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

Date Issued: August 3, 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 E. Seicshnaydre, Esq.
M. Lucia Blacksher, Esq.
James Flinn, Student Attorney
Michael Hartnett, Student Attorney
TULANE CIVIL LITIGATION CLINIC

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I. PRELIMINARY STATEMENT

On July 1, 2010, the court convened an evidentiary hearing in the above-captioned matter for purposes of gathering additional facts, testimony and evidence relating to Respondent Johnny Oce Connor's (Respondent) safety and suitability for maritime service. The hearing was held at the U.S. Coast Guard Administrative Law Judge Courtroom in the Hale Boggs Federal Building, New Orleans, Louisiana, and conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-559, and the United States Coast Guard (Coast Guard) Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard as set forth at 33 C.F.R. Part 20. LCDR Melissa J. Harper, District Eight Legal, and MSSD4 Jo N. Wildman appeared on behalf of the Coast Guard. Respondent was present in court and represented by Stacy E. Seicshnaydre, Esq.; James Flinn, Student Attorney; and Michael Hartnett, Student Attorney; all of the Tulane Civil Litigation Clinic.

Both parties appeared, presented their respective positions and rested. Eight witnesses, in addition to Respondent, testified as to Respondent's character, sobriety and suitability for maritime service. Respondent offered two exhibits into evidence, both of which were admitted. The Coast Guard called no witnesses and offered no exhibits into evidence. At the conclusion of testimony, the court permitted the parties to present their respective closing arguments and the administrative record was thereupon closed.

II. HISTORY OF CASE

The instant matter has a lengthy and relatively complex history before the court, all of which is reviewed infra. The record reflects that this matter initially arouse out of Respondent's March 24, 2008, conviction by the State of Tennessee for manslaughter.

On July 30, 2008, the Coast Guard issued a Complaint under the statutory authority of 46 U.S.C. §7703(2) seeking the revocation of Respondent's license and alleging, inter alia, that Respondent was convicted of manslaughter by a Tennessee court. On August 15, 2008, Respondent timely filed an Answer wherein he admitted all jurisdictional and factual allegations of the Complaint and requested to be heard by the court. On August 26, 2008, the matter was assigned by the Chief Administrative Law Judge (CALJ) to the undersigned Administrative Law Judge (ALJ).

On August 28, 2008, the Coast Guard filed a Motion for Summary Decision seeking revocation in accordance with 33 C.F.R. §20.901. In its Motion for Summary Decision, the Coast Guard alleged there were no genuine issues of material fact and sought revocation of Respondent's license based upon 46 C.F.R. §5.61(a)(4). On September 9, 2008, the court denied the Coast Guard's Motion for Summary Decision as Respondent's manslaughter conviction did not necessarily fit within the ambit of 46 C.F.R. §5.61(a)(4), which related to conviction(s) for murder or attempted murder.

On February 2, 2009, the Coast Guard filed a Second Motion for Summary Decision again alleging that there were no genuine issues of material fact and that it was therefore entitled to a decision as a matter of law. Citing 46 C.F.R. §10.201, the Coast Guard requested the court construe Respondent's conviction for manslaughter as an "intentional homicide [conviction] for the purposes of revoking respondent's license

under 46 U.S.C. §7703(2)." (Second Motion for Summary Decision at 2). On March 13, 2009, Respondent filed a Memorandum in Opposition to the Coast Guard's Motion for Summary Decision alleging, inter alia, that the Coast Guard failed to meet the burden of proof required for summary decision; that 46 U.S.C. §7703 is remedial in nature; that 46 U.S.C. §7703(2) does not support revocation based upon a manslaughter conviction, or in the alternative, that 46 U.S.C. §7703(2) does not support revocation based upon a manslaughter conviction without an evaluation of Respondent's suitability for maritime service. Also on March 13, 2009, Respondent filed a cross Motion for Summary Decision along with a Memorandum in Support thereof (collectively referred to as Memorandum in Support of Respondent's Motion for Summary Decision) contending that "the Coast Guard cannot show that they are entitled to revocation under 46 U.S.C. §7703(2), by reference to 46 C.F.R. §5.61 nor 46 C.F.R. §10.201"and that Respondent was therefore entitled to summary decision as a matter of law. (Memorandum in Support of Respondent's Motion for Summary Decision at 7). On March 25, 2009, the Coast Guard filed an Affidavit Opposing Respondent's Motion for Summary Judgment[1] (Coast Guard's Affidavit in Opposition) wherein the Coast Guard acknowledged that 46 U.S.C. §7703 allows for a sanction of either suspension or revocation. (Coast Guard's Affidavit in Opposition at 1, fn 1). However, the Coast Guard continued its previous line of reasoning arguing that "because Respondent's conviction of manslaughter under Tennessee Code Annotated §39-13-211 fits squarely under 46 C.F.R. Table 10.201(h) as a conviction for the offense of intentional homicide, summary judgment for Respondent is clearly not appropriate. (Id. at 2-3). The Coast Guard went on to argue that "since there

[1] The court would note that Coast Guard Rules of Practice, Procedure, and Evidence for Form Administrative Proceedings do not provide for "Summary Judgment" but "Summary Decision."

is no disputing that Respondent was convicted of manslaughter, and because manslaughter is an offense that, under 46 U.S.C. §7703, would prevent the issuance or renewal of a license, summary judgment for Complainant is warranted." (Id. at 3).

On April 14, 2009, the court convened a hearing for purposes of entertaining the parties' respective pending motions for summary decision. Given that Respondent did not contest the Coast Guard's allegation regarding his conviction for manslaughter and that there were no disputed facts relative to Respondent's conviction; the court granted partial summary decision to the Coast Guard insofar as the manslaughter conviction was concerned. The court next held that "[f]or purposes of this Order, the undersigned regards voluntary manslaughter as an 'intentional homicide.'" (April 16, 2009, Order). The court then discussed the practical interplay between 46 U.S.C. §7703(2), 46 C.F.R. §10.201 and Respondent's conviction. The court found that "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." (April 16, 2009, Order). The court turned to 46 C.F.R. §10.201 and the table contained therein for guidance and observed that Table 10.201(h) listed an "assessment period" of seven to twenty years for a person convicted of intentional homicide. However, the court observed that the "assessment period" approach was flawed in two ways: that term was not defined and 10.201(h)(2) specifically provided that an assessment period could not begin until incarceration was complete. The court therefore found that any assessment period, as contemplated by 46 C.F.R. §10.201, could not commence until Respondent completed his final term of incarceration in April 2012. The court next noted an exculpatory provision to the assessment period requirement contained at 46 C.F.R.

§10.201(h)(4) which provided, 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)." (April 16, 2009, Order quoting 46 C.F.R. §10.201(h)(4)). Therefore, the court held that the applicable "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." (April 16, 2009, Order). Based upon the foregoing, the court found that a material issue of fact existed sufficient to deny the Coast Guard's Second Motion for Summary Decision as it related to revocation of Respondent's license given that Respondent was not afforded an opportunity to present factors in support of his suitability for maritime service. (April 16, 2009, Order).

