

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHNNY OCE CONNER

Respondent

Docket Number: CG S&R 08-0326
CG Case No.: 3282231

DECISION AND ORDER

Date Issued: May 29, 2009

Issued by: Hon. Bruce Tucker Smith, Administrative Law Judge

Appearances:

For Complainant

LCDR Melissa Harper
USCG, District 8 Legal
CWO4 Jo Wildman, IO
USCG, Sector Lower Mississippi

For Respondent

Jane L. Johnson, Esq.
Tulane Law Clinic

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Johnny Oce Conner's (Respondent) Coast Guard-issued license. This action was brought pursuant to the authority contained in 46 U.S.C. §§7703(2) and its underlying regulations as codified at 33 C.F.R. Part 20 and 46 C.F.R. Part 10, specifically Subpart B.

The Coast Guard issued its Original Complaint on July 30, 2008, charging Respondent with conviction of a crime that prevents issuance or renewal of a license under 46 U.S.C. §7703(2). Specifically, the Coast Guard alleged Respondent was convicted of felony manslaughter on March 24, 2008, in the Criminal/Circuit Court of Hardin County, Tennessee. Respondent timely filed his Answer on August 15, 2008, admitting all jurisdictional and factual allegations of the Complaint. Respondent requested a hearing on the proposed order of revocation.

On August 28, 2008, the Coast Guard filed a Motion for Summary Decision and sought revocation in accordance with 46 C.F.R. §5.61(a)(4)—a criminal conviction of murder.

On September 9, 2008, the undersigned denied the Coast Guard Motion and explained Respondent was convicted of manslaughter and did not fit within the ambit of 46 C.F.R. §5.61(a)(4).

Thereafter, the undersigned sought out and ensured that *pro bono* legal counsel was provided to Respondent.

The Coast Guard filed a second Motion for Summary Judgment on February 27, 2009, again seeking revocation of Respondent's license. In an Order issued April 16,

2009, the undersigned granted partial summary judgment to the Coast Guard regarding as Respondent's conviction for manslaughter. However, the portion of the Coast Guard's Motion for Summary Judgment, as it related to revocation of Respondent's license, was denied.

On April 24, 2009, an evidentiary hearing was convened for the purposes of affording Respondent an opportunity to present factors in support of his suitability for marine service, as required by 46 C.F.R. §10.201(h)(4). LCDR Melissa Harper, U.S. Coast Guard, District 8 Legal, and CWO4 Jo Wildman, Investigating Officer, U.S. Coast Guard, Sector Lower Mississippi, appeared on behalf of the Coast Guard. Jane L. Johnson, Esq., Tulane Law Clinic, along with student attorneys Michael J. Flynn and Stephen H. Galloway, appeared on behalf of Respondent.

The Coast Guard introduced ten exhibits and Respondent introduced six exhibits. There are also two ALJ exhibits. The court heard the testimony of six witnesses. The exhibit and witness list are contained in **Attachment A**.

At the hearing, Respondent filed a Motion in *Limine* asking the court to exclude ALJ Exhibit I, a military court-martial order; and Coast Guard Exhibits 3, 4, 5, 6, 7, 8, 9 and 10. After due consideration of Respondent's motion, I **GRANT** the Motion in *Limine* and gave no weight to those items of evidence. The aforementioned exhibits either reflected matters too remote in time to be meaningful or their probative value to the issues at bar were minimal.

Upon careful deliberation of the entire record, including the applicable statutes, regulations, case law, and the parties' respective arguments, the undersigned finds Respondent **DID NOT PROVE** that he is suitable for merchant marine service.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence and the entire record taken as a whole, including party stipulations.

