

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHN C. MCCARTHY III

Respondent.

Docket Number: CG S&R 06-0192
CG Case No. 2616092

FINAL DECISION AND ORDER ON SANCTION

Issued: December 28, 2006

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

CWO Bernard Tufts
CWO Terry Roberts
PO Michael Rohland
United States Coast Guard
Marine Safety Unit
100 W. Oglethorpe Avenue
Savannah, GA 31401

For Respondent

Charles H. Raley, Jr. Esquire
Portman & Raley, LLC
P.O. Box 9087
Savannah, GA 31412

I.**PROCEDURAL HISTORY**

On September 20, 2006, I conducted a hearing in the above-captioned case. The hearing concluded immediately after the parties litigated matters relevant to whether or not the charges were proved. I indicated to the parties that, if any of the charges were proved, an additional session would be reconvened at a later date and that both parties would then have a chance to offer evidence in aggravation and mitigation. In my Decision and Order dated November 29, 2006, I found that Respondent was both Negligent and committed Misconduct in passing the Liquid Natural Gas ("LNG") terminal with an LNG tankship within its slip at 14.2 knots. The Negligence charge was predicated on Respondent's breach of minimum safe speed and the Misconduct charge was predicated on his violating 33 CFR 162.65(b)(3), which requires vessels to proceed at a speed as to not endanger other vessels or structures.

On December 20, 2006, I conducted a second hearing in the above-captioned case. The Coast Guard offered evidence that Respondent has a prior record with the Coast Guard, that Respondent's actions resulted damages totaling \$109,500.00, and that his actions could have resulted in cataclysmic consequences. Respondent offered evidence that he has a reputation for being a conscientious and skilled mariner, that he has a good record, and that he has learned his lesson. In this Order, I make a determination as to the appropriate sanction.

II.**AGGRAVATION EVIDENCE****A. Prior Disciplinary Record**

In determining an appropriate sanction for acts or offenses for which revocation is not mandatory, an Administrative Law Judge ("ALJ") may consider the prior disciplinary 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). It is important to note that the prior disciplinary record of a Respondent only includes acts or offenses less than ten years old. 33 CFR 1315(a). Thus, acts or offenses ten years old or older are not part of a Respondent's prior disciplinary record and thus are not to be considered as aggravating evidence in determining the appropriate sanction.

At the hearing, the Coast Guard offered into evidence several exhibits regarding Respondent's prior disciplinary record. After careful consideration of the aforementioned exhibits and of the testimony at the hearing, it is apparent that none of these prior incidents regarding Respondent occurred less than ten years ago. The Coast Guard did offer evidence of one incident that was less than ten years old. However, it did not involve a charge against Respondent. In fact, it did not even name Respondent as sharing the blame for an accident.¹ As such, none of the Coast Guard's submissions regarding Respondent's prior disciplinary record will be considered as aggravating evidence.

To the contrary, there was credible evidence at the hearing indicating that Respondent has not had a marine casualty in the past ten years. Respondent will, therefore, be considered to have no prior disciplinary record for the strict purpose of determining the appropriate sanction in this case.

B. Damage and Potential Damage

As discussed in my November 29, 2006 Decision and Order, Respondent navigated the CHARLESTON past the LNG terminal with an LNG tankship within its slip at 14.2 knots. This was more than double the proper speed under the circumstances and caused the LNG tankship to surge along the dock and damage ensued. The Coast Guard offered into evidence a detailed

¹ The Coast Guard offered this as Exhibit 18. This exhibit was not admitted into evidence.

report from Southern LNG regarding the actual damage resulting from Respondent's Negligence and Misconduct on March 14, 2006. The report indicated that Respondent's speed and corresponding surge caused \$75,000.00 worth of damage to the south dock gangway alone. The report indicated that the total damage Respondent caused amounted to \$109,500.00. Respondent did not dispute the validity of this report. While small compared to the potential damage that could have resulted from Respondent's conduct, \$109,500.00 is sufficient damage to be weighed as an aggravating factor in determining the appropriate sanction.

As discussed in my November 29, 2006 Decision and Order, navigating past an active LNG transfer with a large ship such as the CHARLESTON at 14.2 knots could have resulted in cataclysmic consequences. The potential damage, destruction, injury, or loss of life that could have resulted from Respondent's actions is staggering. This weighs against Respondent.

III.

MITIGATING EVIDENCE

On the other hand, Respondent offered into evidence several affidavits of other pilots attesting to Respondent's reputation for safety in the maritime community. Respondent also called several witnesses who testified that Respondent is not a danger to life and property at sea, but instead that Respondent is and has been a very safety conscious and skilled mariner. One witness described Respondent as "second to none." These statements are well taken on Respondent's behalf, but the most compelling mitigating evidence came when Respondent took the stand on his own behalf.