On April 24, 2009, the court convened an evidentiary hearing for purposes of gathering facts and evidence relating to Respondent's suitability for maritime service. Therefore, the burden of persuasion was borne by Respondent to establish his suitability. During the course of that hearing, Respondent offered numerous testimonies, including his own, attesting to his sobriety, reliability and suitability for employment as a merchant mariner. The Coast Guard adduced the testimony of James Crouse, Chief, Safety and Suitability Branch at the National Maritime Center (NMC), to establish that Respondent's application for a license would be denied based upon his conviction for voluntary manslaughter. On May 29, 2009, the court issued an order revoking Respondent's license as Respondent did not prove his suitability for marine service as his "character

and habits of life [were] such that he could not be trusted with the duties and responsibilities of a licenses." (May 29, 2009, Order citing 46 C.F.R. §10.201(h)(1)).

On November 24, 2009, Respondent filed a Motion to Reopen Revocation Proceeding and Request for Status Conference together with a Memorandum in Support (collectively referred to as Motion to Reopen) thereof seeking to reopen this matter under 33 C.F.R. §20.904(f). On December 3, 2009, the Coast Guard filed a Motion of Objection to Respondent's Motion to Reopen Proceeding (Motion of Objection) alleging that, inter alia, the requirements of various subparagraphs of 33 C.F.R. §33.904 were not met and that appropriate forum for further dealings in this matter was under the provisions of administrative clemency as set forth at 46 C.F.R. §5.901. On December 17, 2009, Respondent filed a Reply to U.S. Coast Guard's Motion of Objection to Respondent's Motion to Reopen Revocation Proceeding and Request for Status Conference (Reply to Motion of Objection) addressing the Coast Guard's interpretation of 33 C.F.R. §20.904 and the appropriateness of the forum. On December 29, 2009, the court convened a telephonic hearing with the parties to entertain arguments relating to Respondent's Motion to Reopen, which the court granted. More specifically, the court found that Respondent's Motion to Reopen was within the ambit of 33 C.F.R. §20.904(f) and that Respondent must return to court and show good cause why the order of revocation must be modified, rescinded or revoked. (January 8, 2010 Order). Accordingly, Respondent's Motion to Reopen is more appropriately identified henceforth as a Motion to Rescind, Revise or Otherwise Modify the Order of Revocation issued May 29, 2009.

On February 23, 2010, the court convened an evidentiary hearing for the purposes of determining whether Respondent satisfied the dictates of 33 C.F.R. §20.904(f) and the May 29, 2009, Decision & Order sufficient to establish he is fit to return to maritime service. Although the court was satisfied that Respondent was complying with the terms of the May 29, 2009, Decision & Order, the court remained concerned whether sufficient time passed to fully demonstrate a significant change of course. Accordingly, the court held Respondent's Motion to Rescind in Abeyance until July 1, 2010. (March 25, 2010 Order).

On April 20, 2010, the Coast Guard filed a Motion of Objection and Request for Reconsideration (Second Motion of Objection). The Coast Guard's Second Motion of Objection contained numerous incorrect citations to regulations, as well as the record. Moreover, the purported "Prayer for Relief" contained only declaratory statements. On May 14, 2010, Respondent filed a Reply to U.S. Coast Guard's Motion of Objection and Request for Reconsideration (Reply to Second Motion of Objection). On May 17, 2010, the court convened a post-hearing conference for purposes of arguing the Coast Guard's Second Motion of Objection. The Coast Guard presented its arguments in a much more logical and cogent fashion than presented in its written Second Motion of Objection. Observing that it is the fundamental purpose of an ALJ to collect and determine all relevant facts as a precondition to issuing decisions and order, the court therefore held the Coast Guard's Second Motion of Objection in Abeyance pending the July 1, 2010, hearing. (May 21, 2010, Order).

On July 1, 2010, the parties appeared before the court to argue Respondent's suitability for maritime service, as well as present their respective arguments concerning

the Coast Guard's Second Motion of Objection.[2] LCDR Melissa J. Harper, District Eight Legal, and MSSD4 Jo N. Wildman, Sector Lower Mississippi River, appeared on behalf of the Coast Guard. Respondent was present before the court and was represented by Stacy E. Seicshnaydre, Esq.; James Flinn, Student Attorney; and Michael Hartnett, Student Attorney; all of the Tulane Civil Litigation Clinic. Respondent, bearing the burden of persuasion, offered the testimony of eight witnesses,[3] as well as his own, to attest to his sobriety, safety and suitability for maritime service. Respondent offered two exhibits, both of which were admitted into evidence.[4] The Coast Guard called no witnesses nor did it offer any items into evidence. The parties presented their respective closing arguments and rested. The hearing of this matter, as well as its administrative record, was thereupon closed. 33 C.F.R. §20.709.

III. SUMMARY OF DECISION

The primary issue for adjudication herein is whether Respondent has established his safety and suitability for maritime service.

However, the court must first resolve the following: the Coast Guard's Second Motion of Objection and Request for Reconsideration, which has been held in abeyance since May 21, 2010, and Respondent's Motion to Rescind, which has been held in abeyance since March 25, 2010.

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[2] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Volume numbers assigned to transcripts correspond to the hearing dates. Transcript Volume 1 refers to the April 14, 2009, hearing; Transcript Volume 2 refers to the April 27, 2009, hearing; Transcript Volume 3 refers to the February 23, 2010, hearing; Transcript Volume 4 refers to the May 17, 2010, hearing; and Transcript Volume 5 refers to the July 1, 2010, hearing. Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number and Transcript Volume (CG Ex. 1, Tr. Vol.; 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.).

[3] Respondent's Witness List is attached hereto as Attachment A.

[4] Respondent's Witness List is attached hereto as Attachment A.

The court must also examine whether Respondent has adhered to the tripartite framework set forth in its May 29, 2009 Order; and, although not fully dispositive, whether Respondent has abided by the six-part guidance contained within its March 25, 2010 Order.

The court has reviewed applicable jurisprudence; all pleadings and documents filed herein; and the transcripts of each hearing to reach a decision.

A. Coast Guard Motion of Objection

In response to the Coast Guard's pending Second Motion of Objection, the court responds thusly:

The Coast Guard's "Motion" is not truly a motion in the classic sense. Rather, it seems more a declaration of the Coast Guard's continuing objection to the court's ongoing inquiry regarding Respondent's suitability for sea service. However, the Coast Guard incorrectly asserts that the proper forum for Respondent to regain his license is by means of administrative clemency. The court's continuing jurisdiction of this matter, and Respondent's license, is discussed infra.

The Coast Guard's reliance upon 46 C.F.R. §10.211 is erroneous as discussed infra.

The Coast Guard erroneously relies upon 46 C.F.R. §10.107 definition of "safe and suitable person." Moreover, the Coast Guard's analysis of that term is flawed as discussed infra.

The Coast Guard's parsing and interpretation of 33 C.F.R. §20.904 is erroneous as discussed infra.

Because the Coast Guard's "Motion" seeks no particular relief, there is none to give or deny.

B. Respondent's Motion to Rescind

In response to Respondent's Pending Motion to Rescind, the court responds thusly:

While it is true that Respondent has adhered to both the May 29, 2009, tripartite framework and the March 25, 2010, six-part guidance, significant questions concerning Respondent's safety and suitability still remain. Given the totality of the facts adduced from his testimony and the testimony of his own witnesses, Respondent did not establish that he is presently suitable for safe maritime service. Hence, for the reasons cited infra, Respondent's Motion to Rescind, Revise or Otherwise Modify the court's May 29, 2009, Order of Revocation is **DENIED**.