1. At all relevant times mentioned herein Respondent, Johnny Oce Conner, is the holder of Coast Guard issued license, which was renewed on or about April 12, 2007. (CG Ex. 4).¹
2. Respondent currently holds a valid Transportation Worker Identification Credential (TWIC). (Tr. at 134-35).
3. Respondent is sixty-nine years old and suffers from diabetes and high blood pressure. (Resp. Ex. F at 22; Tr. at 61).
4. Respondent has applied for and received eight Coast Guard licenses in the course of his maritime career. (Tr. at 96).
5. Respondent began working on the river in 1967 as a deckhand in the engine room. (Tr. at 61).
6. Respondent began working as a river pilot in 1969. (Tr. at 62).
7. Respondent has been employed by Canal Barge Company, Inc. as a river pilot for approximately nine years. (Tr. at 29).
8. Respondent's typical work routine or "hitch" is twenty-eight days aboard the vessel and twenty-eight days off duty. (Tr. at 33).
9. Respondent's working hours aboard the vessel are six hours on duty and six hours off-duty. (Tr. at 33).
10. Respondent has worked as a pilot with Captain Daryl Wheeler for approximately six years (Tr. at 43).
11. Respondent has been evaluated to be in the top 20% of Canal Barge Company, Inc.'s pilots. (Tr. at 36).

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at ____). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (IO Ex. ____); Respondent's Exhibits are as follows: Respondent followed by the exhibit number (Resp. Ex. ____); ALJ Exhibits are as follows: ALJ followed by the exhibit number (ALJ Ex. ____).

12. During his time on the waterway, Respondent has not had an accident. (Tr. at 62).
13. Respondent has never been fired from a job. (Tr. at 63).
14. Respondent has never been disciplined by Captain Wheeler. (Tr. at 47).
15. Respondent admits to having consumed alcohol for most of his life. (Resp. Ex. F. at 31); however, he denies having an alcohol or drinking problem. (Tr. at 143).
16. Respondent admits his previous drinking habits included consuming a half-case, or a full case, of beer on a weekend. (Resp. Ex. F at 31).
17. Evidence adduced at his criminal sentencing revealed that Respondent is a person who becomes verbally abusive when intoxicated and that he has an angry temper. (Resp. Ex. F at 9, 13-14).
18. Respondent has not attempted any rehabilitative programs or sought counseling with groups such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) (Tr. at 121, 123-24).
19. Respondent had been married to Marilyn Conner for approximately eight years at the time of her death. (Tr. at 110).
20. Respondent shot and killed his wife on April 16, 2006. He was sentenced by a Tennessee state court on March 24, 2008. (Resp. Ex. F at 43-50).
21. On March 24, 2008, the State of Tennessee sentenced Respondent to serve one week in confinement commencing April 15, 2009, for three consecutive years. (Resp. Ex. F at 50).
22. On the day Respondent killed his wife, his blood alcohol level registered .18 three to four hours after Respondent placed a 911 call to authorities reporting his wife's fatal injury. (Tr. at 140-41; Resp. Ex. F at 25).
23. Respondent's blood alcohol level was higher at the time he shot his wife and even higher as he drove his vehicle from bar to bar to his home.
24. The Tennessee court specifically rejected Respondent's proffered mitigation that he acted under strong provocation. More specifically, the sentencing court stated "I don't think . . . by one's behavior engaging in bar hopping, excessive alcohol consumption can later be justified in saying that they acted under strong provocation when something escalates to the point that a gun is used." (Resp. Ex. F at 45).

25. An express condition of Respondent's probation requires strict abstention "from the use of alcohol in any form or fashion." (Resp. Ex. F at 50).
26. Respondent was also sentenced to four years supervision (Resp. Ex. F at 50).
27. Respondent's parole was initially administered through Hardin County, Tennessee, and supervised by Jeff Nichols, State of Tennessee, Board of Probation and Parole, for approximately four to five months. (Tr. at 15-16; 22).
28. Within the first ninety days of Respondent's supervision by Mr. Nichols, he was tested for drug and alcohol use. Respondent tested negative. (Tr. at 27).
29. Respondent received express authorization by the Tennessee court to travel out of state only for purposes of his employment. (Resp. Ex. A).
30. Respondent must obtain permission to travel out of state for personal reasons. (Tr. at 77).
31. Respondent's parole is now administered through Shelby County Probation Office due to a change in his residence. (Tr. at 18).
32. Respondent currently meets with Andrew Bradford, his probation officer in Shelby County every three months. (Tr. at 74).
33. Respondent sends his probation officer in Shelby County a written report monthly regarding his whereabouts and confirming he is still employed. (Tr. at 75).
34. Respondent must report April 15, 2010 and April 15, 2011, for week-long confinement periods before he will have completed the incarceration portion of his sentence.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea and to maintain standards of competence and conduct. *See* 46 U.S.C. §7701; 46 C.F.R. §5.5. Title 46 Code of Federal Regulations section 5.19 gives an Administrative Law Judge (ALJ) the authority to conduct hearings and to suspend or revoke a license or certificate for violations arising under 46 U.S.C. §§7703 and/or 7704. Under 46 U.S.C. §7703(2), if a merchant mariner license holder is convicted of an

offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document, his license may be suspended or revoked. The statute is implemented by 46 C.F.R. Part 10, Subpart B.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. *See* Appeal Decision No. 2640 (PASSARO) (2003). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. *Id.*; Appeal Decision No. 2639 (HAUCK) (2003).

