

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

UNITED STATES COAST GUARD
Complainant

vs.

EVERARDO GARCIA, JR.
Respondent

Docket Number 2010-0264
Enforcement Activity No. 3762979

DECISION AND ORDER
Issued: October 14, 2011

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

**LT Nephtwim Rosario and
CPO Patricia A. Murphy
Sector Corpus Christi**

For the Coast Guard

Alejandro Dominguez, Esq.

For the Respondent

PRELIMINARY STATEMENT

Pursuant to 46 U.S.C. § 7703(2), and its underlying regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5, the United States Coast Guard (Coast Guard) initiated this administrative action seeking outright suspension of Everardo Garcia Jr.'s (Respondent) Merchant Mariner's License (MML) for twelve (12) months.

The Coast Guard issued its Complaint on June 10, 2010, charging Respondent with a "Conviction that would preclude the issuance of MMC" in violation of 46 U.S.C. § 7703(2). Specifically, the Coast Guard alleges that on December 2, 2009, Respondent was convicted of Assault by the City of South Padre Municipal Court. In his Answer, Respondent denied the jurisdictional and factual allegations contained in the Complaint, and requested a hearing in the matter.

Prior to the hearing, on November 10, 2010, the Coast Guard filed a Motion for Summary Decision, alleging that, on the basis of Respondent's conviction and the fact that the Chief of the Safety and Suitability Evaluations Branch (SSEB) of the National Maritime Center (NMC) issued a Memorandum of Determination finding Respondent's conviction and related sentence would prevent the issuance of a merchant mariner's credential (MMC), no genuine issue of material fact existed. On December 17, 2010, Respondent filed an Objection to Motion for Summary Decision and Countermotion for Summary Decision alleging that the memorandum was intended more as "legal guidance," and that the Coast Guard mischaracterized Respondent's assault charge. On March 30, 2011, the undersigned issued an Order Granting Coast Guard's Motion for Summary Decision - In Part, finding that while Respondent was convicted of an offense that would prevent the issuance or renewal of his MMC, Respondent was nonetheless entitled to a hearing on the issue of sanction.

The parties and the undersigned conducted a hearing on August 4, 2011 in Harlingen, Texas. Lieutenant Nephtwim Rosario and Chief Patricia Murphy represented the Coast Guard.

Alejandro Dominguez, Esquire, of Brownsville, Texas appeared on behalf of Respondent. The Coast Guard introduced seven (7) exhibits, six (6) of which were admitted into the record¹. Respondent presented testimony on his own behalf, and introduced three (3) exhibits, all of which were admitted into the record. The witness and exhibit lists are contained in **Attachment A**.

Having already found that the Coast Guard **PROVED** that Respondent's conviction of Assault in violation of Texas Penal Code Section 22.01(a)(3) is an offense that would preclude the issuance of an MMC pursuant to 46 U.S.C. § 7703(2), the undersigned must now determine an appropriate sanction in the matter.

FINDINGS OF FACT

1. At all relevant times mentioned herein, Respondent Everardo Garcia, Jr. was the holder of Coast Guard Merchant Mariner License Number 1191616. (See CG Ex. 5).²

¹ At the hearing, the Coast Guard sought to introduce evidence of a subsequent assault charge yet to be adjudicated. To this end, the Coast Guard offered CG Ex. 7, and elicited testimony from Respondent regarding the incident. (See Tr. at 28-29, 75). At the hearing, the undersigned ultimately deferred ruling on the admissibility of both the exhibit and the line of questioning regarding the subsequent charge. (Tr. at 75-76). Upon review of the record and the applicable regulations, the undersigned finds that neither the exhibit nor the testimony regarding the incident should be considered for purposes of this proceeding.

