

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

UNITED STATES COAST GUARD
Complainant

vs.

DENNIS G. CORBELLO,
Respondent

Docket Number: 04-0517
CG Case No. 2185635

DECISION AND ORDER

Issued: March 1, 2006

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

Appearance:

Lt. Ian Bird, Senior Investigating Officer,
Lt. Ann McSpadden, District Aide and
First Class Petty Officer and Marine Science Technician Jacqueline Plevniak,
Investigating Officers
United States Coast Guard
Marine Safety Office Port Arthur
2901 Turtle Creek Drive
Port Arthur, TX 77642-8056
For the Coast Guard

Francis J. Gonynor, Esquire
Captain L. Robert Sadler, Jr.
Eastham, Watson, Dale & Forney, L.L.P.
Twentieth Floor
The Niels Esperson Building
808 Travis Street
Houston, TX 77002-5769
For the Respondent

I. PRELIMINARY STATEMENT

The United States Coast Guard Investigating Officers (IOs) stationed at the Marine Safety Office in Port Arthur, Texas initiated this administrative action and trial-type hearing seeking a fifteen month outright suspension and twelve months probation of U.S. Coast Guard issued License Number 1049577 issued to Respondent Dennis G. Corbello. This administrative action was brought pursuant to the legal authority contained in 46 U.S. Code (USC) § 7703 and its underlying regulations codified at 46 Code of Federal Regulations (CFR) Part 5. The Coast Guard IOs issued and served personally on Respondent an initial official Complaint on October 22, 2004 that charged Respondent Corbello with both Negligence and Misconduct, resulting from a collision between the towing vessel, the SAN TOMAS, which Respondent Corbello was controlling and navigating, which was pushing the Buffalo Fuel Barge 405, and the tank ship, the TORM MARY on the Neches River, in East Texas on August 2, 2004 shortly after midnight. This location is near the USA's Gulf Coast and port cities of Port Arthur and Beaumont, Texas.

The negligence charge against Respondent Corbello was initially supported by one (1) factual allegation, which read as follows:

1. The Coast Guard alleges that on 02 August 2004 aboard M/V SAN TOMAS the Respondent neglected to properly operate the M/V SAN TOMAS, which resulted in the Buffalo Barge 405 alliding with the T/S TORM MARY.

The misconduct charge against Respondent Corbello was supported by one (1) factual allegation, which read as follows:

1. The Coast Guard alleges that on 02 August 2004 aboard M/V SAN TOMAS the Respondent operated a vessel beyond the limitations set by his Coast Guard issued license.

The Respondent and his captioned attorneys filed an Answer to the Coast Guard's first Complaint in this case in which they admitted all jurisdictional allegations and denied both factual allegations. The Respondent's attorneys also requested a hearing before a U.S. Administrative Law Judge. On November 23, 2004, this case was assigned to the undersigned judge for the trial-type hearing and adjudication by Decision and Order.

On December 13, 2004, the Coast Guard filed and served on Respondent's attorneys its first Amended Complaint, which substituted the word "pilot" with the word "master" in the jurisdictional allegations, thereby alleging that Respondent served as a master aboard the towing vessel SAN TOMAS during these incidents as required by a maritime employer as a condition of employment.

The new Complaint also amended the negligence charge against Respondent Corbello, whereby it is supported by two (2) factual allegations, which read as follows:

1. The Coast Guard alleges that on 02 August 2004 aboard M/V SAN TOMAS the Respondent failed to take action to avoid collision with T/S TORM MARY in ample time with due regard to good seamanship; and

2. Respondent failed to use all available means appropriate to circumstance or condition to determine if risk of collision existed.

On April 6, 2005, the Coast Guard filed and served on Respondent's attorneys a Second Amended Complaint, which substituted the phrase "as required by an employer as a condition of employment" with the phrase "as required by law or regulation, 46 CFR 15.805(a)(5)" in the jurisdictional allegations, thereby alleging that Respondent served as a master aboard the vessel SAN TOMAS as required by law or regulation, 46 CFR 15.805(a)(5).

Respondent Corbello's attorneys filed an Amended Answer to the Amended Complaint, in which Respondent continues to admit all jurisdictional allegations and deny all factual allegations.

The trial-type hearing in this matter convened and commenced on April 20, 2005 at a hearing room of the U.S. Attorney's Office Building in the city and port of Beaumont, Texas before Thomas E. P. McElligott, U.S. Administrative Law Judge hearing and deciding cases for the Department of Homeland Security and the United States Coast Guard. The hearing was conducted in accordance with the U.S. Administrative Procedures Act as amended and codified at 5 U.S. Code §§ 551-559, and the Coast Guard procedural regulations located at 33 CFR Part 20.

Lt. Ian Bird, Senior Investigating Officer, Lt. Ann McSpadden, and MST1 Jacquelyn Plevniak represented the United States Coast Guard at the hearing. Respondent Corbello also appeared at the hearing accompanied by attorney and law partner Mr. Francis J. Gonynor, Esq. and Captain Robert Sadler of the law firm of Eastham, Watson, Dale & Forney, L.L.P., of Houston, Texas.

A total of seven (7) witnesses, including Respondent Corbello, testified under oath in this proceeding. The Coast Guard offered eighteen (18) exhibits that were accepted into evidence by the judge; whereas, the Respondent offered forty (40) exhibits that were accepted into evidence by the judge. The seven (7) witnesses and fifty-eight (58) exhibits are all listed in Appendix A, attached.

Rather than submit proposed findings of fact and conclusions of law, both parties chose instead to submit briefs in the form of a memorandum of law. All facts and issues raised in the

parties' briefs have been addressed throughout the body of this Decision and Order. The briefs were filed by May 17, 2005.

After careful review of the entire record in this matter, I find that the Coast Guard IOs established and proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent was negligent on August 2, 2004 shortly after midnight when Respondent failed to use all available means appropriate to circumstances or conditions to determine if a risk of collision existed with the anchoring tank ship TORM MARY. The Coast Guard IOs also established and proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed an act of misconduct when Respondent operated a vessel beyond the limitations set by his Coast Guard issued license. However, the evidence does not establish and prove that Respondent failed to take action to avoid a collision with the T/S TORM MARY in ample time with due regard to good seamanship.

II. FINDINGS OF FACT

The Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the said exhibits and documentary evidence, the testimonies of witnesses, and the entire record considered as a whole.

1. On August 2, 2003, shortly after midnight a collision occurred in the Neches River, near Nederland, Texas, in east Texas between an anchoring tank ship, the TORM MARY, and a towing vessel, the SAN TOMAS, which was pushing ahead the Buffalo Fuel Barge 405. At and before the time of the collision, the towing vessel SAN TOMAS was navigated, controlled and operated by Respondent Denis Corbello, who was attempting to moor

alongside the anchoring tank ship (T/S) TORM MARY in order to transfer fuel between the fuel barge and the TORM MARY. (*Entire Record*).

2. Respondent Corbello is the holder of U.S. Coast Guard issued U.S. Merchant Mariner's License No 1049577. At the time of the incident, Respondent was licensed to operate steam or motor vessels of not more than one hundred gross registered tons (GRT) upon inland waters of the USA. Respondent's license also allowed him to serve as mate of steam or motor vessels of not more than 200 GRT upon inland waters. (*Agency Exhibit 1*).
3. The towing vessel SAN TOMAS is a 54.3 foot long towing vessel with the identifying official number 628953. (*Tr. 20*). The Buffalo Fuel Barge 405 (Buffalo 405) is a 297-foot long tank barge or fuel barge with the identifying official number 1144508. (*Tr. 20*).
4. The TORM MARY is a Danish 600-foot long tank ship with the identifying official number D3357.
5. At approximately 12:01 a.m., the Respondent and towing vessel SAN TOMAS and barge Buffalo 405 departed Smith Bluff Docks located on the Neches River, in east Texas. (*Respondent Exhibit 42*). They were en route to the foreign or Danish vessel, TORM MARY, which was in the process of anchoring in the Lower Sun Anchorage area just off or a part of the Neches River, Texas. (*Respondent Exhibit 18, 42*).
6. Respondent was on duty that night, serving as the relief captain, operator and lookout onboard in charge of the towing vessel SAN TOMAS, from midnight to 6:00 a.m. Mr. George Edward Lott served as Respondent's only deckhand and tankerman during those six (6) hours of duty and was the only other person awake and on duty with Respondent at the time. (*Tr. 40, 63-64, 208, Agency Exhibits 8-10*). Respondent was the person in charge of navigation and all maneuvers of the towing vessel and pushed barge, and Respondent had the

authority to give orders to Mr. Lott, serving as Respondent's tankerman and deckhand.

