supervision” at the time that he completed and signed the Coast Guard license renewal application form. Respondent was required to admit and disclose it. There was no proper ambiguity or reason for the Respondent to be confused by the simple definition. Respondent’s knowledge of his long period of supervision made the statement fraudulent. The advice Respondent claimed he received from a former attorney regarding what was or was not a “conviction” is irrelevant or immaterial because the U.S. Coast Guard’s definition of “conviction” was clearly stated on the license renewal form. Any action that needed to be taken after the three (3) years supervision period expired or Respondent’s lack of action to remove a criminal conviction from his record is not relevant to this decision because on the day that Respondent submitted his application for license renewal, March 18, 2003, the period of supervision had yet to expire. It was still continuing.

Respondent’s attorney at the hearing before Judge T. McElligott argued that in deciding this case, the Coast Guard should follow Illinois law, which specifies that a period of supervision

is not a conviction. Respondent's Post-Trial Brief, 6 (citing 530 ILCS 5/5 — 6 — 3.1). The U.S. Administrative Law Judge (ALJ) is not obligated to follow state law where the Respondent entered into an agreement with the State that could eventually possibly lead to expungement of the charge if Respondent properly completed it and the State later decided to exonerate him. Appeal Decision 2629 (RAPOZA) (2002). This judge is required to review state law regarding interpretation of the plea, but this “in no way suggest[s] the ALJ is prohibited from examining federal regulations and regulatory history for the same purpose.” Id. at 5. Some of the Coast Guard applicable law and regulations state:

If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads guilty, or no contest or, by order of the trial court has to . . . submit to any manner of probation or supervision . . . the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7703 or 7704 as having received a conviction. 33 CFR 20.1307(d). (Emphasis supplied).

It is, therefore, proper for the Coast Guard to consider Respondent convicted by a Criminal Court of a crime after having been sanctioned and ordered to a period of supervision for 2 years increased to 3 years by the Illinois court. The Coast Guard application instruction in and for Section III of the form made it clear to Respondent that supervision is a type of conviction for Coast Guard purposes. It was required to be admitted to by Respondent on the application.³ Since the Respondent knew he was under a three-year period of supervision, that the supervision was considered by the Coast Guard to be a conviction, and he knowingly did not disclose the information, Respondent committed misconduct.

³ Supra note 2.

I find the United States Coast Guard Investigating Officers proved by a preponderance of the reliable, probative, substantial and credible evidence that Respondent's failure to disclose that he was still attempting to complete and satisfy a period of three (3) years Criminal Court supervision at the time he applied for license renewal, as required under the Coast Guard's definition of "conviction," amounted to misconduct under 46 U.S. Code 7703, 33 CFR Part 20, and 46 CFR Part 5, including 46 CFR 5.27.

SANCTION

The Coast Guard Investigating Officer is seeking Revocation of Respondent's license. It is well within the power of the ALJ to order any of a variety of sanctions, including revocation. See 46 CFR 5.569; see also Appeal Decision 2569 (TAYLOR). The Table of Suggested Range of Appropriate Orders (Table) for various offenses can be found at Title 46 CFR Part 5.569. According to the Table, committing an act of misconduct generally results in suspension of a mariner's document. See 46 CFR 5.569(d). An ALJ, however, is not bound by this table, and has discretion to exceed the suggested range or reduce the sanction. See Id.; see also Appeal Decision 2628 (VILAS) (purpose of the table is to provide guidance to the ALJ and promote uniformity). For the purpose of determining the appropriate sanction, the ALJ may consider any remedial action taken by the respondent, the respondent's prior record and other mitigating or aggravating factors. 46 CFR 5.569(b).

In this case, Respondent had and has a prior criminal record including a court conviction for domestic battery involving his mother and brother and two counts of resisting a peace officer following the same incident on the same date. Respondent was also aware of the repeated

extensions made to his supervision period. Respondent claims this was only because of his own actions in missing court-hearing dates. He knew that in about seven (7) more days after Respondent signed and filed his application on March 18, 2003, at the March 25, 2003 court date, his court supervision period of 3 years was supposed to be completed and reviewed by the Criminal Court. With this knowledge, on March 18, 2003, Respondent failed to truthfully answer whether he had ever been convicted of a crime, including being under supervision. These aggravating factors are enough to raise the sanction to revocation of Respondent's license.

ORDER

IT IS HEREBY ORDERED that U.S. Coast Guard License issued to Respondent John M. Pantoja is hereby **REVOKED**. Respondent is ordered to immediately deliver by mail or in person his license to the Investigating Officers at U.S. Coast Guard Marine Safety Office Chicago, at 215 West 83rd Street, Suite D, Burr Ridge, Illinois 60527 (fax number 630-986-2120; telephone # 630-986-2133).

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated: February 9, 2005
Houston, Texas

THOMAS E. P. MCELLIGOTT
U.S. ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

**U.S. COAST GUARD
COMPLAINANT'S WITNESSES**

1. Joyce Ogden, Office of the State's Attorney, Cook County, Illinois
2. Earl Bibee

RESPONDENT'S WITNESSES

1. David Cuomo
2. Joseph Pantoja, Respondent's Brother
3. John Pantoja, Respondent
4. Jude Domanski
5. Hank Labarbara

EXHIBIT LIST

**U.S. COAST GUARD
COMPLAINANT'S EXHIBITS**

- | | |
|----------|--------------------------------------------------------------------------------------|
| IO Ex. 1 | Certified Statement of Conviction & Disposition, Circuit Court of Cook County |
| IO Ex. 2 | Respondent's License Renewal Application, dated March 18, 2003, signed by Respondent |
| IO Ex. 3 | Report by Joyce Ogden, Office of the State's Attorney, Cook County, Illinois |
| IO Ex. 4 | Respondent's Arrest Record, 1994-2002 |
| IO Ex. 5 | Respondent's Arrest Record for the Domestic Disturbance, March 28, 2000 |

RESPONDENT'S EXHIBITS

- Resp. Ex. A License Renewal Application Form