Pursuant to 33 C.F.R. § 20.802(a), the ALJ "may admit any relevant oral, documentary, or demonstrative evidence, unless privileged." However, the ALJ "...may exclude evidence if its probative value is substantially outweighed by the danger of prejudice...". 33 C.F.R. § 20.802(b). In the instant case, the undersigned finds that the danger of prejudice would substantially outweigh any probative value that the unproven assault charge may have. Notably, 33 C.F.R. § 20.1307 "Use of judgments of conviction," refers specifically to "judgment[s] of conviction," and does not discuss admissibility of pending charges. Further, 33 C.F.R. § 20.1315, "Submission of prior records and evidence in aggravation or mitigation" discusses the *prior* disciplinary record of a respondent, but is silent as to subsequent infractions. See 33 C.F.R. § 20.1315 (a). However, the section makes clear that a prior disciplinary record is comprised of, in part, "[a]ny final judgment of conviction in Federal or State Courts," and does not include any pending charges against a respondent. 33 C.F.R. § 20.1315(a)(4). Accordingly, even if the undersigned were to consider Respondent's subsequent disciplinary record, the subsequent assault charge should not be considered absent a final judgment. Notably, documents submitted post-hearing indicate that the Cameron County District Attorney's Office has not yet reviewed the case to determine whether it will "...be dismissed or presented to the grand jury, reduced, etc."

² Citations referencing the transcript are depicted as follows: (Tr. at __). Citations referring to Coast Guard Exhibits are depicted as follows: (CG Ex. __). Respondent's Exhibits are depicted as follows: (Resp. Ex. __).

2. Respondent works for Tex-Mex Tours at Osprey Fishing Trips, where he has worked for eleven (11) years and been a captain for nearly five (5) years. (Tr. at 23).
3. Respondent has never had any safety incidents on his boat or complaints regarding his ability as a captain. (Tr. at 23).
4. On November 26, 2009, Respondent made unwanted physical contact with a female acquaintance, touching her on her bottom. (See CG Ex. 6, Tr. at 21-22).
5. Respondent characterized his relationship with the female victim as “flirtatious, maybe just friendly.” (Tr. at 19).
6. Respondent testified that he may have been misreading the victim’s friendliness, but acknowledged that he “made a mistake.” (Tr. at 26-27).
7. At the time of the assault, Respondent had been drinking. (Tr. at 19).
8. Respondent testified that his drinking “might have” impaired his judgment at the time of the incident. (Tr. at 19).
9. On December 2, 2009, Respondent pled guilty to assault and was assessed a \$365.00 fine for the November 26, 2009 incident. (See CG Ex. 3, CG Ex. 4).
10. The NMC determined that Respondent was convicted of simple assault, and, as a result of this conviction, would not be issued an MMC for at least one year from the date of his conviction. (See CG Ex. 2).
11. Prior to his December 2, 2009 conviction for Simple Assault, Respondent was charged with Public Intoxication on March 22, 2001 for which he pled “No Contest.” (CG Ex. 1).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). Title 46 C.F.R. § 5.19 gives Administrative Law Judges (ALJs) authority to suspend or revoke MMCs for violations arising under 46 U.S.C. § 7703. If an MMC

holder is convicted of an offense that would prevent the issuance or renewal of an MMC, his or her MMC may be suspended or revoked. 46 U.S.C. § 7703(2).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(2); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the Administrative Procedure Act codified at 5 U.S.C. 551-59.
2. The Coast Guard **PROVED** and the undersigned has previously found by the preponderance of reliable, probative, and credible evidence that Assault in violation of Texas Penal Code Section 22.01(a)(3) is analogous to “Assault (simple)” which is listed under “Crimes Against Persons” in the 46 C.F.R. § 10.211(g) Table.
3. “Assault (simple)” is an offense that would prevent the issue or renewal of a merchant mariner’s credential.
4. The Coast Guard **PROVED** and the undersigned has previously found by the preponderance of reliable, probative, and credible evidence that Respondent’s conviction of Assault in violation of Texas Penal Code Section 22.01(a)(3) is an offense that would prevent the issue or renewal of an MMC.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 U.S.C. § 7703 allows suspension or revocation of a mariner’s credential for conviction of an offense that would prevent the issue or renewal of mariner’s credential. Title 46 C.F.R. § 5.567(a) provides for admonition, suspension with or without probation, or revocation.

