

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL JAMES NEIL

Respondent.

Docket Number: CG S&R 05-0373
CG Case No. 2307534

ORDER

Issued: August 18, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Procedural History

This matter came to be heard on Respondent's timely Answer and request for hearing following service of a Coast Guard's Complaint. The Complaint alleged that Respondent violated 46 U.S.C. 7703(2) having been convicted of offenses that would prevent the issuance or renewal of his Coast Guard issued credentials in accordance with 46 CFR table 10.201(h). Specifically, Respondent was convicted of Cruelty to a Juvenile, Molestation of a Juvenile, and Aggravated Incest. The undersigned heard this matter on August 4, 2005 at Marine Safety Office Morgan City, Louisiana, wherein Respondent appeared, *pro se*; that is, on his own behalf, without professional counsel.

At the conclusion of the hearing and after the parties waived their right to submit proposed findings of fact and conclusions of law, the undersigned rendered the decision orally from the bench. Finding that Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703(2) and further finding that the Coast Guard proved the charge alleged in the Complaint, the undersigned revoked Respondent's license. This Order is issued in accordance with 33 CFR sections 20.710 and 20.902(c) in that once an administrative law judge renders the initial decision orally from the bench at the close of the hearing, a written order must be prepared and served on the parties.

At the hearing, the Respondent presented his original Coast Guard license #921173 which reflects that it was issued on April 4, 2001 and expires five years after that date. The license also reflects that Respondent was certified as a radar observer but the certification expired December 2002. The original license remained with the undersigned until the end of the hearing at which time I gave it to the Coast Guard Investigating Officers pursuant to the oral order of revocation. A copy of the license was made part of the record as ALJ Exhibit – 1.

Coast Guard's Case

The Coast Guard Investigating Officers, (IOs) LCDR Andrew Sheffield, USCG, and CWO Jason Boyer, USCG, moved to amend the Complaint by removing the word, "Misconduct" and the reference to "46 CFR 12 table 12.02-4(c)" from the Factual Allegations section. The IOs also moved to omit the reference to Respondent's Merchant Marine Document (MMD) in paragraph 2 under Jurisdictional Allegations because the Respondent does not possess an MMD. The undersigned granted both motions. The removal of 46 CFR table 12.02-4 (c) does not affect Respondent's actual notice of the charges against him because the Coast Guard is relying on the remaining reference to 46 CFR 10.201(h). Further, Respondent has no MMD, so removal of any

reference to an MMD also has no effect on Respondent's notice of the charge against him.

Finally, removal of the reference to "Misconduct" does not affect notice because the charge is based on 46 U.S.C. 7703(2) and 46 CFR table 10.201(h). .

The Coast Guard then introduced certified copies of the judgment of conviction orders from the State of Louisiana dated February 4, 2003 and February 20, 2003 as IO Exhibit #1, two pages. The prison sentence imposed by the February 4, 2003 judgment of conviction was reconsidered in the order dated February 20, 2003. The conviction orders charged Respondent with eight counts: one count of cruelty to a juvenile, two counts of Molestation of a Juvenile, two counts of Indecent Behavior with a Juvenile, and three counts of Aggravated Incest. Respondent pled guilty to count one, Cruelty to a Juvenile, count two, Molestation of a Juvenile, and count six, Aggravated Incest. The Court then entered a *Nolle Prosequi*¹ in Counts three, four, five, seven, and eight.

At his reconsidered sentencing hearing on February 20, 2003, the Judge sentenced Respondent to home incarceration by electronic monitoring for one and one half years each on counts one and two, said sentences to run consecutively. He was also sentenced to home incarceration for two years on count six to run consecutively with the sentences in counts one and two, for a total of five (5) years to serve on home incarceration by electronic monitoring.

¹ ***nolle prosequi*** (nah1-ee prahs- <<schwa>>-kw1), *n.* [Latin "not to wish to prosecute"] **1.** A legal notice that a lawsuit or prosecution has been abandoned. [Cases: [Pretrial Procedure](#) ¶511. [C.J.S. Dismissal and Nonsuit §§ 30-32, 34-35.](#)] **2.** A docket entry showing that the plaintiff or the prosecution has abandoned the action. -- Often shortened to *nolle*. Nolle prosequi is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some of the counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether. It is a judicial determination in favor of accused and against his conviction, but it is not an acquittal, nor is it equivalent to a pardon." [22A C.J.S. Criminal Law § 419, at 1 \(1989\)](#). Black's Law Dictionary (8th ed. 2004).

Respondent's Case

After the Coast Guard presented its case and rested, the Respondent was sworn and testified under oath that the charges referred to in the conviction orders were not true; that he was falsely accused; and that he was coerced into pleading guilty against his will. Moreover, he claimed that his former wife initiated the false charges.