IV. FINDINGS OF FACT

1. Prior to May 29, 2009, Respondent Johnny Oce Conner (Respondent) was the holder of a Coast Guard-issued Merchant Mariner's License (MML or license), which was renewed on or about April 12, 2007. (CG Ex. 4 at Tr. Vol. 3).

2. In the course of his maritime career, Respondent has applied for and received eight Coast Guard licenses (Tr. Vol. 3 at 96).

3. On May 29, 2010, the court revoked Respondent's license. (Decision & Order issued May 29, 2009).

4. Respondent currently holds a valid Transportation Worker Identification Credential (TWIC). (Tr. Vol. 3 at 134-35; Tr. Vol. 5 at 124, 137).

5. Respondent is seventy years old and suffers from diabetes and high blood pressure. (Tr. Vol. 3 at 61; Tr. Vol. 5 at 135; Resp. Ex. F at Tr. Vol. 3).

6. In 1967, Respondent began working on the river as a deckhand in the engine room. (Tr. Vol. 3 at 61).

7. In 1969, Respondent began working as a river pilot. (Tr. Vol. 3 at 62).

8. Respondent has been employed by Canal Barge Company, Inc. for approximately ten years. (Tr. Vol. 3 at 29; Tr. Vol. 5 at 83, 107).

9. Prior to the revocation of his license, Respondent served as a pilot aboard various Canal Barge Company vessels.

10. Prior to the revocation of his license, Respondent served as a pilot with Captain Daryl Wheeler aboard the M/V NED MERRICK for six years. (Tr. Vol. 3 at 48). During that period of time, Respondent was never disciplined by Captain Wheeler. (Tr. Vol. 3 at 47).

11. Following the revocation of his license, Respondent serves as an "observer" aboard various Canal Barge Company vessels. (Tr. Vol. 3 at 57-58, 128-129, 153-155, Tr. Vol. 5 at 82, 100).

12. As an observer, Respondent's working hours aboard the vessel are twelve hours on duty and twelve hours off-duty. (Tr. Vol. 5 at 93).

13. Respondent has worked as an observer to relatively inexperienced pilots, including Captain Pat Hood aboard the M/V ELIZABETH HUGER. (Tr. Vol. 5 at 86, 88).

14. The M/V ELIZABETH HUGER is a towboat that pushes barges along the Mississippi River, as well as the Intracoastal Waterway. (Tr. Vol. 5 at 92).

15. The M/V ELIZABETH HUGER is captained by both Captain James Markland Hardy and Captain Luther Cleveland Ward. (Tr. Vol. 5 at 83, 100). Neither Captain Hardy nor Captain Ward have disciplined Respondent for violation of company rules. (Tr. Vol. 5 at 85, 102).

16. Prior to the revocation of his license, Respondent was evaluated to be in the top 20% of Canal Barge Company, Inc.'s pilots. (Tr. Vol. 3 at 36).

17. During his time on the waterway as a pilot, Respondent had not had an accident. (Tr. Vol. 3 at 62).

18. During his time on the waterway as a pilot, Respondent was involved in one minor navigation issue wherein a rudder was bent. (Tr. Vol. 5 at 107).

19. During his time on the waterway as a pilot, Respondent had a good safety record. (Tr. Vol. 5 at 107).

20. Respondent has never been fired from a job. (Tr. Vol. 3 at 63).

21. Respondent consumed alcohol for most of his life. (Resp. Ex. F. at 31 at Tr. Vol. 3); As of July 1, 2010, Respondent testified he has been sober for approximately two years. (Tr. Vol. 5 at 132).

22. As of July 1, 2010, Respondent has participated in AA for approximately eleven months. (Tr. Vol. 5 at 132)

23. Respondent's previous drinking habits included consuming a half-case, or a full case, of beer on a weekend. (Resp. Ex. F at 31 at Tr. Vol. 3).

24. Respondent acknowledges himself to be an alcoholic. (Tr. Vol. 5 at 131-132).

25. Evidence adduced at Respondent's 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 at Tr. Vol. 2).

26. Prior to the hearing of April 27, 2009, Respondent had not attempted any rehabilitative programs or sought counseling with groups such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) (Tr. Vol. 2 at 121, 123-24).

27. Following the revocation of his Coast Guard-issued license, Respondent became a regular participant in an Alcoholics Anonymous (AA) group in the Memphis, Tennessee. (Resp. Ex. B, C at Tr. Vol. 3); (Resp. Ex. A at Tr. Vol. 4).

28. Following the revocation of his Coast Guard-issued license, Respondent, through Canal Barge Company's Employee Assistance Program (EAP), sought counseling from Tony McAnally, LCSW. (Tr. Vol. 3 at 219-224; Resp. Ex. A at Tr. Vol. 3; Tr. Vol. 5 at 39-44, 125-127).

29. Respondent had been married to Marilyn Conner for approximately eight years at the time of her death. (Tr. Vol. 2 at 110).

30. 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 at Tr. Vol. 3).

31. 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. Vol. 2 at 140-41; Resp. Ex. F at 25).

32. 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. (May 29, 2009 Order).

33. 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 at Tr. Vol. 2).

34. 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 at Tr. Vol. 2).

35. 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 at Tr. Vol. 2).

36. Respondent was also sentenced to four years supervision (Resp. Ex. F at 50 at Tr. Vol. 2).

37. 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. Vol. 2 at 15-16; 22).

38. Within the first ninety days of his supervision by Mr. Nichols, Respondent was tested for drug and alcohol use. Respondent tested negative. (Tr. Vol. 2).

39. Respondent must receive express authorization by the Tennessee court to travel out of state only for purposes of his employment. (Resp. Ex. A at Tr. Vol. 2).

40. Respondent must obtain permission from the Tennessee court to travel out of state for personal reasons. (Tr. Vol. 2 at 77).

41. Respondent's parole is now administered through Shelby County Probation Office due to a change in his residence. (Tr. Vol. 2 at 18).

42. Prior to February 23, 2010, Respondent met with Andrew Bradford, his probation officer in Shelby County every three months. (Tr. Vol. 2 at 74). Following the February 23, 2010, hearing, Respondent meets with Andrew Bradford approximately once a month. (Tr. Vol. 5 at 47).

43. Respondent must report April 15, 2011, for a week-long confinement period before he will have completed the incarceration portion of his sentence. (Resp. Ex. F at Tr. Vol. 2).

44. As of the July 1, 2010, hearing, Respondent had obtained an Alcoholics Anonymous sponsor George Payne. (Tr. Vol. 5 at 68).

45. The court adopts the testimony of George Payne, which establishes that: "It takes a little while [to make significant changes in life], but you know, we didn't get drunk overnight, we're not going to get sober overnight. . . . It takes a period of reconstruction of character-building in order to become better." (Tr. Vol. 5 at 70).

46. Under the tutelage of George Payne, Respondent has completed the first three steps of the Alcoholics Anonymous Twelve Step Program and is presently working through the fourth step. (Tr. Vol. 5 at 69, 133).

47. Respondent is not an "applicant" for the purposes of 46 C.F.R. Part 10.

V. DISCUSSION

A. RELEVANT AUTHORITY

1. 46 U.S.C. §7703

The Coast Guard initiated the instant administrative proceeding against Respondent's Merchant Mariner's License under the statutory authority of 46 U.S.C. §7703(2), which provides that "[a] license. . . **may** be suspended or revoked if the holder--is convicted of an offense that would prevent the issuance or renewal of [same]." (Id.) (emphasis added). (Clearly, an Administrative Law Judge is vested with the discretion to impose a sanction of either suspension or revocation, ab intio.)