The table at 46 C.F.R. § 10.211(g) prescribes minimum and maximum assessment periods of one (1) year to five (5) years for convictions of Assault (simple). Although it is one of many factors that may be taken into consideration, the assessment period is not used exclusively

by the ALJ to determine the sanction in suspension and revocation cases. As explained above, the NMC applies the assessment periods to determine whether and when to issue or renew merchant mariner's credentials of applicants with criminal convictions.

The Suggested Range of Appropriate Orders Table at 46 C.F.R. § 5.569 (Table) lists sanctions for offenses committed while a respondent was a holder of or acting under the authority of his or her merchant mariner's credential. While the instant offense is not specifically enumerated in that Table, the listed offenses that resemble Respondent's conduct can be used as a framework to fashion an appropriate sanction in this case. Notably, for "Violent acts against other persons (without injury)" the suggested range of outright suspension is 2-6 months.

Coast Guard's Position

At the hearing, the Coast Guard proffered that Respondent exhibited a "...pattern of behavior...inconsistent with that expected of a Coast Guard credentialed professional mariner...". (Tr. at 6). The Coast Guard further noted that Respondent's offense would have precluded him from being issued a merchant mariner credential, and carries with it a minimum assessment period of one (1) year, and a maximum assessment period of five (5) years. Respondent's offense has already been found proven, and the proposed order of twelve (12) months outright suspension is "consistent with the intent of the regulations." (Tr. at 78).

Respondent's Position

At the hearing, Respondent proffered that "...what he thought was a consensual encounter with a friend turned into a misunderstanding, which he understands was wrong, [has accepted responsibility for, but that in no way] indicates any kind of pattern...". (Tr. at 11). Instead, Respondent asserted that he merely pled guilty to Class C assault, for which he received only a fine, and no jail time. (Tr. at 78). The crime for which he was convicted carries a

maximum punishment of a \$500.00 fine, no jail time, and is “[t]he same level of offense as driving without a seatbelt, or speeding.” (Tr. at 78-79, See Resp. Ex. B).

After the close of the hearing, the record was left open for thirty (30) days. During this time, Respondent submitted a letter from R. S. Tyler, President/Owner of Tex-Mex Tours. The letter conveys that Respondent has been employed by Tex-Mex Tours for “many years...[during which] time he has been dependable and hard working.”

DISCUSSION

As discussed, the authority to impose sanctions at the conclusion of a case is exclusive to the ALJ assigned to the matter. Appeal Decision 2362 (ARNOLD) (1984). Notably, while title 46 U.S.C. § 7703 allows suspension or revocation of a mariner’s credential for conviction of an offense that would prevent the issue or renewal of mariner’s credential, it does not require it. Title 46 C.F.R. § 5.567(a) provides generally for admonition, suspension with or without probation, or revocation.

Administrative actions against respondents’ credentials are “remedial and 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. In the instant case, the provision on which the Coast Guard largely relies, 46 C.F.R. § 10.211, refers to a criminal record review conducted *prior* to the issuance of a merchant mariner’s credential.

In the instant case, Respondent has been acting under the authority of an issued merchant mariner’s license for many years. No evidence in the record suggests that Respondent’s personal transgressions have impacted his maritime skill. In fact, Respondent testified that he has been working at the same company for eleven (11) years, without any safety incidents, and the President and Owner of the company he works for substantiates this claim, calling Respondent a “dependable” employee. As such, while 46 C.F.R. § 10.211 assesses suitability for a maritime credential *ante factum*, in the instant case, the undersigned need not speculate as to Respondent’s

suitability to hold an MMC; Respondent has been successfully employed in the maritime industry in excess of eleven (11) years without incident.

