

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

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Complainant

VS.

EDMOND J. ORGERON

Respondent.

Docket Number: CG S&R 04-0382
CG Case No. 2117441

FINAL DECISION AND ORDER ON SANCTION

Issued: October 26, 2005

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

Appearances:

Lt. Ian Bird
MST1 Jacquelyn Plevniak
U.S. Coast Guard
2901 Turtle Creek Drive
Port Arthur, Texas 77640

For the Coast Guard

Michael R. Delesdernier, Esq.
3632 N. Labarre Road
Metairie, Louisiana 70002

For the Respondent

PROCEDURAL HISTORY

On November 4, 2004, a hearing was conducted in the above-captioned case. At that hearing, the Investigating Officer (hereinafter "IO") improperly introduced evidence of Respondent's prior Coast Guard record during the IO's closing argument, after close of testimony. Since the IO was giving his final arguments when he made the statements regarding Respondent's prior history, the IO was not placed under oath or subject to cross-examination. In my Decision and Order of March 31, 2005, I found the allegations of Misconduct and Negligence proved and decided to reconvene the hearing to receive evidence concerning Respondent's prior record. The hearing reconvened on June 21, 2005, in Beaumont, Texas.

In my Decision and Order dated March 31, 2005, I found that Respondent committed an act of Misconduct by operating a vessel beyond the limitations set by his license and three acts of Negligence by: (1) negligently performing duties related to vessel navigation by alliding with a facility while attempting to moor; (2) negligently performing duties related to vessel navigation by attempting to moor a vessel at a facility located 5.5 miles south of Respondent's employer's intended mooring; and (3) negligently performing duties related to vessel safety by failing to have crewmembers on deck for mooring.

I. RESPONDENT'S PRIOR RECORD

In determining an appropriate sanction for acts or offenses for which revocation is not mandatory, an ALJ may consider the prior record of the respondent considering the period of time between prior acts and the act or offense at issue in the present case. 46 CFR 5.569(b)(2). Under 33 CFR 20.1315, the prior disciplinary record of a respondent includes the following:

1. Any written warning issued by the Coast Guard and not contested by the respondent.

2. Final agency action by the Coast Guard on any Suspension and Revocation (S&R) proceeding in which a sanction or consent order was entered.
3. Any agreement for voluntary surrender entered into by the respondent.
4. Any final judgment of conviction in Federal or State courts.
5. Final agency action by the Coast Guard resulting in the imposition against the respondent of any civil penalty or warning in a proceeding administered by the Coast Guard under this title.
6. Any official commendatory information concerning the respondent of which the Coast Guard representative is aware. 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.

At the hearing, the Coast Guard offered evidence of several prior incidents involving Respondent. (Tr. 4). To properly evaluate Respondent's prior record, it is useful to consider each incident separately.

On March 4, 2001 (Coast Guard Activity Nos. 228052 and 738991), Respondent failed to adequately maneuver his vessel and collided with the F/S NELVANA and the TUG CATHERINE B. (IO Ex. A). Subsequently, the Coast Guard filed a Complaint alleging Respondent committed an act of Negligence, and Respondent entered into a settlement agreement resulting in a two month suspension of his license stayed on twelve months probation. (IO Ex. A). As part of the settlement agreement, Respondent agreed to complete a bridge resource management course. (IO Ex. A). Respondent successfully completed the terms of the settlement agreement. (IO Ex. A). At the hearing, Respondent argued that there were mitigating circumstances, because the river was high from the spring thaw and he was underpowered. (Tr. at 6-7; 57-59). Since this incident resulted in a settlement agreement, it is properly considered as part of Respondent's prior record. 33 CFR 20.1315(a)(3).

The Coast Guard argues that on November 18, 2003, Respondent while operating the towing vessel CAPT. LES BARRIOS misjudged the effect of the wind and collided with a mooring dolphin. (Tr. at 4-5, 11-13; IO Ex. B). At the hearing, Respondent stressed that the collision resulted in only very minor damage. (Tr. at 14, 60-61, 63). Respondent argued that the incident involved a blind landing and the collision was the result of poor information Respondent received from his lookout regarding the location of the mooring dolphin and its distance from the vessel. (Tr. at 59-60). Respondent also asserted that the light on the mooring dolphin was not working. (Tr. at 61, 86). However, this incident only resulted in an investigation by the Coast Guard, and the Coast Guard Investigating Officers did not serve a Complaint on Respondent regarding this incident. Consequently, no formal disciplinary action was taken against Respondent's license. (IO Ex. B). Since this incident only resulted in an investigation report, this incident does not constitute a prior record as provided by 33 CFR 20.1315(a). Consequently, this incident will not be considered in determining an appropriate sanction for Respondent's current acts of Misconduct and Negligence.