The question for resolution, here, is not whether Respondent committed an offense which would have precluded the issuance of a license, but rather, once his license was revoked by the court, whether there same court may rescind, reverse or otherwise modify the original order of revocation. That question is answered in the affirmative.

In furtherance of 46 U.S.C. §7703, the Coast Guard promulgated 33 C.F.R. Part 20 and 46 C.F.R. Part 10 to implement and effectuate the statute's purpose. The text of 46 U.S.C. §7703 has remained unchanged since 1996. Likewise, no substantive changes have been made to 33 C.F.R. Part 20 that have any bearing on the instant proceedings. The regulatory authority at 46 C.F.R. Part 10, however, saw significant changes in mid-April 2009, as discussed infra.

Because the Coast Guard relies upon 46 C.F.R. Part 10, a discussion of the applicability of those regulations is timely.

2. Publication of 46 C.F.R. Part 10 Amendments

It must be recognized that the purpose of 46 C.F.R. Part 10 is to determine and verify "the qualifications an applicant must possess" to be eligible for service on merchant vessels. 46 C.F.R. §10.101. Part 10 presumes a new or renewal application for a mariner's credential or license. Part 10 governs "applicants," it does not govern persons subject to the jurisdiction of this court. Nevertheless, on May 22, 2006, the Coast Guard announced a proposed rule, via publication in the Federal Register,[5] that Coast Guard-issued Merchant Mariner Documents, Licenses and Endorsements would be merged into a single document to be known as the Merchant Mariner Credential (MMC).

[5] "The Administrative Procedure Act, as amended by the Freedom of Information Act, requires that certain documents be published in the Federal Register. These include substantive rules and interpretations of general applicability, statements of general policy, rules of practice and procedure, descriptions of agency forms, rules of organization, descriptions of an agency's central and field organization, and amendments or revisions to the foregoing." A Research Guide to the Federal Register and the Code of Federal Regulations, McKinney, Richard J. (Nov. 2006) (citing 5 U.S.C. §552(a)(1)).

(71 Fed. Reg. 29462-01 May 22, 2006).[6] The proposed rule specified that it was limited to "chang[ing] only the application procedures and form in which the qualifications are presented." (Id.). The proposed rule further explained that "[t]o reflect the proposed creation of the MMC, many nomenclature changes were made throughout titles 33 and 46 CFR." (Id.). The bulk "of the proposed substantive changes were made in Part 10." (72 Fed. Reg. 3605-01 Jan. 25, 2007). However, as clarified by a supplemental notice, "[t]he purpose of this rulemaking is to consolidate the merchant mariner qualification credentials. It is not intended to completely revise 46 CFR Subchapter B." (Id.).

On April 15, 2009, a new 46 C.F.R. Part 10 became effective.[7]

3. Import of Amendments to Part 10 vis à vis the Instant Matter

It is important to note that the proposed rules advised that the rulemaking was "not intended to alter the safety and suitability assessment requirements . . . [but] is intended only to make those changes necessary to consolidate the credentials, and streamline the application process." (72 Fed. Reg. 3605-01 Jan. 25, 2007) (emphasis added).

The Coast Guard strenuously argues that this court has erred in applying the predecessor version of 46 C.F.R. §10.201 to the instant matter instead of the April 15, 2009, version found at 46 C.F.R. §10.211. Such a position, however, flies in the face of the purpose of Part 10 and/or of a stated preference against retroactivity of regulations.

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[6] Coast Guard's Notice of Proposed Rulemaking (NPRM) entitled "Consolidation of Merchant Mariner Qualification Credentials"

[7] Additionally, in support of the consolidated credential, the Notice of Proposed Rulemaking (NPRM) proposed a reorganization of the regulations. More specifically, the NPRM called for those regulations previously contained in 46 CFR Part 10 be moved in their entirety to create a new part 11. A new Part 10 would then be created, which would include only the application procedures and information pertinent to the MMC that applies to all mariners."[7] (71 Fed. Reg. 29462-01 May 22, 2006). On March 16, 2009, the Federal Register subsequently published the Coast Guard's Final Rule consolidating the regulations covering issuance of merchant mariner qualification credentials. (74 Fed. Reg. 11196-01 Mar. 16, 2009).

Respondent herein was charged by the Coast Guard on July 30, 2008. The version of 46 C.F.R. §10.201 extant on that date controls. It must also be recognized that 46 C.F.R. §10.201 was used as a framework for the initial determination to revoke Respondent's license.

Pursuant to 46 C.F.R. §5.65, "[t]he decisions of the Commandant in cases of appeal . . . are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority." (Id.). A review of the Commandant's Decisions on Appeal (CDOA) reveals that the Commandant has addressed the issue of retroactivity in Appeal Decision No. 2646 (McDonald) (2003). The McDonald decision was "based on the regulations that were in effect at the time of the [event at issue] . . . , July 31, 2000. Subsequent to the events giving rise to this case, the regulations in question (49 C.F.R. Part 40) were modified in January 2001." The Commandant, reviewing the regulations, observed that there was no "affirmative language to indicate that the regulations were intended to be retroactive. In fact, . . . where the regulations were changed, it was apparent that the [agency] specifically intended that the new regulations be prospective." In addition to a review of the regulations at issue, the Commandant adopted the presumption against retroactivity as articulated by the Supreme Court in Bowen v. Secretary of Health & Human Services, 488 U.S. 204, 208 (1988). "There is a strong presumption against retroactive application of laws and regulations, and a strong presumption in favor of prospective application. . . . Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." (Id.).

Clearly, this court must apply the analysis and rule of the McDonald decision to the instant matter. This court's decision was based upon the regulations that were in effect at the time Respondent was charged on July 30, 2008.[8] Title 46 C.F.R. Part 10, was modified, effective April 15, 2009. The hearing of this matter to determine Respondent's safety and suitability for maritime service was held on April 24, 2009, and the court revoked Respondent's license on May 29, 2009. The court held subsequent hearings as discussed supra. The Coast Guard incorrectly maintains that this court should have applied the April 15, 2009, regulations, an argument that is in direct contravention of McDonald.

The court's review of the three Federal Register publications, as well as the April 15, 2009, version of 46 C.F.R. Part 10 reveals that the regulations contained therein were not intended to be retroactive. There is no language anywhere that this court can locate in the April 15, 2009, version of 46 C.F.R. Part 10 that would indicate that the Department of Homeland Security, Coast Guard, intended retroactive application. Therefore, in accordance with McDonald, this court shall continue to apply the regulations as they existed on July 30, 2008, when Respondent was charged, here, by the Coast Guard. It must be reiterated that 46 C.F.R. Part 10 governs the suitability of applicants for maritime licenses or credentials. The regulatory framework clearly describes the process whereby a would-be applicant secures an appropriate credential.