Respondent at no time ordered Mr. Lott to go to or near the front or bow of the pushed ahead fuel barge to act as a lookout for Respondent.

7. Before departing, Respondent spoke with both the pilot and the master of the tank ship (T/S) TORM MARY. (*Tr. 208*). At which time, they informed Respondent that the tank ship TORM MARY was entering the anchorage area and that the Respondent and the SAN TOMAS could begin its approach to come and moor alongside this tank ship. (*Tr. 206-08*).
8. The T/S TORM MARY first dropped its anchor at approximately 12:05 a.m. local time, or Central Standard Time. (*Tr. 265, 271-72; Respondent's Exhibit 34*). She was anchored with one anchor and chain on the forward bow of the tank ship. (*Tr. 86*).
9. It took approximately twenty minutes for the Respondent and the towing vessel SAN TOMAS pushing the barge ahead at all relevant times to reach the T/S TORM MARY in the area of the river called or known as the Lower Sun Anchorage, arriving at approximately 12:20 a.m. local time or Central Time. (*Tr. 216, 264 Respondent Exhibits 18, 42*).
10. Only when the Respondent's towing vessel SAN TOMAS and pushed ahead barge turned starboard into the anchorage, Respondent radioed his deckhand-tankerman Mr. Lott to let Lott know they arrived. (*Tr. 209, Respondent Exhibit 31*). Only at that point, Mr. Lott left the towing vessel's galley and headed towards or walked toward the front of the 297 foot long barge where he could help the two vessels safely come alongside the T/S TORM MARY and tie off the bow of the barge. (*Tr. 38, 41, 46-47, 63-64*). The intended purpose was to transfer fuel between the pushed ahead barge and the tank ship TORM MARY.
11. Mr. Lott said he did not witness the collision as he was still proceeding or walking forward on the barge when the vessels hit. (*Tr. 39-40, 42, 48, 64-65*). However, when Mr. Lott first

left the towing vessel's galley, he observed that the front or bow of the barge being pushed ahead by Respondent's towing vessel was about fifteen to twenty feet away from the tank ship TORM MARY. (*Tr. 53*). At that time, everything looked normal, including the speed of the vessel and the angle of approach. (*Tr. 48, 54, 56-57, 71, 78*).

12. Similarly, everything appeared normal to Respondent as they approached. In particular, Respondent did not notice any movement on the TORM MARY. (*Tr. 211, 218*). At no time did Respondent call the wheelhouse of the T/S TORM MARY to ask if the T/S was still moving on its anchor chain or completely still.
13. As the Respondent's towing vessel SAN TOMAS approached at approximately 1 mile an hour, Respondent attempted to drive along the side of the T/S TORM MARY as close as possible, which would enable him to line up beside her in a parallel position about 1 to 5 feet away. Ideally, the pushed ahead barge would stop around the mid area of the tank ship for a center connection for the fuel transfer. (*Tr. 204-05; Agency Exhibit 8*).
14. However, when the vessels were about 2 feet apart, Respondent realized that they were going to hit or have a collision. (*Tr. 224*). In particular, Respondent noticed the bow of the barge Respondent was pushing ahead drifting towards and underneath the TORM MARY'S stern. (*Tr. 224-25*). As soon as Respondent perceived there was a problem, he immediately revved up both engines and steered hard to starboard, attempting to pivot the barge away from the TORM MARY. (*Tr. 216-18, 228*). More specifically, Respondent attempted to maneuver the barge full ahead on the port engine, full reverse on the starboard engine, attempting to bring the stern of the barge to the portside and the bow to starboard. (*Tr. 218-19*). But despite his efforts, the vessels collided. (*Tr. 217*).

15. At approximately 12:25 a.m., the port bow of the fuel barge Buffalo 405 Respondent was pushing struck the aft section of the tank ship TORM MARY. (*Tr. 40, 69, 217, 219; Respondent Exhibits 18, 31*). The barge then bounced off the ship and came back out to starboard about twenty to twenty-five feet. (*Tr. 65*).
16. The impact fractured the tank ship TORM MARY'S outer metal skin of a fuel oil tank, and created a hole approximately 2.5 to 4 feet wide, which allowed approximately 95 metric tons of oil to spill into the Neches River in east Texas. (*Tr. 66, 70, 219; Agency Exhibit 8, Respondent's Exhibit 42*).
17. As the relief captain in charge of the towing vessel San Tomas between midnight and 6 a.m., Respondent Corbello chose to serve as the sole lookout on the night of the collision for the towing vessel and pushed ahead barge. (*Tr. 220*). Respondent did not order or ask his deckhand-tankerman Lott to be his lookout and be an extra pair of eyes and ears about 300 feet forward of Respondent in the wheelhouse at the helm and totally behind the barge.
18. When the captain of the towing vessel is in the wheelhouse, he has a greater elevation than the crewmembers standing on or near the bow of the barge by at least twenty to twenty-five feet and, thus, has a greater vantage point in seeing the space between the anchoring vessel and tow. (*Tr. 59, 221, 274*). The barge was 297 feet long and was being pushed ahead by Respondent's towing vessel. (*IOs' color photographs; Agency Exhibits 1A, 3A and 4A*).
19. The captain is usually able to safely maneuver the barge from the towing vessel's wheelhouse without the deckhand acting as an additional lookout. (*Tr. 52*). If the captain is able to see properly from the wheelhouse, the deckhand does not always provide additional aid to the captain by being a second pair of eyes and ears and with a means of

communicating to Respondent or calling out distances between the two vessels from his position on or near the barge's bow. (*Tr. 52, 59*).

20. Although deckhand-tankerman Mr. Lott has served in the past as a "lookout" while on duty as a deckhand, those situations were usually limited to conditions of poor visibility such as fog or heavy rain. (*Tr. 46-47, 225*). In particular, other than the rare instance of fog, Mr. Lott claimed he has never been asked to serve as a lookout when mooring a ship alongside another vessel, even when the mooring occurs in the dark of night. (*Tr. 46-47*).
21. In this case, there was no fog on the night of the incident and Respondent claimed a view from the towing vessel's wheelhouse was clear and unobstructed although he was about 300 feet in back of or aft of the pushed ahead barge's bow. (*Tr. 55, 220-21, 223, 226, 286*).
22. Although it was dark at nighttime shortly after midnight, both Respondent and Mr. Lott maintained they were able to see properly from the towing vessel and the barge with the light from the tank ship TORM MARY. (*Tr. 57-58, 211, 238*).
23. While the lights from the TORM MARY were excessively bright, Mr. Lott was able to see the distance between the two vessels and Respondent maintained he had a full visual picture of the 600 foot tank ship from its stern to its bow. (*Tr. 55-56, 211, 227, 238*).
24. Mr. Richard Frenzel, who has more than forty-five years in the marine industry, was hired by Respondent's attorneys and accepted as an expert witness for the Respondent in this case. (*Tr. 249-50; Respondent's Exhibit 41*).
25. In order to form an opinion and conclusion as to what caused the collision, Mr. Frenzel evaluated several documents, nautical charts and information, including the tank vessel TORM MARY'S logbook and ECDIS printouts. (*Respondent's Exhibit 42*).