Respondent testified that he has sailed the Savannah River approximately one hundred times per year for the last ten years. He further testified that he has not had a single incident during that time and that he has never had a problem with speed. The Coast Guard did not

dispute this, and only offered evidence of Respondent's prior disciplinary record for incidents occurring more than ten years ago.² I find that Respondent has, therefore, successfully navigated the Savannah River at least one thousand times without a single incident. As previously discussed, this particular incident is extremely troubling on its face and its potential consequences make this a very serious mistake. However, one mistake out of one thousand trials is an impressive statistic and is a very strong indicator that Respondent is a very skilled and conscientious pilot and mariner. It is conceivable that this incident was an aberration.

Another fact that weighs in mitigation is that Respondent appears to have a new outlook on speed. He showed remorse at the hearing and assured the court that he will never have a speed problem again. He also testified that he has a new appreciation for the dangers of navigating past the LNG terminal at high speeds. This is also weighted in Respondent's favor.

IV.

SANCTION

The selection of an appropriate order is the responsibility of the ALJ. 46 CFR 5.569(a). In this case, the Coast Guard is seeking revocation. In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider a Respondent's prior records. 46 CFR 5.569(b)(2). As previously discussed, since there was no evidence that Respondent has had a prior incident less than ten years ago, he will be treated as a first time offender for the strict purpose of determining the appropriate sanction in this case. For first time offenders and without considering other factors, the Table of Average Orders suggests a suspension of up to six months for negligently performing duties related to vessel navigation

² The Coast Guard did offer into evidence a case regarding charges against a company Respondent owned at the time of a marine safety incident. Captain McCarthy was not named as a Respondent and there were no allegations that Respondent had contributed in any way to the incident.

and up to three months for misconduct predicated on a failure to comply with U.S. law or regulations. 46 CFR 5.569.

In this case, the damage and potential damage that Respondent caused by his actions must be weighed against Respondent's good record and apparent remorse for his actions. Respondent's actions indeed caused significant damage, and I cannot stress enough that Respondent's actions could have resulted in a massive disaster. However, Respondent's good track record and apparent remorse are sufficient to convince me that he is not a danger to life and property at sea. While not enough to reduce the sanction to a warning as Respondent proposed, these mitigating factors are sufficient to keep the sanction within the standard range of sanctions for these offenses as contemplated by the Table of Average Orders. Revocation is therefore not appropriate in this case.

V.

ORDER

IT IS HEREBY ORDERED that Respondent's Coast Guard issued license is suspended outright for eight (8) months followed by a suspension of twelve (12) months stayed on twelve (12) months probation. This sanction will take effect immediately.

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 Part 20, Subpart J. A copy of Subpart J is provided as an Attachment.

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PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on December 28, 2006 at
Norfolk, VA

ATTACHMENT A – ADDITIONAL WITNESS AND EXHIBIT LIST**A. Witness Lists****I. Agency's Witnesses**

The Coast Guard did not call any witnesses.

II. Respondent's Witnesses

1. Captain Samuel J. Meyer
2. Captain Carl Griffith
3. Captain John C. McCarthy III

B. Exhibit Lists**I. Agency Exhibits**

13. Decision and Order for USCG v. McCarthy. Case no.: 16722/0013/90
14. Coast Guard Report of Investigation
15. Decision and Order for USCG v. McCarthy. Case no. PA95001668
16. Appeal Decision 2601 (McCarthy) (1996)
17. Case of Ingraham v. Citgo
18. Report of accident to Patrick Ingraham (not admitted)
19. Outcome of charges against Respondent
20. Damage report from Southern LNG

II. Respondent's Exhibits

- R. Marine Safety and Security Bulletin 21-06
- S. Letter from Randy Cornwell
- T. Affidavit of Captain Richard Wigger
- U. Affidavit of Captain Arthur Kirk
- V. Letter from Scot A. Couturier
- W. Letter from Captain Russell Gregg

ATTACHMENT B - SUBPART J**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.

Certificate of Service

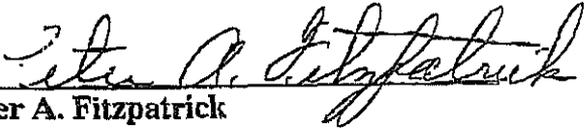
I hereby certify that I have this day served the foregoing Order by Fed Ex upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated:

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Peter A. Fitzpatrick
Administrative Law Judge
United States Coast Guard

Done and Dated on December 28, 2006 at
Norfolk, VA