As mentioned supra, a new Part 10 was created and those regulations previously contained within Part 10 were relocated to Part 11. The April 15, 2009, version of Title 46 Section 10.101, "Purposes of rules in this part" changed significantly from its

[8] The Coast Guard's case is predicated upon Respondent's March 2008, conviction for manslaughter by a Tennessee court.

predecessor, particularly with regard to an "applicant" as a "safe and suitable person." Previously, 46 C.F.R. §10.101 made no reference to the safety and suitability of a mariner. The April 15, 2009, version of 46 C.F.R. §10.101(d) provides that: "the regulations in this part provide: . . . [a] means of determining whether the holder of an MMC is a safe and suitable person." (Id.). Another aspect of the newly enacted Part 10 is the definition of terms. Previously, the definition of terms, as set forth at 46 C.F.R. §10.104, applied to the entirety of Part 10. However, the new definition of terms, now set forth at 46 C.F.R. §10.107, apply only to Subchapter B of Part 10.[9] Additionally, unlike the prior definition of terms, 46 C.F.R. §10.107 now defines a "safe and suitable person" as follows:

> [A] person whose prior record, including but not limited to criminal record and/or NDR record, provides no information indicating that his or her character and habits of life would support the belief that permitting such a person to serve under the MMC and/or endorsement sought would clearly be a threat to the safety of life or property, detrimental to good discipline, or adverse to the interests of the United States. **See 46 CFR 10.211 and 10.213 for the regulations associated with this definition.**

(Id.) (emphasis added).

Even though this definition applies only to an "applicant," and not a person situated as Respondent, herein, there is no guidance as to how a person's prior record or a person's character and habits of life are to be evaluated vis à vis his suitability for maritime service under a MMC. The court would note that the regulation appears to give the Coast Guard immense subjective discretion over who receives a credential.

Although not controlling, 46 C.F.R. §§10.211, as cited within the current

[9] As used in this subchapter, the following terms apply only to merchant marine personnel credentialing and the manning of vessels subject to the manning provisions in the navigation and shipping laws of the United States. 46 C.F.R. §10.107(b).

definition of "safe and suitable person," is of some utility and guidance to the present inquiry by the court.[10]

Of paramount importance to this discussion is that Section 10.211, entitled "Criminal Record Review" repeatedly refers to "applicants" and applications seeking an MMC, endorsements thereto and/or duplicate MMCs.[11] Although the term "applicant" is not defined within §10.107, the plain meaning of "applicant" can be easily be interpreted as "one who applies." Respondent herein is clearly not an "applicant" inasmuch as he is not applying to the Coast Guard for a new MMC. A complete review of this particular section reveals that despite a few changes in nomenclature and a renumbering of the subparagraphs therein, 46 C.F.R. §10.211(i) is nearly identical to that of its predecessor at 46 C.F.R. §10.201(h)(4). Both of these subparagraphs state that "[i]f a person with a criminal conviction applies before the minimum assessment period . . . has elapsed, then the applicant must provide . . . evidence of suitability for service in the merchant marine." 46 C.F.R. §10.211(i); 46 C.F.R. §10.201(h)(4) (emphasis added). Both of these subparagraphs then refer the reader to a list of non-exclusive factors that that are evidence of suitability; these factors are contained in a subsequent subparagraph. (Id.). The non-exclusive factors listed in 46 C.F.R. §10.211(l) mirror the non-exclusive factors previously set forth in 46 C.F.R. §10.201(j). Those factors are as follows:

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[10] Section 10.213, entitled "National Driver Register," is inapposite herein. As mentioned supra Respondent was not convicted of an offense under the National Driver Register Act. Additionally, like 46 C.F.R. §10.211, the text of 46 C.F.R. §10.213 is focused upon applicants and applications for an original or reissuance of an MMC. Again, Respondent is not an applicant nor has he submitted an application for an original issuance or reissuance of his license.

[11] Notably, the term "person" is used within 46 C.F.R. §10.211(f); however, that particular subparagraph focuses upon convictions relating to violating dangerous drug laws and offenses under the National Driver Register Act. 46 C.F.R. §10.211(f). Respondent's conviction at issue herein does not implicate either dangerous drug laws or offenses under the National Driver Register Act.

(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.

Problematically, and as the court acknowledged in the May 29, 2009, Decision and Order, the above-listed factors lack specific guidance or discussion of a nexus between a given criminal conviction and a respondent's suitability for sea service.

Moreover, whether the court applies 46 C.F.R. §10.211(i) and (l) or 46 C.F.R. §10.201(h)(4) and (j) does not alter the outcome. Both regulations clearly apply to "applicants." The "assessment period" referred to in both regulations is inapplicable as an "assessment period" relates to an applicant's incarceration period.[12] Again, since Respondent herein is not an "applicant," reference to or reliance upon "assessment periods" is of no value to a determination of a mariner's safety and suitability for maritime service. The regulations do not speak to those individuals who occupy the position of a respondent petitioning the court to rescind, modify, etc. a previous order. In this regard, Respondent's legal arguments are well taken. Thus, the court relied, and still relies, upon the non-exclusive list of factors for insight only.

[12] The court acknowledges Respondent's incarceration period is not yet complete and will not be complete until April 2012.

B. PURPOSE

Coast Guard suspension and revocation actions are administrative proceedings that 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. Pursuant to 46 C.F.R. §5.19, an ALJ is vested with the authority to conduct hearings and to suspend or revoke a credential, license, document or certificate for violations arising under 46 U.S.C. §§7703 and/or 7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the presiding ALJ. See Appeal Decision No. 2640 (PASSARO) (2003). Additionally, the presiding 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. Appeal Decision No. 2639 (HAUCK) (2003).

C. JURISDICTION

1. GENERALLY

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision No. 2620 (COX) (2001) quoting Appeal Decision No. 2025 (ARMSTRONG) (1975). Where an administrative forum acts without jurisdiction its orders are void. (Id.). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decision No. 2677 (WALKER) (2008) (internal citations omitted); Appeal Decision No. 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decision No. 2425 (BUTTNER) (1986).

At the time the Complaint herein was filed, Respondent was the holder of a Coast Guard issued Merchant Mariner's License. Respondent's status as the holder of a license, in and of itself, afforded the Coast Guard jurisdiction to institute a suspension and revocation proceeding against Respondent's license. Accordingly, this court possesses subject matter jurisdiction over the matter under 46 U.S.C. §§7703 and 7704, as well as 46 C.F.R. §5.19.

2. REOPENING UNDER 33 C.F.R. §20.904

Pursuant to the guidelines of 33 C.F.R. §20.904, the decision to reopen a matter is within the presiding ALJ's discretion. Accordingly, on December 29, 2009, the court granted Respondent's Motion to Reopen the instant proceedings under 33 C.F.R. §20.904(f).[13] Respondent was ordered to appear on February 23, 2010, "and show good cause why the Decision and Order of May 29, 2009, revoking his Coast Guard-issued license [was] no longer valid and establish proof to why the revocation order must be modified, rescinded, or revoked," as requested. (Order Granting Respondent's Motion to Reopen, January 8, 2010). Although the court was "satisfied that Respondent [was] complying with the terms of the May 29, 2009, Decision and Order" and that Respondent was demonstrating a change in course, "the court [remained] concerned whether enough time ha[d] passed for Respondent to fully demonstrate that he has selected a significant course change in his life." (Order Holding Respondent's Motion in Abeyance, March 25, 2010). Therefore, the court set forth six action items for all concerned parties to address and ordered Respondent's Motion to be held in abeyance until July 1, 2010. (Id.).

[13] Order Granting Respondent's Motion to Reopen, January 8, 2010.

At the outset of the July 1, 2010, evidentiary hearing, the court announced that "to date the Respondent has demonstrated sufficient rehabilitative steps so as to warrant further inquiry by this court under 33 C.F.R. §20.904(a), (c) and (f)." (Tr. Vol. 5 at 9).