In the instant case, the Coast Guard charged Respondent with having been convicted of a felonious offense that would prevent the issuance or renewal of a license and requested revocation of Respondent's license, per 46 U.S.C. §7703(2). The undersigned previously granted partial summary decision in favor of the Coast Guard, ruling that Respondent's conviction for manslaughter was an appropriate basis for either suspension or revocation. Thereafter, this matter proceeded to the April 24, 2009, evidentiary hearing to determine Respondent's suitability for maritime service.

For the reasons stated below, in accordance with the analysis provided in 46 C.F.R. Part 10, Subpart B, the undersigned finds that Respondent has **not proved** his license would have been renewed.

Burden of Proof

In this case, like any suspension and revocation case, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703(2), and the implementing regulations in, 46 C.F.R. Part 10, Subpart B. The

Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701; 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (citing *In re Winship*, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)).

Therefore, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violation charged. The Coast Guard was further obligated to prove that his license ought be suspended or revoked because, given his conviction, his application for renewal of that license would have been denied. In this case, Respondent’s conviction of a potentially disqualifying offense was resolved prior to the April 24, 2009, evidentiary hearing.² Accordingly, the undersigned granted partial summary decision in favor of the Coast

² Order Granting in Part, Denying in Part Coast Guard Motion for Summary Judgment.

Guard insofar as Respondent's conviction was concerned.³ However, it remained to be determined whether Respondent's conviction was such that would preclude issuance or renewal of his mariner's licensure, although the facts and circumstances of Respondent's criminal actions are highly relevant in that determination.

Guidance contained in 46 C.F.R. §10.201(h)(4) provides that if a mariner with a criminal conviction applies for a license before a "minimum assessment period" has occurred, "then the applicant must provide evidence of suitability . . . for service in the merchant marine." Such is the case, here, because, Respondent has not yet completed his court-ordered sentence. Hence, in the instant case, a burden of persuasion is imposed upon this Respondent to establish his suitability for marine service; otherwise suspension or revocation of his license is appropriate.

Sanctions

The Coast Guard seeks revocation and specifically noted Respondent's "character and habits of life" are marred by his affliction by alcohol and that he is a danger on the waterways.

Eligibility requirements for issuance and renewal of mariner's licenses are set forth at 46 C.F.R. §10.201(a) and provides in part, that the applicant for issuance or renewal of a license bears a burden in that he:

must establish to the satisfaction of the Coast Guard that he or she possesses all the qualifications necessary (including but not limited to age, experience, character references and recommendations, physical health, citizenship, approved training, passage of a professional examination, a test for

³ Order Granting in Part, Denying in Part Coast Guard's Motion for Summary Judgment issued April 16, 2009. Coast Guard regulations define "conviction" as when a "respondent . . . has to attend classes, contribute time or money . . . submit to any manner of probation or supervision . . . the Coast Guard regards him or her, for the purposes of 46 U.S.C. §§7703 or 7704, as having received a conviction." 33 C.F.R. §20.1307(d).

dangerous drugs, and when required, a practical demonstration of skills.

A mariner applying for issuance or renewal of a license must “provide written disclosure of all prior convictions at the time of application.” 46 C.F.R. §10.201(h).

Subparagraph (h) of §10.201 provides extensive guidance as to the protocol to be followed in the event a mariner with a criminal history applies for a license issuance or renewal. Specifically, the Coast Guard seeks to determine whether the “applicant’s character and habits of life are such that the applicant cannot be entrusted with the duties and responsibilities of the license.” 46 C.F.R. §10.201(h)(1).