26. An ECDIS is an electronic display of a vessel's movements and positions on a nautical chart. *(Tr. 122-23)*. The ECDIS printout tracks and displays the ship's exact location approximately every sixty seconds. *(Tr. 252)*. In this case, the ECDIS printout of the Danish tank vessel TORM MARY contains the local time, date and the tank ship's latitude and longitude in degrees, minutes and seconds. *(Tr. 254; Respondent's Exhibit 37)*. When the vessel is stopped, the ECDIS shows the last time any movement was made. *(Tr. 255; Respondent's Exhibit 37)*.
27. An evaluation of these documents reveal that the T/S TORM MARY radioed the towing vessel SAN TOMAS to come alongside before the tank ship was settled or stopped at anchor and, as a result, the tank ship was still moving prior to and at the time of impact and collision. *(Tr. 256; Respondent's Exhibit 37, 42)*.
28. More specifically, the ECDIS report shows that immediately before the collision occurred, between 12:17 a.m. and 12:20 a.m., the tank ship TORM MARY moved forward approximately thirty feet and west approximately thirty-two feet. *(Tr. 267, 269; Respondent's Exhibit 37, 42)*.
29. The movement occurred when the tank ship TORM MARY came up out of her anchor and then dropped back down. *(Tr. 265)*. More specifically, after the T/S TORM MARY entered the anchorage area and dropped anchor, the entire tank vessel continued to swing several times, both forward and back, until the ship finally set. *(Tr. 258)*. In addition, because the ship is in a floating environment, the incoming tide and current caused her to move forward. *(Tr. 257-58)*.
30. A vessel's anchor typically does not drop straight down. *(Tr. 258)*. Rather, the ship first drives forward to the place where it wants to eventually stop. Then the anchor is dropped to

the bottom and the vessel's engines are placed in reverse to drive the vessel backwards, which digs the anchor into the ground and causes it to set. (*Tr. 260-61*). However, this process stretches the anchor chain and removes all slack, which in turn, pulls the vessel forward again toward its original position. (*Tr. 261-62*). Depending on the amount of momentum, the vessel could continue to swing forward and back approximately three to six times until it finally sets. (*Tr. 262-63*).

31. This continued movement is a usual and normal process experienced by all anchoring vessels, which may even continue up to twenty or thirty minutes after a vessel first drops its anchor. (*Tr. 280-81, 290*). It should be expected and allowed for by masters and captains such as Respondent operating or navigating nearby towing vessels and barges.
32. At the time of these incidents, Respondent's license did not authorize him to operate any type of towing vessel. (*Tr. 20; Agency Exhibit 1*).
33. When Respondent filed an application at the U.S. Coast Guard's Regional Examination Center (REC) Houston, Texas for his license in January, 2004, he applied for a master of towing vessels, 200 gross registered tons (GRT). (*Tr. 229-30*).
34. On February 12, 2004, Respondent received a letter from the U.S. Coast Guard, Regional Examination Center, which stated Respondent Corbello was not qualified for master of towing under 46 CFR 10.464(h). (*Tr. 180; Agency Exhibit 6*). The letter explained that Respondent did not qualify because he began his towing service after May 21, 2001. However, the REC's letter further explained that a license for master of steam or motor vessel 100 GRT inland waters; and mate of steam or motor vessel's 200 GRT inland waters may be issued at any time after Respondent filed another written application with the Regional Examination Center (REC) for it. (*Tr. 163, 169; Agency Exhibit 6*).

35. On February 17, 2004, the Coast Guard REC Houston issued Respondent a license to operate steam or motor vessels of not more than one hundred GRT upon inland waters. (*Agency Exhibit 1; Respondent Exhibit 1*).
36. Despite the letter's explanation, Respondent said he thought that the license for which he qualified allowed him to operate towing vessels of 100 GRT or less. (*Tr. 231*). More specifically, Respondent believed that the license he received was the same as that issued to a number of other captains or masters who were authorized to operate towing vessels. (*Tr. 231*). In turn, Respondent did not think he needed to also obtain a 100 GRT towing endorsement on his Coast Guard issued license in order to operate, navigate and command towing vessels pushing or pulling various numbers of barges, in ports, rivers and waterways of the USA. (*Tr. 231*).
37. When Respondent presented his license to Mr. Charles King, of Respondent's employer and vice president of Buffalo Marine Service Company, Mr. King similarly said he believed that Respondent was authorized to operate a tugboat or towing vessel like the SAN TOMAS. (*Tr. 132*).
38. As such, Buffalo Marine Service hired Respondent to operate tugboats or towboats similar to the SAN TOMAS. (*Tr. 131-32*). By April, 2004, Respondent was serving as a relief captain, alone on duty for about six (6) hours solely in charge of towing vessels navigation. (*Tr. 201*).
39. Mr. King believed that Respondent had an appropriate license to operate the T/V SAN TOMAS because he thought that the master's license for steam and motor vessels of not more than 100 GRT had been historically recognized as a qualifying license for towing vessels. (*Tr. 143, 147*).

40. In particular, Mr. King referred to what is known as “the grandfather clause”. Mr. King believed that under 46 CFR 10.464(h)¹, a mariner who began service or training on a towing vessel prior to May, 2001, can automatically qualify for a master of towing license. (*Tr. 169-70*). However, as this “grandfather clause” was only open for a limited time, mariners who met the above criteria must be qualified and approved prior to November, 2004. (*Tr. 133, 170*).²
41. As such, Mr. King believed that the master license for steam or motor vessels qualified Respondent for service also on towing vessels, and as long as the paperwork was completed by November 2004, Respondent would be automatically covered under the grandfather clause for a master of towing vessel license. (*Tr. 133-34, 149*).
42. Similarly, Respondent believed that he qualified under the grandfather clause because he worked on boats from 1980 to 1985. (*Tr. 243*). As such, Respondent believed that he had the necessary sea time to upgrade his license before November 2004. (*Tr. 233, 243*).
43. However, that information was not included by Respondent in Respondent’s initial license application. It was filed with the REC by Respondent. (*Tr. 243*). In turn, the Regional Examination Center did not approve Respondent for a master of towing under 46 CFR 10.464(h), as his towing service on record began after May 21, 2001. (*Tr. 164-65, 170; Agency Exhibit 6*).
44. Mr. Stanley Mingus, who testified at this hearing is considered the U.S. Coast Guard’s Houston Regional Examination Center’s expert regarding towing licenses and who personally signed Respondent’s license, explained that mariners who begin service in the

¹ In October, 2003, 46 CFR 10.464(h) was revised and redesignated as 46 CFR 10.464(g).

towing industry after the closing date of May 21, 2001, can no longer simply apply for a master of towing license. (*Tr. 159, 161-62, 172*). Rather, these mariners are first issued a steersman license and must then work using it and progress towards a master of towing. Therefore, the original license issued to a U.S. merchant mariner can not be a master of towing license. (*Tr. 172*).

45. A towing endorsement was issued and added to Respondent's license on Sept 15, 2004, approximately one month after the collision and spill in question. The endorsement now authorizes Respondent to serve as master of towing vessels upon Great Lakes and inland waters of the USA. (*Tr. 166; Respondent Exhibit 1*).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Dennis G. Corbello and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the U.S. Administrative Law Judge in accordance with the U.S. Administrative Procedures Act, 5 U.S.C. 551 to 559; 46 U.S.C. §§ 6301 and 7703; 46 CFR Parts 5 and 33 CFR Part 20.
2. At all relevant times, Respondent Corbello was the holder of and acted under the authority of his U.S. Coast Guard issued License No. 1049577 while serving as a master or captain aboard the towing vessel, SAN TOMAS, pushing ahead the Buffalo Fuel Barge 405 on and about August 2, 2004, on and about the Neches River in east Texas, on and after midnight local time, or Central Standard Time.

² To qualify under the grandfather clause, mariners initially needed to complete and file with the REC all paperwork by May 21, 2004; however, the National Maritime Center extended the deadline until November, 2004. (*Tr. 133, 170*).