Respondent then offered three exhibits. The first exhibit offered was a 2002 radar observer course completion certificate. The Coast Guard objected to its admission on the grounds of relevancy. I sustained the objection because the certificate was never made part of Respondent's license and, if it had been, it would have expired in 2003, one year after its issuance. Although the certificate shows that Respondent was attempting to keep his qualifications current, it is not probative on whether he was convicted of an offense that would prevent the issuance or renewal of Coast Guard credentials. Further, the certificate of completion cannot be considered as "evidence of suitability of service in the merchant marine" to be given consideration as if Respondent were applying for his license prior to the expiration of the minimum assessment period as set forth in 46 CFR 10.201(h)(4).

The second exhibit Respondent offered was a safety training certificate of completion. The Coast Guard objected to its introduction on the same grounds as the radar observer course completion certificate; that is, relevancy. The undersigned sustained the objection, noting, as above, that although the exhibit shows Respondent is attempting to keep his qualifications current, it is not probative on whether he was convicted of an offense that would prevent the issuance or renewal of Coast Guard credentials. Further, it also cannot be considered "evidence of suitability of service in the merchant marine."

The third exhibit offered was a signed letter from an individual identifying himself as Respondent's son. The letter stated, among other things, that the charges referred to in the conviction orders were not true; that his mother, (Respondent's former wife) "put the kids up to it;" and, Respondent was coerced into pleading guilty. Again, the Coast Guard objected on relevancy grounds. I sustained the objection because the letter's author was not available for cross examination by the Coast Guard or questioning by the undersigned. In addition, I opined that the suspension and revocation process does not serve as an avenue of collateral attack on state court proceedings. The underlying reasons for Respondent having decided to plead guilty in state court are irrelevant in this suspension and revocation hearing. Appeal Decision 2120 (MCLAUGHLIN) (1978). Further, the undersigned advised that if Respondent wants to contest the conviction he should pursue such relief in the appropriate forum. Appeal Decision 2201 (BROADNAX) (1980). Finally, the Coast Guard IOs reminded the undersigned that pursuant to 33 CFR 20.1307(c) (2), "[a] judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if an S& R (suspension and revocation) proceeding alleges conviction for . . . [a]n offense that would prevent the issuance or renewal of a merchant mariner's license, certificate of registry, or document. . . ." I stated further that even if Respondent's testimony were to be believed, a Coast Guard Administrative Law Judge has no authority to ignore an otherwise validly entered federal or state judgment of conviction order. Therefore, I found that Respondent was convicted of the crimes listed in the judgment of conviction. (IO Exhibit 1). Further, I found that Respondent possessed a valid merchant mariner's license (ALJ – 1) at the time the conviction order was entered. Therefore, the Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 USC 7703.

Law

46 U.S.C. 7703 provides that “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder – (2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner’s document. . . . “

46 CFR 10.201(h)(1) provides, in pertinent part, that “[a]n application (for the issuance of a license, certificate of registry, or merchant mariner’s document) may be disapproved if a criminal record review leads the OCMI (Officer in Charge, Marine Inspection) to determine that the applicant’s habits of life and character are such that the applicant cannot be entrusted with the duties and responsibilities of the license or certificate of registry for which application is made.”

Subsection (2), 46 CFR 10.201(h) states that “[t]he OCMI may use table 10.201(h) to evaluate applicants for licenses and certificates of registry who have criminal convictions. The table lists major categories of criminal activity and is not to be construed as an all-inclusive list. If an applicant is convicted of an offense that does not appear on the list, the OCMI will establish an appropriate assessment period using the list as a guide. The assessment period commences when an applicant is no longer incarcerated. The applicant must establish proof of the time incarcerated and periods of probation and parole to the satisfaction of the OCMI. The assessment period may include supervised or unsupervised probation or parole. A conviction for a drug offense more than 10 years prior to the date of application will not alone be grounds for denial.”

Subparagraph (3) of 46 CFR 10.201(h) states that, “[w]hen an applicant has convictions for more than one offense, the minimum assessment period will be the longest minimum in table

10.201(h) . . . based upon the applicant’s convictions; the maximum assessment period will be the longest shown in table 10.201(h). . . based upon the applicant’s convictions.”

Table 10.201(h) lists several categories of crimes and further lists specific crimes within each category. The table also provides minimum and maximum assessment periods. Listed under “Crimes against Persons,” is “Sexual Assault (rape, child molestation).” The minimum assessment period is 5 years and the maximum assessment period is 10 years.

Finally, 46 CFR 5.61(a) lists acts or offenses for which investigating officers must seek revocation of licenses, certificates, or documents. Those offenses include, among others, “Rape or sexual molestation.” Subparagraph (b) provides that “[a]n investigating officer may (emphasis added) seek revocation of a respondent’s license . . . when the circumstances of an act or offense found proved or consideration of the respondent’s prior record indicates that permitting such person to serve under the license . . . would be clearly a threat to the safety of life or property, or detrimental to good discipline.” Concerning molestation, the Commandant has made it clear that “[t]he regulations implementing the suspension and revocation procedures require (emphasis added) the investigating officer to seek revocation when an act of sexual molestation or an act of perversion is found proved. Appeal Decision 2573 (Jones) (1996).