Here, the facts relative to Respondent’s conviction of voluntary manslaughter were undisputed and illuminating. At the hearing, Respondent testified that on the night of the shooting, he left his wife at their residence at about 6:30 p.m. and then went out for an evening on the town, where for the next five hours; he and friends consumed alcohol in at least two drinking establishments. Respondent testified that he drove home at about 11:30 the night of the shooting, in an intoxicated state. (Tr. at 138-139, 142). Upon inquiry about his state of mind the day and night of the shooting, Respondent said his mind was on “Really just drinking.” (Tr. at 142). The Tennessee court found that Respondent’s killing of his wife “was something that essentially occurred because of [a] combination of anger and alcohol and other factors...” (Resp. Ex. F. at 44). The Tennessee court elaborated: “I don’t think one—by one’s behavior engaging in bar hopping, excessive alcohol consumption can later be justified in saying that they acted under strong provocation when something escalates to the point that a gun is used.” (Resp. Ex. F at 45). There was no dispute in the criminal court record as to Respondent’s culpability or guilt.

In the instant matter, Respondent has only recently completed his first of three incarceration periods. Respondent must still report to jail on April 15, 2010 and April 15, 2011, for week-long periods of confinement before he will have completed the “incarceration” portion of his sentence. Accordingly, Respondent will be considered “no longer incarcerated” upon his completion of three consecutive years of week-long incarceration as per the sentencing court.

Given that Respondent has not yet completed serving his sentence, §10.201(h)(4) is particularly instructive and provides, in part, “. . . the applicant must provide evidence of suitability for service in the merchant marine” including information listed in 46 C.F.R. §10.201(j). This is Respondent’s burden of persuasion.

A non-exclusive list of factors in 46 C.F.R. §10.201(j) assists in determining a mariner’s suitability for service and includes:

- (1) Proof of completion of an accredited alcohol- or drug-abuse rehabilitation program.
- (2) Active membership in a rehabilitation or counseling group, such as Alcoholics Anonymous or Narcotics Anonymous.
- (3) Character references from persons who can attest to the applicant’s sobriety, reliability, and suitability for employment in the merchant marine including parole or probation officers.
- (4) Steady employment.
- (5) Successful completion of all conditions of parole or probation.

What is absent from these criteria is specific guidance and discussion of a nexus between a given criminal conviction and a respondent’s suitability for sea-service.

At the hearing, the Coast Guard made reference to guidance contained in the

“Marine Safety Manual” as authoritative for the criteria and analysis of a mariner’s background, etc., *vis à vis* his suitability for safe sea service. (Tr. at 174-75, 177, 180, 184-85, 187-90). The Marine Safety Manual is neither a creature of either statutory or regulatory law.⁴ It is not published in either the Federal Register or the Code of Federal Regulations. (Tr. at 174-75). Because it is neither a statute nor a regulation, it cannot be said that the public is on notice of its requirements. Hence, it cannot be used here as a legal standard against which a mariner’s conduct can be judged. Thus, it is of little value in this deliberation, although it is of absolute utility to other aspects of Coast Guard operations.

Gleaning what guidance is provided for in the pertinent regulations, however, I base my decision herein on three key criteria: Respondent’s rehabilitative efforts, his character and employment record, and his judgment.

Rehabilitative Efforts

In the instant matter, Respondent has not attempted any rehabilitative programs or sought counseling with groups such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) (Tr. at 121, 123-24). Despite Respondent’s agreement with the sentencing court that alcohol was a substantial factor contributing to his wife’s death (Resp. Ex. F at 31) and his admission that he has consumed alcohol for most of his life (Resp. Ex. F. at 31), Respondent still denies having an alcohol or drinking problem. (Tr. at 143). Interestingly, he admitted that he drinks a half-case or a full case of beer on a weekend. (*Id.*) Evidence adduced at his criminal sentencing also revealed that he is a

⁴ Marine Safety Manual, Vol. III, Marine Personnel COMDT INST M16000.8B; referred to herein simply as the Marine Safety Manual. The Marine Safety Manual is a comprehensive volume created by the Coast Guard for purposes of guidance and information to the maritime public. It is not promulgated as part of its rule-making function. (Tr. at 174-75).

person who becomes verbally abusive when intoxicated and that he has an angry temper. (Resp. Ex. F at 9, 13-14).