The Coast Guard further argues that on February 19, 2004 (Coast Guard Activity Number 2020428), Respondent was involved in a grounding of the UTB FREEDOM. (IO Ex. C; Tr. at 14-19). However, whether Respondent was responsible for this incident is unclear. (Tr. at 43-49, 53). Respondent argues that the other captain on the vessel, Mr. Tommy Purser, was at the helm when the grounding occurred and that when Respondent came on duty he found the vessel aground and Mr. Purser asleep at the wheel. (Tr. at 43-49, 53). Respondent also testified that Mr. Purser is a diabetic who frequently falls asleep at the wheel, and the company had placed a deckhand in the pilothouse with Mr. Purser to try to keep Tommy Purser awake. (Tr. at 43-49; 91-97). Based on the Coast Guard's reaction to this testimony, the Coast Guard appeared to be

interested in investigating these allegations about Tommy Purser to determine whether any other legal action may be appropriate.

However, for the purposes of this hearing, I do not need to resolve whose version of the facts is correct, because again this incident only resulted in an investigation by the Coast Guard Investigating Officers and did not result in any served Complaint against Respondent's license. Therefore, this grounding does not constitute a part of Respondent's prior record as provided by 33 CFR 20.1315(a). If I were to consider this incident as part of Respondent's prior record, I would be placed in the awkward position of having to make specific findings of fact and conclusions of law regarding this incident when a Complaint was never filed and served on Respondent against Respondent's license for this incident.

The Coast Guard also argues that on February 19, 2004 (Coast Guard Activity Number 2009614), Respondent was involved in another grounding of the UTB FREEDOM. (Tr. at 25-30; IO Ex. D). Again, Respondent argues that Captain Tommy Purser was serving at the helm controls when the vessel ran aground, and Respondent should not be held responsible for the incident. (Tr. at 6, 30, 52-54). As with the previous grounding, this incident again did not result in any disciplinary action or Complaint against Respondent's license and does not warrant consideration as part of Respondent's prior record. (IO Ex. D). See 33 CFR 20.1315(a).

On April 2, 2004 (Coast Guard Activity Nos. 2037554 and 2040180), Respondent failed to report a loss of propulsion on the UTV FREEDOM and failed to comply with Coast Guard's Vessel Traffic Service (VTS) Morgan City, Louisiana's order for Respondent to wait for an assist tug before transiting the VTS zone in an under-powered vessel. (IO Ex. E). Respondent was given a letter of warning by the Coast Guard Investigating Officer, which he accepted, for violating 33 CFR 161.18 and the VTS User's Manual. (IO Ex. E). At the hearing, Respondent's

attorney argued that he was unable to comply with VTS Morgan City's order, because he lost an engine and could not stop the vessel. (Tr. at 36, 64-65). Respondent's counsel also stressed that this incident did not involve a collision, allision, grounding, or unsafe navigation. (Tr. at 33). However, the Coast Guard argued that the Vessel Traffic Service (VTS) was intended to help prevent or minimize collisions or allisions, and a failure to comply with the VTS Morgan City's orders is a safety issue. (Tr. at 37-38). Under 33 CFR 20.1315(a)(1), this letter of warning issued by the Coast Guard and not contested by the respondent is properly considered as part of Respondent's prior record.

Therefore, only two of the five incidents above meet the requirements of 33 CFR 20.1315(a). As such, only the settlement agreement resulting from the allision with the F/S NELVANA and the TUG CATHERINE B and the letter of warning dated April 8, 2004 can be considered as Respondent's prior record in determining an appropriate sanction in this matter.

II. MITIGATING EVIDENCE

Following the incident in the case at hand, Respondent did not work for a period of three months. (Tr. at 74). Although evidence at the first hearing indicated the Coast Guard advised Respondent that he should not work under his license until the case at hand was resolved, it is now clear that the Coast Guard did not so advise Respondent, but rather Respondent misunderstood the Coast Guard's instruction not to operate vessels beyond the scope of his license. (Tr. at 75, 100-101).

Respondent is on the tenth issue of his license and until the last few years has had a clear and good record with the Coast Guard (Tr. at 88; Resp't Ex. E). Additionally, Respondent has received good reviews from his employers. (Resp't Ex. F, G, and J).

Respondent also presented evidence that his family would experience financial hardship if he was unable to work under his Coast Guard license. (Tr. at 40-42; 76-82; Resp't Ex. K). Specifically, Respondent's wife had a stroke and as a result Respondent and his wife fell behind in their mortgage, lost their house, and are currently living in a hotel. (Tr. at 39-41).

III. SANCTION

The selection of an appropriate order is the responsibility of the Administrative Law Judge (ALJ). 46 CFR 5.569(a). In accordance with 46 CFR 5.569(b)(2), an ALJ should consider a respondent's prior records when determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory. For first time offenders, 46 CFR 5.569 suggests a suspension of one to three months for Misconduct by failing to comply with a U.S. law or regulation, a suspension of two to six months for negligently performing duties related to vessel navigation, and a suspension for one to three months for negligently performing non-navigational duties related to vessel safety. Therefore, if Respondent had been a first time offender, the guidance would have suggested a total suspension between six to eighteen months. However, Respondent is not a first time offender, and under 46 CFR 5.569(d), orders for repeat offenders will ordinarily be greater than those specified in the Table of Suggested Orders.