Applying the Law to the Facts

At a minimum, at least one of Respondent’s convictions (Molestation of a Juvenile or child molestation) is conduct expressly alluded to in 46 CFR 10.201(h) (1) that would “lead(s) the OCMI to determine that the applicant’s habits of life and character are such that the applicant cannot be entrusted with the duties and responsibilities of the license or certificate of registry for which application is made.” Since the regulations direct the OCMI to apply 46 CFR table

10.201(h) to evaluate applicants who have criminal convictions, the minimum assessment period for Molestation of a Juvenile (child molestation), without considering the other offenses, is 5 years after Respondent completes his incarceration. Excluding credit for time served as stated in the judgments of conviction, good behavior, and the possibility of parole, Respondent will not be released from home incarceration by electronic monitoring until February 19, 2008. Absent circumstances not present in this case, 46 CFR table 10.201(h) prescribes that Respondent's application will not be considered until the minimum assessment period has run.

As noted above, 46 CFR 5.61 (a) (3) requires that revocation be sought when "Rape or sexual molestation" is found proved. It is inconceivable that a conviction of an offense for which an IO is directed to seek revocation would not be considered evidence of an "applicant's habits of life and character . . . such that the applicant cannot be entrusted with the duties and responsibilities of the license . . . for which application is made." 46 CFR 10.201(h).

Therefore, I found as a conclusion of law that Respondent's convictions, especially Molestation of Juvenile, which is synonymous with "Child Molestation" as listed in 46 CFR table 10.201(h), is a "conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant marine's document" under 46 U.S.C. 7703(2). The Complaint alleging that Respondent was "convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document" was found PROVED.

Sanction

46 U.S.C. 7703 states, at the outset, that "[a] license, certificate of registry or merchant mariner's document issued by the Secretary may be suspended or revoked" While it is clear

that a merchant mariner's credentials may be suspended, 46 CFR 10.201(h) expressly prescribes that the OCMI may refuse to issue a license, etc., if it is determined that the applicant's habits of life and character are such that the applicant cannot be entrusted with the duties and responsibilities of the license or certificate of registry for which the application is made. In light of the seriousness with which 46 CFR 5.61 treats "Child Molestation," to the extent that investigating officers are directed to seek revocation, it is clear that the Title 46 regulatory scheme contemplates that "Child Molestation" or "Molestation of a Juvenile" are the habits of life and character such that the Respondent cannot be entrusted with the duties and responsibilities of his license. Therefore, it can be reasonably inferred that the above language contemplates revocation only and not suspension.

Several Commandant Decisions on Appeal also support revocation over suspension when the charge involves sexual misconduct. In Appeal Decision 2426 (FUTCHER) (1986), the Respondent's request for temporary license was denied despite his argument that sexual misconduct does not make him "a hazard to the navigation of any vessel." The Commandant reasoned that Futcher's crime amounted to sexual molestation under 46 CFR 5.61(a) (3) for which revocation is sought. "The selection of an appropriate order by the Administrative Law Judge should involve the consideration of the promotion of safety of life at sea and the welfare of individual seamen." Appeal Decision 2573 (JONES) (1996). Sexual molestation is "presumed not compatible with safety at sea." Commandant v. Moore, NTSB Order No. EM-200 (2005), footnote five. "The Coast Guard has a duty to protect lives and property at sea. This extends to protection against immorality and moral perversion. The only suitable order for such an act of moral baseness is one of revocation in order to prevent the offender's malignant influence from affecting other seafarers." Appeal Decision 1042 (MOLINA) (1958). Having found proved that

Respondent was convicted of Cruelty to a Juvenile, Molestation of a Juvenile (child molestation), and Aggravated Incest, Revocation is the appropriate sanction.

ORDER

IT IS HEREBY ORDERED that Respondent's U.S. Merchant Mariner's license #921173, now in the possession of the U.S. Coast Guard, is **REVOKED**.

IT IS FURTHER ORDERED that the effective date of REVOCATION is the hearing date, August 4, 2005.

PLEASE TAKE NOTICE that service of this Order 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 August 18, 2005.
New York, New York

**WALTER J. BRUDZINSKI
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

COMPLAINANT'S WITNESSES - NONE

RESPONDENT'S WITNESSES

1. Mr. Michael James Neil, Respondent

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

1. Certified copy of Judgment of Conviction Orders entitled State of Louisiana vs. Michael James Neil, Sr. dated February 4, 2003 and February 20, 2003, 2 pages.

RESPONDENT'S EXHIBITS – NONE. Respondent offered three exhibits described in the decision, but none were accepted.

JUDGE'S EXHIBITS

1. True copy of USCG Merchant Mariner's License #921173, dated April 4, 2001 issued to Michael J. Neil, 2 pages.

Certificate of Service

I hereby certify that I have served the foregoing document upon the following parties to this proceeding and to the ALJ Docketing Center at the addresses indicated by the method specified below:

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Attn: LCDR Andrew Sheffield, USCG
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Done and dated August 18, 2005
New York, NY

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