3. The evidence in the record considered as a whole demonstrates that Respondent Corbello, negligently operated the towing vessel SAN TOMAS on August 2, 2000, which resulted in a collision with the T/S TORM MARY and oil spill when he attempted to moor or stop alongside the anchoring vessel in order to transfer fuel, between the barge Respondent was pushing ahead and maneuvering and the T/S TORM MARY.
4. The first offense under the charge of Negligence, alleging that Respondent failed to take action to avoid collision with the T/S TORM MARY in ample time with due regard to good seamanship, is **NOT PROVED**.
5. The second offense under the charge of Negligence, alleging that Respondent failed to use all available means appropriate to circumstance or condition to determine a risk of collision is **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence and testimony as taken from the entire record considered as a whole.
6. The charge of **MISCONDUCT** against Respondent Corbello is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence and testimony as taken from the entire record considered as a whole.

IV. DISCUSSION

A major purpose of suspension and revocation trial-type hearings and judge's written decisions is to protect lives and properties at sea, on USA rivers and ports against actual and potential dangers. See 46 U.S.C. § 7701. The purpose is not just to assess blame for marine casualties, collisions and sinkings. See Appeal Decision 1755 (Ryan). If it is shown that a U.S. license holder has committed an act of negligence or misconduct in performing his duties

relating to the vessel, his U.S. issued license may be suspended or revoked. See 46 U.S.C. § 7703(1)(B).

In suspension and revocation proceedings and hearings, the burden of proof is on the Coast Guard Investigating Officers to establish or prove a prima facie case of negligence or misconduct by a preponderance of the evidence. See 5 U.S.C. § 556(d); 33 CFR 20.701-20.702; see also Appeal Decision 2485 (Yates). Misconduct is defined in 46 CFR 5.27 as “human behavior which violates some formal, duly established rule,” such as those found in the common law, the general maritime law, a ship’s regulation or order, or shipping articles. It is an act that is forbidden or a failure to do what is required. See 46 CFR 5.27. In the absence of such a rule, misconduct is the human behavior that a reasonable person would consider to constitute a failure to conform to the standard of conduct that is required in light of all the existing facts and circumstances. See Appeal Decision 2152 (MAGIE). In addition, specific intent is not an essential element of the charge of misconduct in these administrative proceedings. See Appeal Decision 2607 (ARIES); see also, Appeal Decision 2286 (SPRAGUE).

Similarly, negligence is defined in 46 CFR 5.29 as “the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.” This definition includes a failure of an individual to exercise the degree of care, vigilance and forethought that a person of ordinary caution and prudence ought to exercise. See Appeal Decision 2550 (RODRIQUES). In order to prove negligence, the Coast Guard IOs must show that Respondent’s conduct, in some manner, failed to conform to the standard of care required of a reasonable prudent mariner under

the same circumstances. See Appeal Decision 2321 (HARRIS); see also Appeal Decision 2282 (LITTLEFIELD).

In addition, a mariner is negligent if he failed to take the precautions a reasonably prudent mariner would take in the same circumstances, regardless of whether or not his conduct or failure to act was the proximate or a contributing cause of the casualty. See Appeal Decision 1755 (RYAN). As such, contributory negligence is not a defense in these proceedings, and the possible fault or negligence of another person or vessel in no way mitigates Respondent's negligence or contribution to the collision and spill. See Appeal Decision 2031 (CANNON); see also Appeal Decision 2492 (RATH); Appeal Decision 2380 (HALL). Although the causal connection is necessary to establish liability for negligence in a civil proceeding for damages, it is not an element of negligence for the purposes of a suspension and revocation action. See Appeal Decision 2358 (BUISSET); see also Appeal Decision 2438 (TURNER). Therefore, the alleged fault or contributory negligence of the tank vessel *TORM MARY'S* captain or crew relating to the marine casualty in this case will not serve to excuse any contributory negligence or misconduct on the part of Respondent Corbello.

However, unlike an allision case where there is a presumption of negligence when a moving vessel strikes a fixed object or stopped vessel, the mere fact that a collision occurred between two vessels is not sufficient proof that Respondent acted negligently. See Appeal Decision 2358 (BUISSET). Rather, a collision is merely an event that prompts the investigation into the Respondent's actions; and while there is sufficient evidentiary material in the record to substantiate the occurrence of both a collision and an oil spill, neither of these facts alone, as a matter of law, will support a finding of negligence. See Appeal Decision 2277 (Banashak); see also Appeal Decision 2057 (Shipp).

In this case, the Agency charged Respondent with failing to take action to avoid a collision with the tank vessel TORM MARY on August 2, 2004; however, the Complaint contained no additional facts amounting to negligence nor was testimonial and/or documentary evidence presented at the hearing to support this allegation. Rather, the Coast Guard merely referenced Inland Navigational Rule 8 in its post-hearing brief, which states: “any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time, and with due regard to the observance of good seamanship.” See 33 U.S.C. § 2008(a). Inland Navigational Rule 8 further states in pertinent part that if necessary to avoid a collision or allow more time to assess the situation, “a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.” See 33 U.S.C. § 2008(e). After citing Inland Navigational Rule 8, the Agency argued that Respondent indicated in his testimony, that he did not slacken his speed, stop, or reverse propulsion; and as such, Respondent was negligent.

Despite the Agency’s contention that Respondent failed to act, a full review of the entire hearing record reveals that he took active measures in a failed attempt to avoid a collision with the tank vessel TORM MARY. At the hearing, Respondent testified that everything appeared normal to Respondent as the towing vessel SAN TOMAS and her pushed barge approached. In particular, Respondent did not see or notice any movement on the anchoring T/S TORM MARY. (*Tr. 211, 218*). It was not until the vessels were about 2 feet apart that Respondent saw and realized they were going to hit or collide. (*Tr. 224*). As soon as Respondent perceived or saw there was a problem, he immediately revved up both engines and steered hard to starboard, attempting to pivot the barge, his towing vessel was pushing ahead, away from the TORM MARY. (*Tr. 216-18, 228*). More specifically, Respondent attempted to maneuver the towing vessel and barge full ahead on the port engine, full reverse on the starboard

engine, only attempting to bring the stern of the barge to the portside and the bow to starboard. (*Tr. 218-19*). While the vessels collided despite Respondent's failed efforts, actions were nonetheless taken by Respondent in an attempt to avoid a collision, in compliance with Inland Navigational Rule 8.

It should be additionally noted that Inland Navigational Rule 8(a) provides that any action taken to avoid collision is determined in light of whether "the circumstances of the case admit." This case involved a close area approach, where Respondent purposely attempted to align the vessels next to each other, approximately one to five feet apart, in order to transfer fuel. As such, Respondent's reaction time and maneuvering must be considered in light of the close quarter situation. The IOs presented no evidence that the actions taken by Respondent were inappropriate for the situation at hand, nor did the Agency show that Respondent's measures further contributed to the collision. Likewise, the Coast Guard presented no alternative actions that if taken by Respondent in ample time would have avoided the collision. Therefore, I find that the Coast Guard failed to prove Respondent was negligent in failing to take action to avoid collision with the tank vessel *TORM MARY* in ample time with due regard to good seamanship.

However, the Agency IOs successfully established and proved that Respondent Corbello was negligent on the night of the incident by failing to determine a risk of collision between the Respondent's towboat and pushed barge and the anchoring vessel. In particular, Respondent should have known that the tank vessel *TORM MARY* was still swinging and moving on her anchor and, in turn, Respondent should have approached with greater caution. Likewise, Respondent committed an act of misconduct when he operated a vessel beyond the limitations of his license. As such, the actions of Respondent Corbello failed to conform to the

standard of care exercised by a reasonably prudent mariner of the same station under the same circumstances.

In defense of his actions taken on August 2, 2004, Respondent's attorneys raise the following arguments, which will be addressed in further detail. Respondent's attorneys argue:

- I) Respondent Corbello was not negligent in failing to determine a collision as he was in the best position from his station at the wheelhouse to act as a proper lookout; and
- II) According to the Agency's interpretations of licensing requirements for towing vessel operators published in NVIC 04-01, Respondent was properly licensed on the day of the incident.