Herein lies the divergence of positions between the Coast Guard and Respondent. The former contending that Respondent must apply for his MMC under the purview of 46 C.F.R. Part 10 and the latter contending that the court's jurisdiction over this Respondent is ongoing, per the strictures of 46 U.S.C. § 7703; 46 C.F.R. § 5.19; and 33 C.F.R. §20.904. The latter course is the one observed by this court. Accordingly, this court has retained jurisdiction over the instant matter pursuant to 46 U.S.C. §7703 and 46 C.F.R. §5.19 and 33 C.F.R. §20.904.

Because the court finds that it remains vested with jurisdiction to reopen the proceeding under 46 U.S.C. §7703, 33 C.F.R. §20.904 and 46 C.F.R. §5.19, the court further finds that the provisions of 46 C.F.R. §10.235 and the administrative clemency provisions within 46 C.F.R. Parts 5 and 10 are inapplicable herein.[14] In sum, the authority of the court is paramount in this instance.

D. BURDEN OF PROOF

The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. 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. See 5 U.S.C. §556(d).

[14] The court recognizes that it is without jurisdiction to issue licenses upon application, as that is within the authority conferred upon the National Maritime Center.

Presently, the onus is upon Respondent to establish by a preponderance of the evidence that he is now fit for maritime duty by a showing of his safety and suitability. 33 C.F.R. §§20.701; 20.702(b). "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) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

E. RESPONDENT'S COMPATIBILITY WITH GOOD DISCIPLINE & SAFETY AT SEA

Admittedly, the phrase "compatible with the requirement of good discipline and safety at sea" is a showing required by 33 C.F.R. §33.904(f)(1) and not by 33 C.F.R. §33.904(a) or (c). However, the court finds that this phrase is particularly useful in determining Respondent's safety and suitability for maritime service. As part of determining whether Respondent has proved he is now fit for maritime service, the court shall undertake a review of the tripartite framework set forth in the May 29, 2009, Decision and Order in conjunction with the six-point outline set forth in the March 25, 2010, Order Holding Respondent's Motion in Abeyance.

1. Recognition of Addiction

By his own admission, Respondent, who is almost seventy years old, started drinking at age fifteen. (Tr. Vol. 3 at 249). In direct contravention of his previous

assertions that he was not an alcoholic (Tr. Vol. 2 at 143), Respondent now admits his alcoholism. (Tr. Vol. 5 at 131-132; see generally, Tr. Vol. 3 at 216-254). More importantly, and as of July 1, 2010, Respondent testified that he is presently sober and has been so for approximately two years. (Tr. Vol. 5 at 132). The court believes that Respondent comprehends the high level of commitment required to maintain sobriety in both his professional and personal life. (Tr. Vol. 3 at 216-254).

2. Utilization of Addiction Resources

Respondent is acutely aware that "the recovery will be . . . a whole lifetime . . .[as there is] never no recovery for a[n] alcoholic." (Id.). Following the revocation of his license nearly one year ago, Respondent now makes use of, and benefits from, a variety of available recovery resources.

a) Active Participation in AA

Respondent has become a regular, if not daily, attendee at Alcoholics' Anonymous (AA) meetings since June 17, 2009. (Tr. Vol. 5 at 127; Tr. Vol. 3 at 227; Respondent's Ex. A at Tr. Vol. 5). Respondent's regular attendance was confirmed by the telephonic testimony of Don Hall, a fellow AA attendee and the telephonic testimony of George Payne, Respondent's AA sponsor. (Tr. Vol. 3 at 28-43; Resp. Ex. B, C at Tr. Vol. 3). Through his regular attendance at AA meetings, it appears to the court that Respondent has established a social network upon which he can rely to provide a sober environment.

Hall testified that he met Respondent on Respondent's first day at their local AA group meeting and since that time they have grown to become "really good friends." (Tr. Vol. 5 at 58). Hall further testified that he and Respondent's AA acquaintance and

ensuing friendship includes frequent telephone conversations. If both gentlemen are in the Memphis area, then they speak on a near daily basis. If one or both gentlemen are out of the Memphis area, then they speak "once every week or maybe two." (Id. at 59). With regard to their AA group meetings, Hall testified as to the general structure of the meetings and Respondent's participation in the meetings. (Id. at 57, 60). Hall described Respondent as "quite reserved" when he began attending the meetings, but as Respondent has continued to attend meetings "he's blossomed out." (Id. at 60-61). Hall further testified that Respondent has made "a lot of friends there at the meeting," that Respondent is respected by others and that others enjoy Respondent's participation. (Id. at 61). Respondent's participation has been recognized by the elected leadership of their AA group; he was recently presented with a key to the meeting room, which allows Respondent to come and go at will to set up for meetings or to meet with his sponsor. (Id.). Additionally, Hall testified that Respondent is committed to his sobriety and the teachings, including the socialization aspects, of AA. (Id. at 62-64).

Since the February 23, 2010, hearing, Respondent has obtained his AA "sponsor," George Payne. Respondent's previous testimony reflects that he put a great deal of thought and consideration into the important role a sponsor will play in his life. (Tr. Vol. 3 at 231-233). Payne explained that the role of a sponsor is to "help people that are new get acquainted with the program, learn how to work the steps in the program, and how to become responsible about the program so they can help someone else a few years down the line to get sober and stay sober." (Tr. Vol. 5 at 68). In his capacity as "sponsor," Respondent and Payne meet at least once a week to review and discuss the various steps of the AA program. (Id. at 69). Presently, Respondent is "working on his fourth step,

which is an inventory." (Id.). Curiously, Payne testified "we discussed the first step of Alcoholics Anonymous, and then we set a few days later and we discussed the second step and the third step, **and then he got serious, and we took the [first] three steps**." (Id.) (emphasis added). Regarding Respondent's commitment and progress, Payne testified, "I think he's doing okay. You know, some of us get it quick, some get it slow, but Johnny's just about . . . an average person in AA." (Id. at 70). Payne described Respondent's attitude as "real good" and that "he has yet to balk at anything I ask him to do as far as being associated with Alcoholics Anonymous." (Id.). Payne agreed that Respondent has made some significant changes in his life and stated that "he [Respondent] is slowly but surely changing. It takes a little while, but you know, we didn't get drunk overnight, we're not going to get sober overnight. . . . It takes a period of reconstruction of character-building in order to become better." (Id.) (emphasis added). The court notes with particularity, and ascribes great weight to Mr. Payne's observation that an alcoholic does not "get sober overnight."

b) Counseling Session Attendance

By participating in the Employee's Assistance Program (EAP) sponsored by his employer, Canal Barge Company, Respondent has been evaluated by a clinical psychiatrist and has receiving counseling from a Licensed Clinical Social Worker (LCSW). Respondent has met with his EAP-funded counselor, Tony McAnally, LCSW, approximately thirteen times, seven of which occurred subsequent to the February 23, 2010, show cause hearing.[15] (Tr. Vol. 5 at 40). McAnally, as in his previous testimonies,

[15] Following the conclusion of the February 23, 2010, show cause hearing, Respondent met with McAnally on April 8, 2010; April 14, 2010; May 25, 2010; June 7, 2010; June 15, 2010; and June 22, 2010. (Tr. Vol. 5 at 40).