Given Respondent's admission of his age and diabetes and high blood pressure, it is noteworthy that he continues to consume alcohol. (Resp. Ex. F at 22). Thus, not only is the Respondent's alcohol consumption called into question, it is his judgment that is subject to scrutiny, *infra*.

Indeed, the Tennessee court noted of Respondent's alcohol consumption,

It also could put some other party potentially at risk. Although I don't think he is a substantial risk to society at large. But there is a contradiction between him feeling remorse and him continuing to consume alcohol. And I would suspect that it's more than a six-pack on weekends. As a matter of fact, I think we went from a six-pack on weekends, in his testimony, to sometimes half a case or whatever he said. And that gives the Court great cause for concern. (Resp. Ex. F. at 49) (emphasis added).

Clearly, alcohol plays a major role in Respondent's life.

Character References & Employment

Respondent introduced the testimony of Paul Barnes and Daryl Wheeler, regarding his sobriety, reliability, and suitability for employment as a merchant mariner.

Mr. Barnes is employed by Canal Barge Company, Inc. as a port captain. (Tr. at 29).

Mr. Barnes explained that Canal Barge Company, Inc. is a marine transportation company which primarily moves cargo via barges on inland waterways. (Tr. at 30-31).

Mr. Barnes described Respondent as one of the top 20% of pilots and captains in the company. (Tr. at 36). Respondent was described by Mr. Barnes as "one of [his] go-to guys" explaining "he's always there if you need him." (Tr. at 37). Mr. Barnes denied

having any concerns about Respondent's sobriety. (Tr. at 38). Respondent was described as "very valuable to [Canal Barge Company, Inc.]" (Tr. at 39). Respondent has been steadily employed for the past nine years by Canal Barge Company, Inc. as a pilot. (Tr. at 29 and 37).

Captain Daryl Wheeler testified "[Respondent] has been [his] pilot for six years." (Tr. at 43). Mr. Wheeler described Respondent's performance as "outstanding." (Tr. at 44). He has never taken any form of disciplinary action against Respondent. (Tr. at 47). Captain Wheeler testified Canal Barge Company, Inc. has a zero-tolerance policy for alcohol aboard its vessels and violators are subject to immediate termination. (Tr. at 47-48). Captain Wheeler denied having ever suspected Respondent of drinking while underway (Tr. at 48).

At the hearing, Respondent attempted to introduce the testimony of Captain John Patrick Riley. However, the Coast Guard objected to this testimony as an unfair surprise and unduly cumulative. The undersigned sustained the Coast Guard's objection but allowed Respondent to make an offer of proof.⁵

Respondent's former parole officer, Jeff Nichols, described Respondent as "an excellent probationer for the short period of time [he] supervised [Respondent]." (Tr. at 17). Mr. Nichols testified Respondent complied with all the terms of his probation, such as providing proof of employment, payment of supervision fees and attempting to pay costs and fines as directed by the court. (*Id.*). Mr. Nichols further testified Respondent

⁵ Respondent's offer of proof was properly made on the record as required by 33 C.F.R. § 20.804(b).

⁶ Mr. Nichols testified, prior to Respondent's supervision transfer to Shelby County, he met with Respondent once a month for the months of April, May, June and July of 2008. Mr. Nichols further testified he was unsure whether he met with Respondent in August due to the pending transfer request to Shelby County. (Tr. at 22).

was tested within the first 90 days of his supervisory period for drugs and alcohol and that Respondent tested negative to drug and alcohol tests. (Tr. at 27).

In addition to testimony regarding his sobriety, reliability, and suitability for employment, Respondent also produced numerous letters and affidavits from colleagues attesting to the same. (Resp. Ex. B, C, D and E).

The undersigned could not help but be impressed by the support shown by Respondent's employer; especially the post-hearing letter provided by counsel to Canal Barge Company, Inc.,⁷ responding to the court's invitation to participate by way of amicus.⁸

Judgment

Remarkably, Respondent's blood-alcohol level was .18 some three to four hours after he killed his wife. (Tr. at 140-141; Resp. Ex. F. at 25, 32). The inevitable conclusion is that Respondent's blood-alcohol level was much higher at the time he shot his wife...and even higher as he drove his car from bar to bar to home. I take official notice that this level is higher than the "legal limit" in any of the fifty United States.