For all the reasons stated herein, Respondent's arguments are rejected.

I. While Respondent Corbello was in the Best Position to Act as a Lookout, He Failed to Determine a Risk of Collision

The Coast Guard IOs contended that by Respondent not designating a lookout on the bow of the barge Respondent was pushing ahead as Respondent approached the anchoring vessel at close range, Respondent violated Inland Navigation Rule 7 in that he failed to use all available means to determine if a risk of collision existed. Respondent, on the other hand, asserts that there is no absolute duty to maintain a lookout on or near the barge's bow, and whether this precautionary measure is necessary is to be determined from all circumstances on the basis of common prudence. Respondent's attorneys contend that on the night of the incident, Respondent's view from the helm in the wheelhouse of the towing vessel behind the full length

of the 297 foot long barge ahead was unobstructed; therefore, he was in the best position to serve as lookout.

Case law and regulation pertaining to lookout clearly state that a second lookout is not always required and the helmsman may serve as lookout if the situation permits. In particular, Inland Navigational Rule 5 requires vessels to make a full appraisal of the situation and the risk of collision by maintaining a proper lookout by sight, hearing, and all available means appropriate in the prevailing circumstances and conditions. See 33 U.S.C. § 2005 (emphasis added). U.S. Senate Report 96-979, which accompanies the Inland Navigation Rules, expresses Congressional intent concerning the helmsman's ability to safely serve as lookout:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety. See S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980)

Similarly, case law has interpreted this rule as a general guide, to be determined by the totality of the circumstances. In particular, Commandant's Decisions on Appeal have repeatedly held that the adequacy of a lookout on board a vessel is a question of fact to be resolved under all-existing facts and circumstances of each case. See Appeal Decision 2390 (Purser); see also Appeal Decisions 2503 (MOULDS); Appeal Decision 2421 (RADER); Appeal

Decision 2414 (HOLLOWELL); Appeal Decision 2319 (PAVELEC). Therefore, each situation must be considered independently when determining whether a separate, dedicated lookout is also required. See Appeal Decision 2503 (MOULDS).

While there are some Commandant Decisions on Appeal that have found a mariner negligent for failing to use additional personnel as lookout on the bow or forward on a vessel, those cases usually pertained to circumstances of restricted visibility where the view from the wheelhouse was obstructed. See Appeal Decision 2581 (DRIGGERS) (where it was determined that a forward bow lookout was required given the blind spot in front of the flotilla, the presence of numerous pleasure boats in the area, and the additional activities performed by the lookout stationed at the helm); see also Appeal Decision 2482 (WATSON) (requiring a separate lookout at the head of the tow in light of the number of barges in the tow, the length of the tow, the density of fog creating restricted visibility, and the congested nature of the river); Appeal Decision 2474 (CARMENKE) (holding that a prudent mariner would have assigned an additional lookout given the restricted visibility caused by fog and the density of traffic).

In this case, Respondent operated the pushing towing vessel SAN TOMAS from the helm in the wheelhouse and could clearly see the position of both the towing vessel and barge in front relative to the TORM MARY as he approached. More importantly Respondent had an unobstructed view of all points necessary to ascertain the distance between the ship, the barge, and the tow. Three Respondent's witnesses at the hearing: Respondent Corbello, Mr. George Lott, who served as Respondent's deckhand and tankerman on the towing vessel SAN TOMAS, and Mr. Richard Frenzel, an expert witness for Respondent with over forty-five years experience in the merchant marine industry, explained that the pilot has the clearest view of the bow of the barge from his position in the wheelhouse of the pushing towing vessel. More

specifically, when the captain of the towing barge is in the wheelhouse, he has a greater elevation than the crewmembers standing on or near the bow of the barge by at least twenty to twenty-five feet and, thus, has a greater vantage point in seeing the space between the tank vessel and tow. (*Tr. 59, 221, 274-275*). In turn, the captain is usually able to maneuver the towing vessel and barge from the wheelhouse without the deckhand acting as an additional lookout. (*Tr. 52*). In fact, Mr. Lott, deckhand and tankerman, further explained that while the deckhand can see along the side of the barge from his position on the barge's bow and observe the distance between the two vessels, the deckhand would not benefit the captain by calling out distances if the captain is able to see properly from the wheelhouse. Rather, this would be redundant and inefficient. (*Tr. 52, 59*).

While Mr. Lott, deckhand and tankerman, has been asked in the past to serve as a lookout, those situations were usually limited to conditions of poor visibility such as fog or heavy rain. (*Tr. 46-47, 225*). In particular, other than the rare instance of fog, Mr. Lott claimed he has never been asked to serve as a lookout when mooring the ship alongside another vessel, even when the mooring occurs in the dark of night. (*Tr. 46-47*). In this case, there was no fog on the night of the incident and Respondent said his view from the wheelhouse was clear and unobstructed. (*Tr. 55, 220-221, 223, 226, 286*). Moreover, although it was nighttime, both Respondent and Mr. Lott testified they were able to see from the pushing towing vessel and barge with the ambient light from the *TORM MARY*. (*Tr. 57-58, 211, 238*). It is important to note that while the lights from the *TORM MARY* were excessively bright, Respondent said he had a full visual picture of the anchoring tank ship from the stern to the bow. (*Tr. 211, 227, 236-37*). A review of all existing facts and circumstances in this case reveal that Respondent was in a

position to act as lookout from his station at the helm in the wheelhouse of the pushing towing vessel and was not negligent for failing to post a second lookout on or near the bow of the barge.

However, a full examination of the entire hearing record reveals that Respondent was negligent for failing to determine if a risk of collision existed with the tank ship TORM MARY, a vessel that had just gone into anchorage and had not yet set or stopped moving. Inland Navigational Rule 7 directs that “every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision exists.” See 33 U.S.C. § 2007(a). A vessel and its navigator at the helm in the wheelhouse must take into consideration that such a risk may sometimes exist when an appreciable bearing change is evident, particularly when approaching a vessel at such close range. See 33 U.S.C. § 2007(d)(ii). In addition, Inland Navigational Rule 2 provides that nothing in the navigational rules exonerates a vessel, master, or crew from the consequences of any neglect to comply with any precaution that may be required by the ordinary practices of navigators or by the special circumstances of the case. See 33 U.S.C. § 2002(a). In construing and applying the rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances. See 33 U.S.C. § 2002(b).

This case involved a special situation whereby Respondent attempted to come alongside a larger tank vessel that had very recently started anchoring. It is basic or common knowledge among mariners in the maritime and towing industry that an anchored vessel continues to move forward and back until the anchor finally sets. (*Tr.* 278-80). Respondent’s attorneys’ maritime expert witness Mr. Frenzel explained at the hearing that these movements are a normal process experienced by all vessels attempting to anchor, which movements may even continue up to twenty or thirty minutes after a vessel first drops its anchor. (*Tr.* 280-81,

290). Depending on the amount of momentum, the vessel could continue to swing forward and back approximately three to six times until it finally sets or stops. (*Tr.* 262-63).

In this case, when the tank vessel TORM MARY radioed the towing vessel SAN TOMAS to come alongside, Respondent was specifically told by the T/V's pilot or captain that the vessel had just completed anchoring. (*Tr.* 206-08; *Agency Exhibit 8*). As the operator of a towboat or push-boat, Respondent should have known that since the tank vessel TORM MARY had only recently just finished anchoring, there was a greater likelihood that the tank vessel would still be swinging or moving on its anchor chain when the towboat approached merely twenty minutes later. (*Tr.* 216, 264). With this knowledge, Respondent should have approached with greater caution, particularly in light of the fact that this was a close approach situation involving the transfer of fuel. The record reveals that Respondent did not know the anchored vessel could be swaying nor did he approach with greater caution. As such, the Respondent is negligent for failing to use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision existed with the T/S TORM MARY.