testified Respondent maintained "a positive attitude" towards treatment and continued to display improvement throughout the course of counseling sessions. (Id.). McAnally described Respondent has displaying a "depressed and tearful" affect at the initial session and diagnosed Respondent as having "a major depression single episode with alcohol abuse." (Id. at 40; 42). McAnally did not perform the Minnessota Multiphasic Personality Inventory (MMPI) nor conduct any other written evaluations on Respondent, but based his assessment from clinical interactions and interviews with Respondent. (Id. at 43). McAnally testified that Respondent did not need any further therapy given Respondent's significant progress and his willingness to comply with counseling. (Id. at 41). The court notes that Mr. McAnally is a Licensed Clinical Social Worker, not a psychologist or a psychiatrist. Hence, his diagnostic and prognostic conclusions are only of a limited use herein.

c) Employment with Canal Barge Company

Respondent has continued to faithfully serve his employer, Canal Barge Company, observing all lawful and pertinent company rules. Respondent has considerable experience navigating the inland waters of the United States, particularly the Mississippi River, as a pilot. Despite the revocation of Respondent's license on May 29, 2009, Canal Barge Company has retained Respondent in their employ as an "observer." The court cannot help but be impressed by Canal Barge Company's role as a good corporate citizen—standing by its employee as that employee battles a lifelong chemical addiction. Canal Barge Company is to be highly commended for its role in these proceedings.

Respondent testified that he has an "excellent" work record with Canal Barge Company. (Tr. Vol. 5 at 133). Respondent's direct supervisor, Port Captain Paul Barnes, similarly describes Respondent has having "an excellent work record" in addition to having an excellent safety record. (Id. at 107).

In his current position of "observer," Respondent shares his experience and "tricks of the trade" with newly minted pilots. (Id. at 101, 108, 133). Respondent stands watch with new pilots and dispenses advice as needed. (Id. at 86, 101, 134). Since his revocation, Canal Barge Company has instructed Respondent that he is to not maneuver the vessel nor is he to touch the vessel's steering mechanism whether it be a wheel or sticks. Respondent has abided by those instructions. (Id. at 87, 134-135).

d) No Notice Testing

In addition to the testing regime already in place at Canal Barge Company, and the testing Respondent was subject to by his probation and parole officer, the court directed Respondent submit to at least six no-notice drug and/or alcohol tests prior to the July 1, 2010, hearing.

The testimony of William Thomas Smith, Vice President of Human Resources for Canal Barge Company, was offered by Respondent to establish that the court's order regarding testing was properly accomplished. Smith testified he was instructed to place Respondent "in a special random testing program over and above whatever he would have been eligible—or participated in as one of our marine employees." (Tr. Vol. 5 at 114). Due to a disconnect in communications between Canal Barge Company and the Coast Guard, Smith testified that Canal Barge Company "applied the random testing protocol, that's part of our Coast Guard compliant program to . . . [Respondent] and . . .

three tests were conducted." (Id.). However, following the May 17, 2010, hearing, the testing was conducted by an independent third party known as Western Kentucky Corporation. (Id. at 115). Smith explained that "West[ern] Kentucky is the contractor [Canal Barge Company] access[es] or hire[s] to help either collect the samples from [] mariners, or they're involved in the communications." (Id. at 115-116). Following the chain of custody upon gathering the collection samples, Western Kentucky then sends the samples to a lab for testing and review by a Medical Review Officer (MRO). Western Kentucky then contacts Canal Barge Company and reports the results of testing. (Id. at 116). Smith further testified that Western Kentucky was under standing orders to conduct all testing in accordance with Coast Guard protocol. (Id. at 118).

Smith's testimony, as well as evidence tendered to the court, reflects that Respondent submitted to seven no-notice drug and/or alcohol tests, all of which tested negatively for the presence of drugs or alcohol. (Id. at 122; Resp. Ex. B at Tr. Vol. 5).

e) Compliance with March 24, 2008 Sentencing

Respondent's probation parole officer Andrew Bradford, of the Tennessee Board of Probation and Parole Offices in Memphis Tennessee, testified that he sees Respondent monthly. Bradford described Respondent as "jovial" and "believes [him] to be on the right path" with regard to his sobriety. (Tr. Vol. 5 at 47-48). Bradford further testified Respondent has passed all drug[16] and alcohol[17] screens without issue, including three drug tests and one alcohol test administered since the February hearing. (Id. at 48-50). Moreover, Respondent has complied with the terms of his parole. (Id. at 47).

[16] The drug screen tests for the presence of drugs approximately ten substances, including cocaine, marijuana, opiates, oxycodone, PCP, amphetamines, barbiturates, benzodiazepine, methadone and methamphetamines. If the urine specimen submitted tests positive, it is then sent to a laboratory for further testing. (Tr. Vol. 5 at 49).

[17] Alcohol testing is performed by the toxicology lab, presumably at the Memphis office of the Tennessee Board of Probation and Parole. (Tr. Vol. 5 at 50).

3. Demonstration of Significant Course Change

Since the revocation of his license, Respondent has, indeed, 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. He has become an active member of an AA group and has formed a supportive social network as a result.

Testimony by nearly all of Respondent's witnesses' reveals a consensus that Respondent's mental condition has significantly improved over the year. Respondent's social worker 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. Vol. 3 at 106-107). At the time of the hearing, Respondent had met with McAnally approximately thirteen times. (Tr. Vol. 5 at 40). McAnally testified he has "see[n] a big improvement on the third session and it's continued until the last session." (Tr. Vol. 3 at 107; Tr. Vol. 5 at 40) (testifying Respondent's mood and affect have improved throughout treatment). McAnally described Respondent's new attitude as "energetic" and "very compliant." (Tr. Vol. 3 at 108). At the February 23, 2010, hearing, 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." (Id. at 35). More recently, Hall described Respondent as having "blossomed out" in their AA meetings. Captain Kenway Hurst (Hurst), a fellow Canal Barge Company employee, testified telephonically at the February 23, 2010, hearing that he has a "pretty close-knit relationship" with Respondent and speaks via telephone with

Respondent "seven, eight times a month, at least." (Id. at 201; 202). Hurst further testified that before Respondent began attending AA meetings that "he was real . . . down and out." (Id. at 203). However, Hurst described that once Respondent began attending AA meetings that "his character, his persona took a dramatic change for the good." (Id.). Unfortunately, Hurst was not called to testify at the July 1, 2010, hearing; the two captains who were called to testify did not indicate they were as personally acquainted with Respondent as Hurst. However, both captains testified they had never witnessed Respondent consume alcohol and that they believed him to be a dependable and well-skilled mariner. (Tr. Vol. 5 at 85, 101-102). Both captains denied having any concerns that Respondent might endanger life or property while on the job. (Id. at 85, 102).

Captain Paul Barnes (Barnes), Port Captain for Canal Barge Company, testified at the February 23, 2010, hearing that, like Hurst, he too has observed "quite a dramatic change in [Respondent]," since Respondent started attending AA meetings. (Tr. Vol. 3 at 60). Barnes reiterated that Respondent "don't seem like the same person. He's a totally different person. He seems happier in his life." (Tr. Vol. 5 at 109). Barnes testified he speaks with Respondent on a weekly basis. (Id.). Barnes further testified that Respondent is a reliable employee suitable for employment as a pilot as Respondent explained that Respondent has "never give me any reason to doubt his ability to safely navigate a vessel." (Id. at 109-110). When questioned about Respondent's sobriety, Barnes stated he has no concerns and "would trust my grandkids with him today." (Id. at 110).