It is true that the Tennessee court said of Respondent, "I don't think that this gentleman necessarily poses a threat to society. I think it was an isolated incident rising out of a domestic violence situation." (Resp. Ex. F at 47). But the standard, here, is not merely whether Respondent poses a threat to the general public: the question here is whether he poses a safety risk on the waterways. The latter consideration is a much

⁷ Post-hearing *Amicus Curiae* letter requested by the court and submitted by Thomas O. Lind, Esq., General Counsel & Secretary to Canal Barge Company, Inc. is identified within the court's record as ALJ Ex. II.

⁸ The court issued an open invitation on the record for either party or amicus to address the primary issue of "whether a Respondent would be on notice of what conduct would cause him or her to have his license application rejected or his license application not renewed, based on a criminal conviction, based solely upon the reading of the Code of Federal Regulations. I am concerned whether the CFR is telling there what conduct would get him or her in trouble *vis à vis* the renewal of that license." (Tr. at 196-97).

higher standard and brings into sharp focus a mariner's history of sobriety and his judgment. On this count, Respondent fails. Despite his diabetes (a condition exacerbated by alcohol consumption), he knowingly consumed alcohol to the extent of extreme intoxication; operated a motor vehicle in that state; and engaged in a domestic dispute involving a firearm. All of these factors suggest poor judgment and strongly militate in favor of revocation.

CONCLUSION

After thorough review of the criteria set forth variously throughout the pertinent regulations and, in particular, Respondent's absent rehabilitative efforts, character and employment, and his judgment – I am left with the unalterable conclusion that he currently poses a significant threat to safety on the waterways.

Respondent's present lack of insight that alcohol plays a detrimental role in his life is a major determining factor to my conclusion. Likewise, his poor judgment in choosing to voluntarily intoxicate himself and then operate a motor vehicle before becoming entangled in an emotional, domestic dispute involving a gun, which resulted in a death, is determinative.

I am not impervious to the opinions of his supervisors, co-workers and even the leadership of his employing firm. Theirs was a compelling and heartfelt presentation. What is most haunting about this case, however, is not that Respondent has thus far avoided an alcohol-related incident on the waterways—it is the spectre of what may happen if he is allowed to continue as a licensed mariner.

Respondent has proven himself presently to be a danger to others and, indeed, himself, when he is under the influence of alcohol. I am not persuaded that he drinks

only when ashore and off duty. The very level of alcohol in his system on the night of his wife's death belies a claim of general sobriety. How a person, such as Respondent, who has a life-long affinity for alcohol, could successfully operate a motor vehicle with a blood alcohol level in probable excess of .18 defies reason and suggests a more serious alcohol affliction than was admitted.

Accordingly, Respondent's character and habits of life are such that he cannot be trusted with the duties and responsibilities of a license. 46 C.F.R. §10.201(h)(1).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. §7703 (2); 46 C.F.R. Parts 5 and 10; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§551-59.
2. At all relevant times mentioned herein and specifically on April 16, 2006, Respondent, Johnny Oce Conner, was the holder of Coast Guard Issued License.
3. Respondent was convicted on or about March 24, 2008, in the Criminal/Circuit Court of Hardin County, Tennessee, on a Felony charge of Manslaughter.
4. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent was convicted of an alcohol-related manslaughter by an appropriate criminal court.
5. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent was convicted of an offense that could prevent the issuance or renewal of a license or merchant mariner's document under 46 U.S.C. §7703(2).
6. Respondent **DID NOT PROVE** his suitability for maritime service.

REVOCATION

The nature of this administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959); 46 U.S.C. §7701. These proceedings are remedial, not penal in nature, and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 C.F.R. §5.5. The facts adduced in these proceedings reveal that Respondent was convicted of an alcohol-related manslaughter, that he has abused alcohol and that he likely poses a significant threat to the maritime environment. His Coast Guard-issued license is hereby **REVOKED**.

However,

*And earthly power doth then show likest...When mercy
seasons justice!
I have spoke thus much to mitigate the justice of thy plea;
Which if thou follow, this strict court...
Must needs give sentence 'gainst the merchant there.
William Shakespeare, *The Merchant of Venice*, Act IV Scene 1.*

The law, here, is not without mercy. Under the provisions of 33 C.F.R. §20.904 an Administrative Law Judge may, for good cause shown, reopen a record of a proceeding and take additional evidence. Specifically, §20.904(e)(1)(i) provides that a respondent, such as Captain Connor, may file a petition with the court to rescind any order of revocation of a mariner’s license if the order rests on a conviction of an offense that would prevent the issuance or renewal of a document.

If, at some future date, Respondent were to recognize the role alcohol plays in his personal and professional life and if he were to avail himself to the many resources (such as Al Anon, or other appropriate medical/psychological agencies) and if he were to

demonstrate, objectively, a significant course change – then he might successfully avail himself to the provisions of 33 C.F.R. §20.904 and return to the maritime service.

Certainly Respondent has the clear support of his employer and his co-workers – all he need do is take positive, meaningful, lasting and verifiable steps on his own behalf.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT Respondent’s Coast Guard-issued license is REVOKED.

IT IS FURTHER ORDERED THAT Johnny Oce Conner, is to tender any other valid Merchant Mariner’s Documents, Merchant Mariner’s Licenses, and all other credential issued by the Coast Guard in his possession immediately to the nearest Coast Guard Marine Safety Office or mail those credentials to the following office: United States Coast Guard, Sector Lower Mississippi, Investigations Department, 2 Auction Avenue, Memphis, Tennessee 38105-1502.

IT IS FURTHER ORDERED THAT Johnny Oce Conner is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner’s Document or Merchant Mariner’s License issued by the U.S. Coast Guard.

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 C.F.R. §§ 20.1001 – 20.1004. (**Attachment B**).

Done and dated this 29th day of May, 2009,
New Orleans, Louisiana

BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. *Previously submitted with Motion for Summary Decision*
2. *Previously submitted with Motion for Summary Decision*
3. Military record of Respondent
4. Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document signed by Respondent 10/25/2006
5. Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document signed by Respondent 02/28/2002
6. Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document signed by Respondent 09/30/1997
7. Application for License as an Officer, Operator, or Staff Officer submitted 11/11/1992
8. Application for License as an Officer, Operator, or Staff Officer submitted 11/16/1987
9. License and Renewal Application, Received 06/06/1983
10. GS General Inquiry, 03/20/2009

RESPONDENT EXHIBITS

- A. Order Allowing Travel Out of State, Circuit Court of Hardin County, Tennessee, Docket No. 8558
- B. Letters of Recommendation:
 1. Captain Keith Smith, Canal Barge Company, Inc.
 2. Tankerman Anthony Huskey, Canal Barge Company, Inc.
 3. Captin Simpson Kemp, Canal Barge Company, Inc.
 4. Captain Katherine A. Chaplin, Canal Barge Company, Inc.
 5. Joseph A. Clark, Canal Barge Company, Inc.
 6. Steersman Kenway Hurst
 7. Jamie Axthelm
 8. Captain Roy McManus, Canal Barge Company, Inc.
 9. Chief Engineer Vance Lipe, Canal Barge Company, Inc.

10. Captain Roy Ellison Bendy

- C. Affidavit of Joseph M. Tyson, Vice President—Operations and Technical Services of Canal Barge Company, Inc.
- D. Letter of Recommendation from Steve Golding, President Golding Barge Lines, Inc.
- E. Letter of Recommendation from Captain Bert Daville, Canal Barge Company, Inc.
- F. Transcript of Respondent’s Sentencing Hearing held March 24, 2008

ALJ EXHIBITS

- I. Department of the Army: Special Court-Martial Order Number 18, 09/19/1966
- II. Amicus Curiae Submission by Thomas O. Lind, Esq., General Counsel & Secretary of Canal Barge Company, Inc.

WITNESS LIST

- 1. Jeff Nichols, State of Tennessee Board of Probation and Parole⁹
- 2. Captain Paul Barnes, Canal Barge Company, Inc.
- 3. Captain Daryl Wheeler, Canal Barge Company, Inc.
- 4. Captain John Patrick Riley, Canal Barge Company, Inc.¹⁰
- 5. Johnny Oce Conner
- 6. James Crouse, Chief Safety & Suitability Branch, National Maritime Center¹¹

⁹ Testimony proffered via telephone conference call

¹⁰ Offer of Proof

¹¹ Testimony proffered via telephone conference call