II. Respondent Corbello was not Properly Licensed to Operate a Towboat on the Day of the Incident

Respondent argues that the requirements in 46 CFR 10.464, which regulate the licensing of towing vessel personnel, are confusing, susceptible to various interpretations, and have caused general problems with the towing industry since their inception. Therefore, Respondent contends that the requirements in 46 CFR 10.464 should be void for vagueness. Despite the confusion, Respondent additionally asserts that he was authorized to operate a

towing vessel at the time of the incident according to the Agency's own interpretation in its Navigation and Vessel Inspection Circular (NVIC) 04-01, published in May, 2001.

More specifically, Respondent refers to an email circulated by Mr. Larry Griffin, the Coast Guard Senior Personnel Inspector at the Houston Texas Regional Examination Center (REC), in which Mr. Griffin acknowledges that there was still some confusion regarding the licensing credentials of towboat operators. While Mr. Griffin advises industry representatives to review in its entirety this NVIC 04-01, he provides in his email a brief extraction of the NVIC, which refers to the licensing and manning requirements for officers of towing vessels.

(Respondent Exhibit 38). From that extraction, Respondent focuses on section 7(m)(1)(b)(5) of NVIC 4-01, which provides in part that, between May 20, 2001 and May 21, 2006, any towing vessel that requires a second licensed officer maybe under the direction and control of another officer holding a "mate of inspected self-propelled vessels with any restrictions on that license, until the first renewal or upgrade of the license."

On the day of the incident, another crewmember aboard the towing vessel SAN TOMAS, Mr. Shawn Conger, held a Master's license for towing vessels. While Mr. Conger was relieved of all duties by Respondent for six hours (12 midnight to 6 a.m.) and therefore off duty at the time of the collision, the tug SAN TOMAS nevertheless required two licensed officers on board as per Coast Guard regulation. Therefore, Respondent argues that he was authorized to be in charge in the wheelhouse at the helm of the pushing vessel SAN TOMAS, serving as a second licensed officer, on the day of the incident.

A Navigation and Vessel Inspection Circular provides detailed guidance about the enforcement or compliance with a particular federal marine safety regulation or Coast Guard marine safety program. See Navigation & Vessel Inspection Circulars (NVICs), at

<http://www.uscg.mil/hq/g-m/nvic/> All NVICs are indexed and available to the public and the marine industry; however, they do not have the force of law. While NVICs are not regulations, they are important tools for interpreting a regulation and complying with the law. In this case, Respondent's understanding of NVIC 04-01 and the correlating regulations at 46 CFR 10.464 is in error. In particular, Respondent narrowly focuses on a single section of NVIC 04-01 in an attempt to understand the totality of statutes, regulations and guidelines pertaining to licensing and personnel manning requirements for towing vessel operators. As also directed by Mr. Larry Griffin in his email to the industry representative, NVIC 04-01 must be read in its entirety. (*Respondent's Exhibit 38*).

To begin with, the Coast Guard revised the rules for licensing of all operators or navigators of towing vessels, which became effective on May 21, 2001 and applied to all mariners in the towing industry. See NVIC 04-01 §§ 4 and 6(a). The purpose of this revision was to improve licensing, training, and qualifications of operators of uninspected towing vessels and to improve navigational safety on towing vessels. See NVIC 04-01 § 4. In turn, NVIC No 4-01 was published to clarify and provide specific guidance on the licensing and manning of towing vessel operators. See NVIC 04-01 § 1.

Before the revision, the primary license issued to towing vessel operators and captains was the OUTV (operation uninspected towing vessel). The license structure, effectively, contained only a single grade of license, which resulted in a limited license progression. See NVIC 04-01 § 4(c). However, under the new licensing plan or scheme, a progression was established in which mariners would progress through several grades after service on towing vessels, training, and examination before qualifying for their master and captain of towing vessel license. More specifically, a mariner would first receive a license as an

apprentice mate (steersman); then after training and assessment, a mariner would receive a license as a mate (pilot). After further experience, a mariner would finally receive a license as master of towing vessels. See NVIC 04-01 § 4(f).

However, maritime officers who operated towing vessels before the revised rules took effect, did not have to convert their licenses under the new system until their old licenses required a renewal on or after May 21, 2001. See NVIC 04-01 §§ 4(g), 6(b) and 7(l); see also Enclosure (1) to NVIC 04-01, page 1. Similarly, mariners who began training or service on a towing vessel before May 21, 2001, may also be “grandfathered” into the new system, whereby they would immediately qualify for a master’s license rather than progressing through the various grades. See NVIC 04-01 § 4(g); 46 CFR 10.464(g). Yet, the allowance for those mariners who began training or service before May 21, 2001 is not automatic. Rather, those mariners must receive a license with a towing endorsement, which will only be issued after a mariner has served the required amount of sea time and passes an examination. See 46 CFR 10.464(g).

It is important to note that all license transactions after May 21, 2001, whether issued for the first time, upgraded, or renewed, must contain a towing endorsement. See NVIC 04-01 § 7(i)(2). Section 7 of NVIC 04-01 provides an in depth discussion of the various licensing requirements and the progression steps undertaken by mariners that enable them to operate towing vessels. In particular, a distinction between the licensing requirements for officers who held towing vessel licenses before the revision date of May 21, 2001 and the requirements for all other licenses issued or endorsed after that date is clarified in Section 7(i)(1) and (2). Specifically, section 7(i)(1) provides a list of licenses that authorize a mariner to operate a towing vessel, if that license was issued before May 20, 2001. If a mariner holds one of these

listed licenses, he may continue to operate a towing vessel up to May 21, 2006, unless there is any type of license transaction, such as a license renewal or upgrade, during that period. See NVIC 04-01 § 7(i)(1). If there is any type of license transaction, the license must contain one of the endorsements listed in 7(i)(2). Similarly, all new licenses for service on towing vessels that are issued or endorsed after May 21, 2001 must contain one of the endorsements listed in 7(i)(2). See NVIC 04-01 § 7(i)(2).

When reviewing NVIC 04-01 in its entirety, it becomes clear that the provisions pertaining to the manning of a towing vessel by a second licensed officer, must reflect the above stated requirements. More specifically, any towing vessel that requires a second licensed officer may be under the direction and control of another officer holding a “mate of inspected self-propelled vessels with any restrictions on that license,” if that license was issued before May 21, 2001. See NVIC 04-01 § 7(m)(1)(b)(5). That license will authorize the mariner to operate a towing vessel up to May 21, 2006, unless there is any type of license transaction, such as a renewal or upgrade, during that period. See NVIC 04-01 § 7(m)(1)(b)(5). After which time, the mariner’s new license must have one of the endorsements listed in section 7(i)(2).

Because Respondent Corbello received his mate license in February, 2004, well after the fundamental date of May 21, 2001, Respondent was not authorized to operate a towing vessel as a second officer under the criteria established in NVIC 04-01 § 7(m)(1)(b)(5).

At the time Respondent’s initial license was issued, the new regulations were in effect requiring a license endorsement for service on towing vessels. In this case, Respondent was initially hired by Buffalo Marine Service Company as a deckhand, and after an appropriate length of time, he began training as a tanker man. After additional service, Respondent went to school to become a master of towing vessels based on his experience and service at sea. (*Tr.*

131-32). Because Respondent's training began in the 1980's, he applied for a master of towing license under the allowances provided in 46 CFR 10.464(g). (*Tr. 131-32, 229-30, 243*).

However, Respondent still needed to complete an examination and show that he possessed the required amount of training and time at sea. See 46 CFR 10.464(g). The relevant and important information pertaining to Respondent's service and training was not included by Respondent in his initial written and filed application; therefore, the Coast Guard Houston Regional Examination Center (REC) did not issue Respondent an endorsement to operate towing vessels. (*Tr. 164-65, 170, 243; Agency Exhibit 6*).

Instead, Respondent received a license to operate steam or motor vessels of not more than one hundred GRT and to operate steam or motor vessels as a general mate of not more than 200 GRT. Respondent's license was accompanied with a letter from the REC, explaining that Respondent did not qualify for the master of towing license because he did not begin his towing service before May 21, 2001. However, the letter also informed Respondent that he was approved to test for the steersmen of towing vessel license; he just needed to schedule an appointment in advance. (*Agency Exhibit 6*). There is no indication in the record that Respondent ever applied for and received the steersman license.