As noted during the course of the February 23, 2010, hearing, (Tr. Vol. 3 at 253), the court would again note that Respondent's physical condition has undergone a

dramatic change since the April 27, 2009, hearing. Respondent's change in appearance is further indication of positive changes he has made thus far; Respondent's testimony supports that he has continued to make significant and positive changes.

Respondent testified that he has been sober for two years; an admirable accomplishment. (Tr. Vol. 5 at 132). Respondent, with the assistance of his sponsor, has completed three of the twelve steps of AA. Respondent is presently working of the fourth step, "the inventory." Respondent testified he is "working at [his] own pace because . . . defects in character and stuff that's happened to you, it takes a while to get over that." (Id. at 133). Respondent is in the midst of taking his inventory and writing it down, but is "not through with it. . . . Making - -taking inventory of yourself, it takes a while." (Id.). Respondent's involvement in AA has been pivotal to his change in course, as shown by his testimony wherein he stated, "I don't want to go back to the way that I was." (Id. at 135). Respondent enjoys attending the meetings, socializing with fellow AA members and developing friendships that foster his sober lifestyle. (Id. at 136). Upon inquiry by the court, Respondent explained why it has taken him nearly a year to complete three steps and to begin work on the fourth step. Respondent reiterated that he wanted to carefully select his sponsor. (Id. at 141). In addition to carefully choosing a sponsor, Respondent has devoted time to reading texts recommended by his sponsor including, "Living Sober," "12 Steps, 12 Traditions," and the AA "Big Book."

Respondent's statement that "I have one over there in the motel room I bring with me and I read it" is evidence of his intent to live a life of sobriety. (Id. at 141-142). Respondent further testified that it is his goal to make amends with his deceased spouse's children who reside in the nearby city of Savannah, Tennessee. (Id. at 142-143).

Respondent explained that while he and the younger child, who is approximately 19 years old, "get along," the eldest child, who is approximately 20 years old, will not speak to Respondent. (Id. at 143). Respondent hopes that eventually they will "both accept me and [] know it was an accident. . . And I hope to feel free that they can come see me." (Id.).

That Respondent is only now addressing the needs of his deceased spouse's children is an indication that Respondent is still early in his recovery.

The court takes official notice of the well-publicized "Twelve Step" program synonymous with Alcoholics Anonymous and takes particular note of the significance that Respondent is only now embarking on Step 4.[18] The next five Steps[19] thereafter are of particular import to Respondent vis à vis and this inquiry and to his fitness for sea duty. Respondent has clearly undertaken observable and quantifiable steps toward sobriety and rehabilitation. In this regard, he and his employer are to be lauded. No doubt, Respondent's many supporters would endorse his immediate return to sea service, but those opinions are subjective and understandably biased.

It is the difficult judgment of this court that Respondent has not yet arrived at a personal, medical compass heading that ensures confidence that he will remain sober and safe at sea. The court is cognizant that Respondent has followed every directive and

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[18] Step 4 states "Made a searching and fearless moral inventory of ourselves." Alcoholics Anonymous, "The Twelve Steps of Alcoholics Anonymous" available at http://www.aa.org/lang/en/en_pdfs/smf-121_en.pdf.

[19] Steps 5 through 9 are as follows:

> 5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
> 6. Were entirely ready to have God remove all these defects of character.
> 7. Humbly asked Him to remove our shortcomings.
> 8. Made a list of all persons we had harmed, and became willing to make amends to them all.
> 9. Made direct amends to such people wherever possible, except when to do so would injure them or others.

(Id.).

order issued to him by this court. The court is cognizant he has made good-faith efforts to turn his life around; but he is not "there" yet. Alcoholism is an insidious disease. Relapses are common and to be expected—no matter how hard one tries—especially in the early stages of recovery. It is foreseeable that as Respondent undertakes Steps 4 through 9, he may suffer a relapse. While this court wishes him well, the risks to safety at sea are, at present, too great. The day may very well come when he will be a safe mariner, but as Respondent's AA sponsor correctly observed, "[Y]ou know, we didn't get drunk overnight, we're not going to get sober overnight. . . . It takes a period of reconstruction of character-building in order to become better." (Tr. Vol. 5 at 70).

Inasmuch as Respondent is only now embracing the crucial portions of the Twelve Step Program, the court cannot pronounce him presently a safe and suitable mariner.

VI. ULTIMATE FINDINGS OF FACT

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. Prior to May 29, 2009, Respondent, Johnny Oce Conner, was the holder of Coast Guard-issued Merchant Mariner's 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. On April 16, 2009, this court found that 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. On May 29, 2009, this court found that 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 present suitability for maritime service.

VII. AUTHORITY TO IMPOSE SANCTION

It is the nature of suspension and revocation proceedings to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. 7701(a); Appeal Decision No. 2294 (TITTONIS) (1983). For the reasons discussed supra, the court **DENIES** Respondent's Motion that the Order of Revocation issued May 29, 2009, be rescinded, revised or otherwise modified.

VIII. ORDER

IT IS HEREBY ORDRERED, that the Coast Guard's Motion of Objection, to the extent it seeks relief, is **DENIED**.

IT IS FURTHER ORDERED, that Respondent's Motion to Rescind the court's Order of Revocation issued May 29, 2009, is **DENIED**. The Order of Revocation issued on May 29, 2009, remains in full force and effect.

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**).

IT IS SO ORDERED.

Done and Dated this the 3d day of August, 2010,
at New Orleans, Louisiana.

Bruce T. Sm

HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

IX. CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **ORDER** upon the following parties and limited participants (or designated representatives) in this proceeding via email:

LCDR Melissa Harper
USCG, District 8 Legal
500 Poydras Street, #1311
New Orleans, LA 70130
Telephone: (504) 671-2033
Facsimile: (504) 671-2040
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Commanding Officer, USCG Sector
Lower Mississippi River
Investigations Department
Attn: CWO4 Jo N. Wildman, IO
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mhartnet@tulane.edu

ALJ Docketing Center
U.S. Coast Guard
40 S. Gay Street, Rm. 412
Baltimore, MD 21202
Telephone: (410) 962-7434
Facsimile: (410) 962-1746
Email: aljdocket@aljbalt.uscg.mil

Done and dated this the 3d day of August, 2010,
at New Orleans, Louisiana.

KATY J.L. DUKE, ESQ.
ATTORNEY-ADVISOR

X. ATTACHMENT A: WITNESS & EXHIBIT LIST

Respondent Witnesses

1. Tony McAnally, LCSW[20]
2. Andrew Bradford[21]
3. Don C. Hall[22]
4. George Payne[23]
5. Captain James Markland Hardy[24]
6. Captain Luther Cleveland Ward[25]
7. Captain Paul Barnes
8. Thomas William Smith
9. Johnny Oce Connor

Respondent Exhibits

A. Results of Drug Tests (21 pages)
B. Respondent's self-maintained log of AA attendance (4 pages)

U.S. Coast Guard Witnesses

None

U.S. Coast Guard Exhibits

None offered

[20] Testimony proffered telephonically.
[21] Testimony proffered telephonically.
[22] Testimony proffered telephonically.
[23] Testimony proffered telephonically.
[24] Testimony proffered telephonically.
[25] Testimony proffered telephonically.

XI. ATTACHMENT B: NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

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.