The 46 C.F.R. § 5.569 (Table), which examines suitability for MMCs *post factum*, suggests outright suspension of 2-6 months for “Violent acts against other persons (without injury).” Notably, the table “...should not affect the fair and impartial adjudication of each case on its individual facts and merits.” 46 C.F.R. § 5.569(d). Further, “...where there are mitigating factors, the regulation contemplates that the sanction be less severe than that suggested in the table.” Appeal Decision 2628 (VILAS) (2002). However, the ALJ must articulate the reasoning behind departure from the guidelines. See Commandant v. Moore, NTSB Order No. EM-201 (2005).

While the allegations against Respondent in the City of South Padre Police Report are distasteful, the undersigned notes that Respondent ultimately pled guilty to a Class C misdemeanor for which the maximum punishment was \$500.00 and jail time could not have been assessed. As a mitigating factor, the undersigned notes that Respondent credibly characterized the incident as a misunderstanding on his part, noting that he may have misread his relationship with the victim.³ Respondent was ultimately assessed only a fine of \$365.00 for his crime. The undersigned also notes that there is no evidence in the record to suggest that Respondent has any prior Coast Guard disciplinary record. The record does not establish a “pattern of behavior” on part of Respondent; to the contrary, the evidence indicates Respondent has been a dependable employee at the same company for eleven (11) years.

While the undersigned does not dispute that the crime for which Respondent was convicted is properly classified as simple assault, the undersigned, unlike the NMC, recognizes

³ The undersigned notes that the victim’s version of events is contained in CG Ex. 6. However, the undersigned notes that CG Ex. 6 is comprised of hearsay evidence. While the undersigned may consider hearsay evidence, “...[t]he ALJ may consider the fact that evidence is hearsay when determining its probative value.” 33 C.F.R. § 20.803. For the record, the undersigned does not consider the fact that Respondent may have been under the influence of alcohol to be a mitigating factor.

varying degrees of simple assault. Here, the evidence in the record does not support suspending Respondent's License for twelve (12) months, particularly when the State of Texas allowed Respondent to plead guilty to a Class C Misdemeanor and found a \$365.00 fine appropriate to settle the matter.

While Respondent undoubtedly broke the law and acknowledged he made a mistake, upon consideration of the mitigating factors, the suggested sanction of twelve (12) months outright suspension is not warranted by the evidence in the record. Nevertheless, it is also clear to the undersigned that Respondent should be held accountable for his illegal actions, and needs to address issues related to his personal life.⁴

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Everardo Garcia Jr.'s Merchant Mariner's License Number 1191616 is hereby **SUSPENDED** outright for a period of six (6) months. However, the suspension is **STAYED** pending successful completion of a twelve (12) month probation period. The conditions of the probation are as follows:

- a. Comply with all Federal, State, local laws and statutes for a period of twelve (12) months following the issue date of this decision. Respondent is required to report all violations to the Coast Guard. If Respondent reports any such violation, the matter will be referred to the undersigned to determine if said offense constitutes a violation of probation.

⁴ At the close of the hearing, Respondent acknowledged that he could benefit from Alcoholics Anonymous or family counseling. (Tr. at 80).

- b. Within thirty (30) days of issuance of this Decision and Order, begin attending Alcoholic Anonymous (AA) meetings twice monthly, and continue attending said meetings for a minimum period of twenty-six (26) weeks.
- c. If the undersigned determines that Respondent has violated any of the terms of his probation period, his Merchant Mariner's License will be suspended outright for a period of six (6) months.

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).

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date:

ATTACHMENT A

Coast Guard's Exhibits:

1. Town of South Padre Island Report of Violations
2. National Maritime Center Memorandum
3. Arraignment Sheet
4. State of Texas vs. Everardo Garcia Citation 33213A
5. Screenshot Showing Everardo Garcia's Merchant Mariner's License Information
6. South Padre Island Police Department Offense/Incident Report

Respondent's Exhibits:

- A. Affidavit By Everardo Garcia
- B. Texas Penal Code
- C. Criminal Jurisdiction of Texas Courts

Respondent's Witnesses:

1. Everardo Garcia

ATTACHMENT B

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

§ 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.

§ 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.

§ 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.

§ 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.