At the time of the incident, Respondent's license was limited to the operation of only steam or motor vessels. As this license was issued after May 21, 2001, Respondent needed one of the endorsements listed in NVIC 04-01 § 7(i)(b) before he could serve as master or captain on a towing vessel. On the date charged, he did not hold any one of these endorsements. It is noted that Respondent subsequently was issued a license allowing service on towing vessels and that it is likely he qualified for such an endorsement when he initially filed his incomplete application and at the time of the incident. However, Respondent was not properly endorsed;

therefore, on the face of the license that he possessed on the date of the collision and spill, Respondent should not have been performing the duties of a master or mate of a towing vessel.

Admittedly, both 46 CFR 10.464 and the accompanying NVIC instructions are daunting and confusing. However, I find that the relevant sections pertaining to the issuance of licenses after May 21, 2001 are clear. All license transactions occurring after May 21, 2001 must have a printed or written endorsement on them to authorize service on towing vessels. Nothing in the applicable regulation, the NVIC, or letter from REC supports Respondent's conclusion that his general mate license authorized him to operate towing vessels without such an endorsement. Rather, it is unsound to argue or conclude that the operation of towing vessels by Respondent was permissible at the time of the incidents in question. Respondent Corbello received a license to operate steam or motor vessels, and the accompanying letter from REC informed him that he could apply and test for steersman of towing vessels, which is the lowest grade license for the operation of towing vessels. It is, therefore, unreasonable to conclude or argue that a general mate's license for steam or motor vessels would authorize a mariner to act as master of towing vessels, for which the highest grade license is required. As such, I find that Respondent Corbello committed an act of misconduct on August 2, 2004 when he wrongfully exceeded the scope of his license by operating and navigating a towing vessel.

V. CONCLUSION

The preponderance of evidence in the entire record supports a finding that Respondent acted negligently on August 2, 2004 shortly after midnight local time when he failed to use all available means appropriate to circumstances or conditions to determine if a risk of collision existed between Respondent's towboat and its pushed ahead barge and the anchored tank vessel,

the TORM MARY. The preponderance of evidence in the record further supports a finding that Respondent committed an act of misconduct on the day of the incident when he operated a vessel beyond the limitations set by his Coast Guard issued license. However, the evidence does not prove or establish that Respondent failed to take action to avoid a collision with the TORM MARY in ample time with due regard to good seamanship.

It is well within the power or authority of the undersigned judge to order any of a variety of sanctions, including suspension. See 46 CFR 5.569; see also Appeal Decision 2569 (Taylor). The Table of Suggested Range of an Appropriate Order codified in 46 CFR 5.569(d) recommends an order of 2 to 6 months suspension for negligence related to vessel navigation and 1 to 3 months suspension for misconduct related to compliance with U.S. law or regulation. In this case, the U.S. Coast Guard IOs have proposed that Respondent receive a fifteen (15) month outright suspension of Respondent's license and also a twelve months probation. The undersigned judge, however, is not bound by the Table of an Appropriate Order. See (Taylor). The Table of an Appropriate Order merely serves as general guidance to an Administrative Law Judge, and consideration of mitigating or aggravating factors may justify a lower or higher order than the range suggested in the order table. See 46 CFR 5.569(d).

In this case, Respondent should have known that the tank vessel TORM MARY was swinging or could well be moving on her anchor chain and, in turn, approached with greater caution. However, it is important to note that the TORM MARY radioed the towboat and informed Respondent that it was safe to come alongside to transfer fuel. Although Respondent testified that he could have asked if the anchored vessel was moving before approaching, he claimed this is not the customary practice among mariners in the towing industry. (*Tr.* 229). Rather, it was explained at the hearing that when an anchored vessel requests an approach and

informs the towboat operator that it is safe to come alongside, the towboat operator typically approaches without inquiring when the vessel dropped anchor or how long it's been in anchorage, or whether the anchoring or anchored vessel is fully stopped. (*Tr.* 280, 288-289). Similarly, there is no requirement or rule that such action be taken. Nor is there any rule forbidding the careful marine operator or navigator to ask if the anchoring vessel is still moving or completely stopped in the water. As such, Respondent is not required to exercise extraordinary diligence to avoid collision, but only that degree of care that, in similar situations, would ordinarily be sufficient to the safety of lives and properties. See Appeal Decision 544 (LEE). Similarly, no evidence was presented that a prudent mariner under the same circumstances would have operated the towboat in a manner different than that performed by the Respondent. However, Respondent was negligent on the day of the incidents.

It should additionally be noted that the Coast Guard could have presented documentary exhibits and evidence and/or witnesses in aggravation involving the oil spill caused by this collision. While a brief discussion of the spill was presented in the Agency's post hearing brief, no actual evidence was submitted on the size, scope and significance of the oil spill, caused by Respondent's navigation of the towing vessel and barge.

In consideration of mitigating factors, there is some evidence that reasonable steps were taken to contain the spill in that it was quickly boomed off and the appropriate authorities were notified of the incident. In addition, while Respondent operated a vessel beyond the scope of his license, I find that he did so without intent. Rather, Respondent acted with a good faith belief that the license he possessed at the time of the incident authorized him to operate a towboat.

In light of all the totality of circumstances and facts surrounding this case, a more appropriate sanction is deemed to be a six (6) month outright suspension with additional twelve (12) months probation. WHEREFORE,

It is hereby further,

ORDERED that the service of this Decision on Respondent's attorneys will serve as notice to Respondent and his attorneys of his right to appeal, the procedure for which is set forth in 33 CFR 20.1001-20.1003. (Attachment A)

VI. ORDER

IT IS ORDERED that the charge of Negligence against Respondent Dennis G. Corbello and the supporting offense thereunder that he failed to use all available means appropriate to circumstance or condition to determine a risk of collision is **PROVED**; it is further,

ORDERED that the charge of Misconduct against Respondent Corbello and the supporting offense thereunder that he operated a vessel beyond the limitations set in his Coast Guard issued license is **PROVED**; it is further

ORDERED that the U.S. Coast Guard License, No 1049577 issued to the Respondent is hereby **SUSPENDED** outright for a period of six (6) months to begin upon delivery of Respondent's license to the Investigating Officers at the Marine Safety Office in Port Arthur, Texas. A **PROBATIONARY PERIOD** will follow of twelve (12) months probation on six (6) months suspension. If in another suspension and revocation proceeding it is proved, or admitted to, for violations during the twelve-month period of probation following the six (6) months outright suspension, Respondent's Coast Guard issued credentials would then be suspended for an additional six (6) months. Respondent is ordered to deliver his U.S. Merchant Mariner's License to the Investigating Officers at the Marine Safety Office Port Arthur, Texas by mail or in person.

