

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

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Complainant

v.

JOHNNY OCE CONNOR

Respondent

Docket Number CG S&R 08-0326
CG Enforcement Activity No: 3282231

**ORDER GRANTING IN PART, DENYING IN PART COAST GUARD
MOTION FOR SUMMARY JUDGMENT**

ORDER SETTING EVIDENTIARY HEARING

Issued: April 16, 2009

Issued by: Bruce T. Smith, Administrative Law Judge

Appearances:

Investigating Officer:

LCDR Melissa J. Harper
CWO4 Jo N. Wildman
Coast Guard Sector Lower Mississippi River

For Respondent:

Jane Johnson, Esq.
Tulane Legal Clinic

On Tuesday, April 14, 2009, a hearing on the parties' opposing Motions for Summary Decision was convened before the undersigned in New Orleans, LA. The Coast Guard was represented by LCDR Melissa Harper, District 8 Legal Office. Respondent was represented by Messrs. Galloway and Flynn, student interns from the Tulane Legal Clinic under the supervision of Jane Johnson, Esq.

After extensive briefing and arguments by the parties, the matters were submitted to the undersigned for a decision. During the hearing, it was discovered that an affidavit signed by a Mr. Joseph M. Tyson and filed by Respondent's counsel, was not associated with the court file. That matter was rectified on April 16, 2009 when Respondent's counsel provided a copy to the undersigned.

The Coast Guard's Motion affirmatively seeks revocation of Respondent's license (1182998) because his conviction for voluntary manslaughter would have precluded the issuance of renewal of his license per 46 U.S.C. §7703(2) and the implementing regulations contained at 46 C.F.R. Subpart B.

By contrast, Respondent's Motion for Summary Decision seeks no affirmative relief; rather, it simply seeks to maintain the status quo of the case and has the practical effect of urging this court to proceed to a full evidentiary hearing. Respondent's Motion is, in substance, a rebuttal of the Coast Guard's Motion.

Coast Guard's Motion for Summary Decision

To prevail on a Motion for Summary Decision, a party must establish that there are no material issues of fact in dispute and that the moving party is entitled to a

judgment as a matter of law. Summary Decision may be granted “in all or any part of the proceeding.” 33 C.F.R. §20.901.

Here, the Coast Guard alleges the Respondent was convicted of voluntary manslaughter in the State of Tennessee on March 24, 2008, as evidenced by a certified copy of the judgment entered by circuit court of Hardin County, TN. Because Respondent does not contest the fact of his conviction, there is no disputed material fact relative to Respondent’s conviction. Hence, partial summary decision is granted in favor of the Coast Guard insofar as the conviction of voluntary manslaughter is concerned. For the purposes of this Order, the undersigned regards voluntary manslaughter as an “intentional homicide.”

The Coast Guard argues that 46 U.S.C. §7703(2) provides that a mariner’s license may be suspended or revoked if the holder is convicted of an offense that would preclude the issuance or renewal of that license. The statute essentially looks back in time to determine whether, given the fact of the conviction, the Coast Guard would have issued or renewed the mariner’s license under its pertinent regulations.

Guidance in 46 C.F.R. §10.201 contains the criteria for the eligibility for mariner’s licenses and §10.201(h) offers guidance for the evaluation of mariners with criminal backgrounds. Further, §10.201(h)(2) directs an “OCMI” (Officer in Charge, Maritime Inspections) to use table 10.201(h) to evaluate applicants who have criminal convictions. Table 10.201(h), in turn, identifies “assessment period” of seven to twenty years for a person convicted of intentional homicide.

Unfortunately, the pertinent regulations do not provide a definition of an “assessment period” or what utility that period is to either an OCMI or an Administrative

Law Judge. That omission, however, is moot, here, because §10.201(h)(2) specifically provides that: “The assessment period commences when an applicant is no longer incarcerated.” Here, Respondent’s sentence, entered on March 24, 2008, provides that he will:

Serve 1 week in jail for 3 consecutive years during the week of April 15th beginning April 15, 2009. No alcohol use of any kind unless small amount through prescription. [sic]

Thus, no “assessment period” can commence for this Respondent, because his last incarceration will end in April 2012.

Section 10.201(h)(4) provides that if a person applies for a license before the minimum assessment period has elapsed, “then the applicant must provide evidence of suitability for marine service” including information listed in §10.201(j).

In sum, the regulations afford a criminally-convicted respondent an opportunity to present factors in support of his suitability for marine service when that respondent either applies for a license, renewal of a license, or faces the possibility of suspension or revocation.

Because Respondent has not been afforded an opportunity to present matters in support of his suitability for marine service, a material issue of fact exists. Thus, summary decision is inappropriate and I **DENY** that portion of the Coast Guard’s Motion for Summary Decision as it relates to the petition for revocation of Respondent’s license. (Conversely, I **GRANT** that portion of the Respondent’s Motion for Summary Decision as it relates to the petition for revocation of Respondent’s license.)

Evidentiary Hearing

Both parties are entitled to an expeditious resolution of this matter. Only an evidentiary hearing will afford both parties an opportunity to present factual matters which aid the undersigned in resolving the issue whether the Respondent would have been denied issuance or renewal of his license following his criminal conviction.

WHEREFORE,

IT IS HEREBY ORDERED that the Coast Guard's Motion for Summary Decision is **GRANTED** in part and **DENIED** in part as more fully explained above.

IT IS FURTHER ORDERED that an evidentiary hearing will convene at 1:00 pm, CDT, on Monday, April 27, 2009 in the courtroom located in Suite 1211, Hale Boggs Federal Building, 500 Poydras St., New Orleans, LA. and will continue from day to day thereafter until completed.

Done and dated April 16, 2009
New Orleans, Louisiana

BRUCE T. SMITH
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD