

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

UNITED STATES COAST GUARD,

Complainant,

vs.

JOHNNY OCE CONNOR,

Respondent.

Docket No: 08-0326
CG Enforcement Activity No: 3282231

ORDER HOLDING RESPONDENT'S MOTION IN ABEYANCE

Date Issued: March 25, 2010

Issued by: HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

Appearances:

For Complainant:

LCDR Melissa J. Harper
U.S. COAST GUARD DISTRICT EIGHT LEGAL

MSSD4 Jo N. Wildman, IO
U.S. COAST GUARD SECTOR LOWER MISSISSIPPI RIVER

For Respondent:

Stacy Seicshnaydre, Esq.
M. Lucia Blacksher, Esq.
Joseph H. Escandon Esq.
William Gamble, Student Attorney
Daniel Myer, Student Attorney
Zachary Weisberg, Student Attorney
TULANE CIVIL LITIGATION CLINIC

I. PRELIMINARY STATEMENT

The above-captioned matter ultimately arises out of Respondent Johnny Oce Connor's (Respondent) March 24, 2008, conviction for felony manslaughter in the Criminal/Circuit Court of Hardin County, Tennessee. As a result of Respondent's conviction, the United States Coast Guard Sector Lower Mississippi (Coast Guard) initiated an administrative action seeking revocation of Respondent's Coast Guard-issued Merchant Mariner's License (MML) pursuant to the legal authority codified at 46 U.S.C. §7703 and the underlying regulations set forth in 46 C.F.R. Part 5.

On April 16, 2009, partial summary decision was granted in favor of the Coast Guard insofar as the conviction of voluntary manslaughter was concerned.¹ 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). On May 29, 2009, this court issued a Decision and Order finding, *inter alia*, that Respondent had been convicted of an alcohol-related manslaughter by an appropriate criminal court in the State of Tennessee. The court further found that the offense was one that **could** have prevented the issuance or renewal of a license or merchant mariner's document under 46 U.S.C. §7703(2), although the court's Decision and Order did not specifically address whether such conviction would have prevented the issuance or renewal. Finally, the court found that Respondent failed, at that time, to prove his suitability for maritime service. Respondent's Coast Guard-issued mariner's license was thereupon revoked.

¹Additionally, the April 16, 2009, partial Summary Decision held that, for the purposes of this case, voluntary manslaughter was to be interpreted as an "intentional homicide." Further, it should be noted that the instant litigation is a licensure action; not a re-visitation of the Respondent's prosecution for voluntary manslaughter. The criminal aspect of Respondent's actions were resolved by a court of competent jurisdiction. It is not for this court to supplant his wisdom for that of the Tennessee trial judge.

On January 8, 2010, the court granted Respondent's Motion to Reopen Revocation Proceeding under 33 C.F.R. §20.904(f). Respondent was directed to return to this court and show good cause why the Decision and Order of May 29, 2009, revoking his Coast Guard-issued credential is no longer valid and establish proof to why the revocation order must be modified, rescinded, or revoked.²

On February 23, 2010, the above-captioned matter came on for hearing at the U.S. Coast Guard Administrative Law Judge Courtroom, located in the Hale Boggs Federal Building, in New Orleans, Louisiana. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and the Coast Guard procedural regulations as set forth at 33 C.F.R. Part 20. LCDR Melissa J. Harper, District Eight Legal, and MSSD4 Jo N. Wildman, Sector Lower Mississippi, appeared on behalf of the Coast Guard. Respondent was present in court and represented by Stacy Seicshnaydre, Esq.; M. Lucia Blacksher, Esq.; Joseph H. Escandon, Esq.; William Gamble, Student Attorney; Daniel Myer, Student Attorney; and Zachary Weisberg, Student Attorney; all of the Tulane Civil Litigation Clinic.

Both parties appeared, presented their respective positions and rested. Nine witnesses testified as part of Respondent's case-in-chief and offered three exhibits into evidence, all of which were admitted. The Coast Guard called no witnesses and offered one exhibit into evidence, which was admitted.³ The court took judicial notice of Respondent's conditions of probation. 33 C.F.R. §20.806. At the conclusion of the

² The court noted with particularity that the granting of Respondent's Motion did not return Respondent's Coast Guard-issued credential to him. The court advised the parties that the grant of the instant Motion does not forecast or foretell the court's ruling at the hearing re-opening this matter.

³ Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

proceeding, the parties were permitted to present their respective closing arguments and invited to submit written briefs. Both parties timely submitted their respective post-hearing written briefs.

II. SUMMARY OF DECISION

The sole issue for adjudication herein is whether Respondent has satisfied the dictates of 33 C.F.R. §20.904(f) and the May 29, 2009, Decision and Order sufficient to establish that he is fit to return to the maritime service. After a thorough and careful analysis of the applicable law, the documentary evidence and testimony of witnesses at the motion hearing, as well as the entire record taken as a whole, Respondent's pending Motion is hereby **HELD IN ABEYANCE** as described more fully, infra.

III. DISCUSSION

A. General

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. Pursuant to 46 C.F.R. §5.19, Administrative Law Judges (ALJs) possess the authority to conduct hearings, as well as the power to suspend or revoke a license or certificate, for violations arising under 46 U.S.C. §§7703 and/or 7704. Moreover, ALJs are vested with the power to reopen the record of a proceeding, take additional evidence and modify or rescind any order suspending or revoking a Coast Guard-issued credential. 33 C.F.R. §20.904.

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 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 2639 (HAUCK) (2003).

B. Jurisdiction

This court is vested with jurisdiction over the instant matter pursuant to 5 U.S.C. §556(b)(3) and may reopen the revocation proceeding of Respondent's license subject to the provisions of 33 C.F.R. §20.904.

C. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before ALJs. 46 U.S.C. §7702(a). Pursuant to Coast Guard Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings, the movant bears the burden of proving that the requested relief is supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(b). Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). “[T]he term ‘substantial evidence’ is synonymous with ‘preponderance-of-the-evidence’ as defined by the 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) (quoting In re Winship, 397 U.S. 358, 371-72 (1970)) (Harlan, J., concurring) (brackets in original). Therefore, Respondent must prove by credible, reliable, probative, and substantial evidence that he is fit to return to maritime service.

D. Compatibility with Good Discipline & Safety at Sea: 33C.F.R. §20.904(f)

On December 29, 2009, the court granted Respondent's Motion to Reopen Revocation Proceeding under 33 C.F.R. §20.904(f). As articulated in the January 8, 2010, order, Respondent was directed to appear before the court and show cause whether the dictates of 33 C.F.R. §20.904(f) and the May 29, 2009, Decision and Order were observed such that he is fit to return to maritime service.

Subsection (f) requires a clear showing "why the basis for the order of revocation is no longer valid and how the issuance of a new merchant mariner credential . . . is compatible with the requirement of good discipline and safety at sea." 33 C.F.R. §20.904(f)(1). In the May 29, 2009, Decision and Order, this court set forth a tripartite framework suggesting how Respondent "might successfully avail himself to the provisions of 33 C.F.R. §20.904 and return to the maritime service."

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. (emphasis in original).

Respondent's presentation at the February 23, 2010, hearing closely adhered to the proposed framework, and is discussed, infra. The Coast Guard's rebuttal presentation was deficient, and is discussed, infra.

1. Recognition of Addiction

By his own admission, Respondent, who is almost seventy years old, started drinking at age fifteen. (Tr. at 249). In direct contravention of his previous assertions that he is not an alcoholic, Respondent now readily admits his alcoholism. (See generally,

Respondent's testimony Tr. at 216-254). Respondent further testified, and the court is convinced, that Respondent comprehends the high level of commitment required to maintain sobriety in both his professional and personal life. (Id.).

2. Utilization of Addiction Recovery Resources

Respondent is acutely aware that "the recovery will be . . . a whole lifetime . . . [as there is] never no recovery for a[n] alcoholic." (Tr. at 232-233). Following the revocation of his license nearly one year ago, Respondent now makes use of, and benefits from, a variety of available recovery resources. By voluntarily participating in the Employee's Assistance Program (EAP), Respondent has been evaluated by a clinical psychiatrist and is receiving counseling from a Licensed Clinical Social Worker (LCSW).

In addition to seeking EAP-funded treatments, Respondent testified he has become a regular, if not daily, attendee at Alcoholics' Anonymous (AA) meetings since June 17, 2009. (Tr. at 227). Through his regular attendance at AA meetings, it appears to the court that Respondent has begun to establish a social network upon which he can rely to provide a sober environment. Respondent's regular attendance was confirmed by the telephonic testimony of Don Hall, a fellow AA attendee. (Tr. at 28-43; Resp. Ex. B, C).

Although Respondent has not yet obtained an AA "sponsor," Respondent's testimony reflects that he has put a great deal of thought and consideration into the important role a sponsor will play in his life. Respondent did testify he has made plans to ask a fellow member of his AA group who has twenty-four years of sobriety. (Tr. at 231-233).

Despite the Coast Guard's protestations, the fact that Respondent has not attended or completed an accredited alcohol abuse program is not indicative of Respondent's

commitment to sobriety. This is supported by testimony Respondent's EAP-funded psychotherapist, Tony McAnally, LCSW, (McAnally) wherein he testified that Respondent was not referred an accredited program as "he hadn't been drinking for quite a while before he came to see me" and "[a]s long as he can maintain his sobriety" there is no need to refer Respondent to such a program. (Tr. at 120-121).

3. Demonstration of Significant Course Change

Since the revocation of his license, Respondent has embarked upon a significant change of course in his life. Respondent now admits he is an alcoholic and recognizes that alcoholism is a disease that requires a great deal of diligence to maintain sobriety. Respondent sought, and continues to seek, recovery resources available to him by virtue of his EAP. Respondent has become an active member of an AA group and has formed a supportive social network as a result.

Testimony by nearly all of the witnesses' reveals a virtual consensus that Respondent's mental condition has improved over the last several months. Respondent's psychotherapist testified that at their initial meeting, Respondent displayed a tearful and depressed affect and was distraught over the death of his wife and the revocation of his license. (Tr. at 106-107). At the time of the hearing, Respondent had met with McAnally approximately seven times. McAnally testified he has "see[n] a big improvement on the third session and it's continued until the last session." (Tr. at 107). McAnally described Respondent's new attitude as "energetic" and "very compliant." (Tr. at 108). Don Hall, a member of Respondent's AA group, testified that since attending the meetings "[Respondent's] conversation has been more positive and . . . [believes] he's on a good track personally." (Tr. at 35). Captain Kenway Hurst (Hurst), a fellow Canal Barge

Company employee, testified telephonically that he has a “pretty close-knit relationship” with Respondent and speaks via telephone with Respondent “seven, eight times a month, at least.” (Tr. at 201; 202). Hurst testified that before Respondent began attending AA meetings that “he was real . . . down and out.” (Tr. at 203). Hurst further testified that once Respondent began attending AA meetings that “his character, his persona took a dramatic change for the good.” (Id.). Similarly, Captain Paul Barnes (Barnes), Port Captain for Canal Barge Company, testified that he too has observed “quite a dramatic change in [Respondent],” since attending AA meetings. (Tr. at 60).

Additionally, as noted during the course of the hearing by the court, Respondent’s physical condition has undergone a dramatic change in recent months. Respondent’s marked change in appearance is definite proof of positive changes he has made thus far. (Tr. at 253).

E. Statutory Authority for Proceedings

The Coast Guard initiated these administrative proceedings against Respondent’s Merchant Mariner’s License under the statutory authority of 46 U.S.C. §7703(2). A review of 46 U.S.C. §7703(2), is therefore appropriate and provides as follows, “A license. . . **may** be suspended or revoked if the holder--is convicted of an offense that would prevent the issuance or renewal of [same].” Notably, 46 U.S.C. §7703(2) does not mandate suspension or revocation; the clear language of the statute says that suspension or revocation is a **permissible** sanction.

In operation, 46 U.S.C. §7703(2), essentially looks back in time to determine whether, given the fact of a conviction, the Coast Guard would have issued or renewed the mariner’s license under its pertinent regulations. That inquiry is fraught with

uncertainty, because resolution is completely contingent upon a subjective decision-making process for which there are no ascertainable, objective criteria.⁴ It is a process that allows for widely-divergent results depending upon the mental processes and personalities of the particular Officer in Charge, Marine Inspections (OCMI) and the facts unique to each attendant case.

Alternatively stated, it is impossible that a mariner would be on notice whether his particular conviction would result in revocation, suspension or neither.

Eligibility requirements for issuance of a mariner's license are set forth at 46 C.F.R. §10.201. Specific guidance for evaluation of a mariner with a criminal background is provided at 10.201(h). An OCMI may, but is not necessarily required to, employ table 10.201(h) when evaluating mariner applicants who have a criminal background. 46 C.F.R. §10.201(h)(2). 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 the definition or purpose of an "assessment period" or what utility that "assessment period" serves to either an OCMI or a presiding ALJ.⁵

However, that omission is moot in the instant matter because §10.201(h)(2) specifically provides that: "The assessment period commences when an applicant is no

⁴At hearing, the practical operation of the interplay between 46 U.S.C. §7703(2) and 46 C.F.R. §10.201 would call upon the Coast Guard to produce testimony from an OCMI to speculate whether a given respondent would or would not suffer revocation or suspension, based upon an entirely speculative set of circumstances.

⁵ In practice, an OCMI might resort to the ubiquitous Marine Safety Manual for further definition and guidance regarding the decision-making criteria. However, that document constitutes neither regulatory nor statutory law. It appears that the OCMI's decision-making process is entirely subjective; determined on a case-by-case basis. Hence, it cannot be said that 46 C.F.R. §10.201 provides adequate, advance legal notice to a mariner of that conduct which would result in the loss of his license per 46 U.S.C. §7703(2).

longer incarcerated.” Here, Respondent’s sentence, entered March 24, 2008, orders Respondent shall:

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

Thusly, Respondent’s “assessment period” cannot commence until he completes his week-long incarceration period 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).⁶ Respondent met that burden at the February 24, 2010, hearing, as discussed supra, when he presented the testimony of Don Hall, a member of Respondent’s AA group who testified as to Respondent’s regular attendance; the testimony of Andrew Bradford, Respondent’s probation and parole officer, who testified Respondent’s compliance with the conditions of his sentence; and the testimonies of Captain Paul Barnes, Captain Mark Businelle, Sr., Captain Burt D. Daville, Captain Daryl Wheeler, and Captain Kenway Hurst, all of who testified as to attest to the applicant’s sobriety, reliability, and suitability for maritime service. Moreover, in what can only be characterized as an “extraordinary” show of support from his employer, Canal Barge Company, Respondent’s value to not only the company, but the maritime industry was clearly and indisputably established.

Specifically, the testimony Paul Barnes, Canal Barge Company’s Port Captain was

⁶ The non-exclusive list of factors set forth in 46 C.F.R. §10.201(j) 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.

compelling in that when the court specifically confronted the witness about the potential risk Respondent might pose, not only to his employer, but to the safety of human lives, property and the environment, Captain Barnes stands ready to assign Respondent to a vessel as a pilot should his license be returned. (Tr. at 94). Captains Businelle, Daville and Wheeler all testified they would readily have Respondent on their respective tows as their pilot. (Tr. at 131; 150; and 164). Additionally, Captain Daville's description of Respondent as a "legend" on the river is a point well taken by this court.

IV. MISCELLANY

Respondent's Motion in Limine to exclude the expert testimony of James Crouse of the National Maritime Center is **MOOT** as the Coast Guard did not call the witness at the hearing of this matter.

Respondent's Motion in Limine to exclude Coast Guard's proposed Exhibit 2 is **MOOT** as the Coast Guard did not attempt to enter such exhibit into evidence at the hearing of this matter.

References made during the course of this hearing to improper crewing of Canal Barge Company vessels are not proper for adjudication in this matter.

V. CONCLUSION

The court is concerned with the Coast Guard's obvious misapprehension of the issue for adjudication. Alternatively stated, by its post-hearing submission, the Coast Guard evinces that it simply did not understand the fundamental grounds for this hearing. It is abundantly clear to this court that the Coast Guard continues to be distracted by the acts underlying the Tennessee criminal conviction. The only issues before this court are safety and Respondent's suitability for return maritime service. The Coast Guard failed

to produce any substantive evidence or testimony sufficient to rebut the proof adduced by Respondent that he is fit to return to maritime service.

Based upon the foregoing, uncontroverted testimony, the court is satisfied that Respondent is complying with the terms of the May 29, 2009 Decision and Order, in that he is demonstrating an understanding of the destructive role alcohol has played in his personal and professional life. Moreover, the court is satisfied that he is availing himself to appropriate medical and support agencies to assist in his rehabilitation.

However, the court is concerned whether enough time has passed for Respondent to fully demonstrate that he has selected a significant course change in his life. Respondent testified he has “done about a 90-degree turn” in his life’s course change. (Tr. at 240). The court is seeking 180-degree turn. Thus, because Respondent’s course change is still underway, the court shall hold Respondent’s Motion in abeyance until July 1, 2010, pending the following actions from all concerned parties:

1. Respondent will continue active participation in AA by attending at least three (3) meetings per week, work or health permitting until July 1, 2010.
2. Respondent will continue to abide by all dictates of his March 24, 2008, sentence, particularly, abstaining from any and all use of alcohol.
3. Respondent will attend the five currently-authorized therapy sessions with an appropriate therapist provided by Canal Barge Company’s EAP from the date of this Order until July 1, 2010.
4. Respondent will continue to faithfully serve his employer, Canal Barge Company, observing all lawful and pertinent company rules.
5. Canal Barge Company will maintain Respondent as an employee so long as he comports himself with all lawful and pertinent company rules.

6. The Coast Guard, working in partnership⁷ with Canal Barge Company under the remedial aegis of 46 C.F.R. §5.5, will ensure Respondent is subject to no fewer than six no-notice (without advance notice) drug and/or alcohol tests from the date of this Order until July 1, 2010.

If, after July 1, 2010, Respondent presents himself to the court with verifiable proof that he has complied with the conditions set forth above, then the court will be disposed to more favorably consider and resolve his Motion.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED, that Respondent's Motion to Rescind is hereby held in abeyance until after July 1, 2010.

IT IS FURTHER ORDERED, that all parties herein shall comport with the conditions set forth, supra.

IT IS FURTHER ORDERED, that Respondent shall appear before this court on Thursday, July 1, 2010, at 10:00 a.m. (CST) with verifiable proof that he has complied with the conditions set forth supra.

Done and dated this the 25th day of March, 2010,
at New Orleans, Louisiana.



**HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD**

⁷ See <http://www.uscg.mil/hq/cg5/cg5211/Partner.asp> "To strengthen the communication and working relationship between the Coast Guard...and the barge and towing industry."

ATTACHMENT A – EXHIBIT & WITNESS LIST

RESPONDENT’S EXHIBITS –

- A: Correspondence to the court from Interface EAP, with postmarked envelope dated July 22, 2009, 3 pages
- B: Respondent’s records of attendance at Alcoholics Anonymous, 17 pages
- C: Respondent’s records of attendance at Alcoholics Anonymous, 1 page

RESPONDENT’S WITNESSES

- 1. Don Hall⁸
- 2. Captain Paul Barnes
- 3. Tony McAnally, LCSW⁹
- 4. Captain Mark Businelle, Sr.
- 5. Captain Burt D. Daville
- 6. Captain Daryl Wheeler
- 7. Andrew Bradford¹⁰
- 8. Captain Kenway Hurst¹¹
- 9. Johnny Connor

COAST GUARD’S EXHIBITS

- 1. Canal Barge Company records reflecting Respondent’s vessel assignments, 5 pages

COAST GUARD’S WITNESSES

None

JUDICIALLY NOTICED

Terms and conditions of Respondent’s Probation

⁸ Testimony offered telephonically.

⁹ Testimony offered telephonically.

¹⁰ Testimony offered telephonically.

¹¹ Testimony offered telephonically.