THOMAS E. P. MCELLIGOTT
U.S. Administrative Law Judge
U.S. Department of Homeland Security
U.S. Coast Guard

Dated this 1st day of March, 2006
Houston, Texas

APPENDIX A

UNITED STATES COAST GUARD v. DENNIS G. CORBELLO

DOCKET NUMBER: 04-0517

CG Case No. 2185635

LIST OF WITNESSES AND EXHIBITS

INVESTIGATING OFFICER (IO) EXHIBITS

1. Copy of Merchant Mariner's License, Serial Number 1049577 (introduced and accepted as Agency Exhibit 1)
2. Application for Original License on January 26, 2004 (introduced and accepted as Agency Exhibit 2)
3. Coast Guard Form 2692, Report of Marine Accident, Injury or Death from SAN TOMAS (introduced and accepted as Agency Exhibit 3)
4. Copy of Certificate of Documentation for towing vessel and tug SAN TOMAS (introduced and accepted as Agency Exhibit 4)
5. Copy of Certificate of Documentation for barge BUFFALO 405 (introduced and accepted as Agency Exhibit 5)
6. Letter from Regional Examination Center to Dennis Corbello (introduced and accepted as Agency Exhibit 6)
7. Apprentice Mate (Steersman) of Towing Vessel Sheet (introduced and accepted as Agency Exhibit 7)
8. Written Statement from Mr. Stephen Mills (introduced and accepted as Agency Exhibit 8)
9. Written Statement from Shawn Conger (introduced and accepted as Agency Exhibit 9)
10. Written Statement from deckhand and tankerman George Lott (introduced and accepted as Agency Exhibit 10)
11. Written Statement from Amador Pena (introduced and accepted as Agency Exhibit 11)
12. Email from Charles King to Larry Griffin, dated November 19, 2004 (introduced and accepted as Agency Exhibit 12)

13. Blown up Photograph of the anchored tank vessel TORM MARY (introduced and accepted as Agency Exhibit 1A)
14. Blown up Photograph of the TORM MARY (introduced and accepted as Agency Exhibit 2A)
15. Blown up Photograph of the TORM MARY (introduced and accepted as Agency Exhibit 3A)
16. Blown up Photograph of the TORM MARY (introduced and accepted as Agency Exhibit 4A)
17. Blown up Photograph of the Neches River Waterway and Banks in East Texas (introduced and accepted as Agency Exhibit 5A)
18. Blown-up Navigational Chart of the Neches River and the McFadden Bend Cutoff (introduced and accepted as Agency Exhibit 6A)
19. Nautical Chart 11343 of the Sabine and Neches Rivers (introduced and accepted as Agency Exhibit 7A)

INVESTIGATING OFFICER (IO) WITNESS LIST

1. Mr. George Lott
2. Mr. Stephen Mills
3. Mr. Stanley Mingus
4. Mr. Larry Griffin

RESPONDENT EXHIBIT LIST

1. Captain/Mate license, and Back of License with Towing Endorsement Attached (introduced and accepted as Respondent Exhibit 1)
2. Copy of Dennis Corbello's U.S. Merchant Mariner's License (introduced and accepted as Respondent Exhibit 2)
3. Letter from Commanding Officer MSO-Houston to Dennis Corbello, Dated February 12, 2004 (introduced and accepted as Respondent Exhibit 3)
4. Letter from Buffalo Marine Service, Charles King to Commanding Officer U.S. Coast Guard, dated November 12, 2003 (introduced and accepted as Respondent Exhibit 4)
5. Letter from Officer in Charge, Marine Inspection to Dennis Corbello, dated October 22, 2004 (introduced and accepted as Respondent Exhibit 5)

6. E-mail Communication from Stanley Mingus to Lt. Ian Bird and Larry Griffin, dated August 16, 2004 (introduced and accepted as Respondent Exhibit 6)
7. Email Message from Lt. Ian Bird to Larry Griffin, dated August 16, 2004 (introduced and accepted as Respondent Exhibit 7)
8. Email Message from Larry Griffin to Stanley Mingus, dated August 12, 2004 (introduced and accepted as Respondent Exhibit 8)
9. Email Message from Martin Bryant to Larry Griffin, dated August 12, 2004 (introduced and accepted as Respondent Exhibit 9)
10. Email Message from Stanley Mingus to Martin Bryant, dated August 12, 2004 (introduced and accepted as Respondent Exhibit 10)
11. Email Message from Larry Griffin to Stanley Mingus, dated August 12, 2004 (introduced and accepted as Respondent Exhibit 11)
12. Email Message from Martin Bryant to Larry Griffin, dated August 12, 2004 (introduced and accepted as Respondent Exhibit 12)
13. Letter from Buffalo Marine Service, Charles King, to Investigating Officer U.S. Coast Guard MSO-Port Arthur, dated August 11, 2004 (introduced and accepted as Respondent Exhibit 13)
14. Letter from Buffalo Marine Service, Charles King, to Commanding Officer, Regional Exam Center Houston, dated November 12, 2003 (introduced and accepted as Respondent Exhibit 14)
15. First Aid/CPR Certificate for Dennis Corbello (introduced and accepted as Respondent Exhibit 15)
16. Radar Observer Unlimited Certificate from Dennis Corbello (introduced and accepted as Respondent Exhibit 16)
17. 82-Hour Master Not More Than 100 Gross Tons Certificate from Louisiana Technical College for Dennis Corbello (introduced and accepted as Respondent Exhibit 17)
18. Daily Log Sheet for the Tug SAN TOMAS, dated August 1, 2004, August 2, 2004 and August 3, 2004 (introduced and accepted as Respondent Exhibit 18)
19. Navigation Vessel Inspection Circular No. 4-01 published by Commandant U.S. Coast Guard, May 21, 2001 (introduced and accepted as Respondent Exhibit 20)
20. Enclosure No. 1 of NVIC 4-01 (introduced and accepted as Respondent Exhibit 21)
21. Enclosure No. 2 of NVIC 4-01, pages 9 through 18 (introduced and accepted as Respondent Exhibit 22)

22. Chart Excerpt of Neches River East Texas (introduced and accepted as Respondent Exhibit 23)
23. Copy of Inland Navigational Rule 3, continued page only (introduced and accepted as Respondent Exhibit 24)
24. Letter from Training Officer, U.S. Coast Guard, National Maritime Center, William St. J. Chubb to Capt. Robert L. Sadler, Jr. (introduced and accepted as Respondent Exhibit 25)
25. Enforcement Summary for Activity No. 2185670, proceeding against Shawn Conger, 6 pages (introduced and accepted as Respondent Exhibit 27)
26. Letter from Investigating Officer MSO Port Arthur to Shawn Conger, dated September 27, 2004 (introduced and accepted as Respondent Exhibit 28)
27. Photocopy of Various Photographs of Hull Damage Sustained by the M/V TORM MARY (introduced and accepted as Respondent Exhibit 29)
28. Coast Guard 2692 Report of Marine Accident, Injury or Death, Submitted by the SAN TOMAS, including barge addendum and written statement of Dennis Corbello (introduced and accepted as Respondent Exhibit 31)
29. Coast Guard 2692 Report of Marine Accident, Injury or Death, Submitted by the TORM MARY, including additional statements and additional witness list (introduced and accepted as Respondent Exhibit 32)
30. Vessel Particulars for the M/V TORM MARY (introduced and accepted as Respondent Exhibit 33)
31. Deck Log for the M/V TORM MARY, July 31, 2004, August 2, 2004, and August 4, 2004 (introduced and accepted as Respondent Exhibit 34)
32. Fathometer Excerpts from the M/V TORM MARY (introduced and accepted as Respondent Exhibit 35)
33. Course Recorder Excerpts from the M/V TORM MARY (introduced and accepted as Respondent Exhibit 36)
34. ECDIS Printout for the M/V TORM MARY (introduced and accepted as Respondent Exhibit 37)
35. E-mail from Larry Griffin to Dave Foreman, et al, sent Friday, January 7, 2005 (introduced and accepted as Respondent Exhibit 38)
36. Consolidated Discovery Responses from the Coast Guard to Dennis Corbello's Attorney's Requests for Production and Interrogatories (introduced and accepted as Respondent Exhibit 39)

37. Letters from Industry Representatives Submitted by Charles King Regarding Coast Guard Licensing Procedures (introduced and accepted as Respondent Exhibit 40)
38. Curriculum Vita and additional Coast Guard credentials for Richmond L. Frenzel (introduced and accepted as Respondent Exhibit 41)
39. Expert Report from Richard Frenzel (introduced and accepted as Respondent Exhibit 42)
40. Memorandum from Jennifer Carpenter, of American Waterways Operators, to Common Issues Council Members regarding CIC meeting agenda items for April 21, 2005 (introduced and accepted as Respondent Exhibit 43)

RESPONDENT WITNESS LIST

1. Mr. Charles King
2. Mr. Dennis Corbello
3. Mr. Richard Frenzel

ATTACHMENT A

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS
PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR
FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD
SUBPART J - APPEALS
[REDACTED]