The Investigating Officer argues that in the interest of public safety revocation is the appropriate sanction, because Respondent has had a number of accidents and over time the incidents have become more serious. (Tr. at 101). In response, Respondent requests the undersigned consider the time in which Respondent did not work under his license as part of his suspension time and a probationary period is appropriate. (Tr. at 101). Although I think revocation is too harsh in this particular case, I note that in the two prior records that I have

considered the Coast Guard has attempted to remediate Respondent with measures such as probation, completion of a bridge management course, and a letter of warning, and these efforts have not had the desired effect. I believe the facts of this case demonstrate that Respondent has continued to make imprudent decisions and has not learned lessons from the prior incidents despite the Coast Guard's efforts. Additionally, in the two prior incidents, Respondent took out a vessel he knew was under powered and luckily the incidents were not more serious. Following these incidents, Respondent then chose to operate a vessel that was beyond the scope of his license and he did so negligently. Therefore, a sanction more than probation is required. However, I acknowledge that Respondent is on the tenth issue of his license, for many years had an excellent clear record with the Coast Guard, and has received good reviews from his employers. (Tr. at 88; Resp't Ex. E, F, G, and J).

At the hearing on the sanction, Respondent also presented evidence that his family would experience financial hardship if he was unable to work under his Coast Guard license. (Tr. at 40-42; 76-82; Resp't Ex. K). Although Respondent's wife's recent illness and his financial situation are relevant to determine how severely the sanction will impact Respondent and I have done so in this case, financial hardship alone cannot excuse Respondent from a remedial sanction. See Appeal Decision 2618 (SINN) (2000) ("Financial hardship is considered subservient to the remedial purpose of these proceedings to promote safety at sea."); Appeal Decision 2346 (WILLIAMS) (1984) ("The need for a seamen to support his family must be considered subservient to the remedial purpose of these proceedings to promote safety at sea.").

After considering the severity of the violations at hand, all of the aggravating and mitigating evidence, and how severely the sanction will impact Respondent, I believe an outright suspension of nine months followed by a twelve month

suspension stayed on twenty-four months probation is appropriate in this case. If Respondent does not commit any violations during the 24 months of probation, his license will not be suspended for the twelve months.

ORDER

IT IS HEREBY ORDERED that Respondent's Coast Guard issued license is suspended outright for nine months followed by a suspension of twelve months stayed on twenty-four months probation. Respondent is further ordered to immediately deliver his license to the Coast Guard, and the sanction will take effect on the date Respondent delivers his license to the Coast Guard Investigating Officers in Port Arthur, Texas.

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 October 26, 2005
Houston, Texas

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

ATTACHMENT A

NOTICE OF 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

RESPONDENT'S WITNESS

1. Edmond J. Orgeron (Respondent)

EXHIBIT LIST

COAST GUARD'S EXHIBITS

IO Ex. A – Case Report No. 32332

IO Ex. B – Case Report No. 154721

IO Ex. C – Case Report No. 211778

IO Ex. D – Case Report No. 164169

IO Ex. E – Case Report No. 169239

RESPONDENT'S EXHIBITS

Resp't Ex. E –Coast Guard License

Resp't Ex. F – Letter from Floyd Barrois of Five B's, Inc. to the Coast Guard

Resp't Ex. G – Sea Service Form

Resp't Ex. H – Merchant Mariner Physical Examination Report

Resp't Ex. I – Drug Test Results from Heinen Medical Review

Resp't Ex. J – Proficiency Evaluation

Resp't Ex. K – Letter from Respondent to Judge McElligott

ATTACHMENT C

RULINGS ON OUTSTANDING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COAST GUARD'S PROPOSED FINDINGS

1. Captain Orgeron's Coast Guard record showed numerous previous violations. Per the Coast Guard Marine Information for Safety and Law Enforcement (MISLE) system, Captain Orgeron was directly involved in the following acts:
 - a. March 4, 2001, (activity numbers 228052 & 738991) Captain Orgeron had an allision with the F/S NELVANA and the towing vessel CATHERINE B. For this incident, his license was suspended for 2 months and he was put on probation for 12 months.
 - b. November 18, 2003, (activity number 1950770) While operating the towing vessel CAPT LES BARRIOS, Captain Orgeron allied with a fixed mooring dolphin.
 - c. February 19, 2004 (activity number 2020428) Captain Orgeron, while operating the towing vessel FREEDOM, ran aground with barge AX 3202 in the Marianne Channel at 0600.
 - d. February 19, 2004 (activity number 2009614) Captain Orgeron ran the towing vessel FREEDOM aground in the Marianne Channel at 1416.
 - e. April 2, 2004 (activity numbers 2037554 & 2040180) Captain Orgeron failed to report a loss of propulsion on the towing vessel FREEDOM. Captain Orgeron failed to comply with orders from VTS Morgan City requiring him to wait for assist tugs before transiting the Morgan City zone with an underpowered vessel. Captain Orgeron was issued a Letter of Warning for failure to comply with the VTS Morgan City order.

ACCEPTED IN PART AND REJECTED IN PART. Under 33 CFR 20.1315, only the incidents of March 4, 2001 and April 2, 2004 are properly considered as Respondent's prior record in these proceedings.