

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA :  
UNITED STATES COAST GUARD :

v. :

MERCHANT MARINER CREDENTIAL :

Issued to: BYRON ANTHONY TROSCLAIR :

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL

NO.

- 27 1 1

**APPEARANCES**

For the Government:  
Bruce L. Davies, Esq.  
CWO James R. Mints, USCG  
Coast Guard Marine Safety Unit Port Arthur

For the Respondent:  
Christopher H. Riviere, Esq.  
William N. Abel, Esq.  
Law Office of Christopher H. Riviere

Administrative Law Judge: Bruce Tucker Smith

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated April 23, 2014, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked the Merchant Mariner Credential of Mr. Byron Anthony Trosclair (hereinafter "Respondent") upon finding proved two specifications of negligence and one specification of misconduct.

The first negligence specification alleges that Respondent, while acting under the authority

of his Coast Guard-issued license as Master of the STARFLEET PATRIOT, was negligent in that he failed to ensure that the STARFLEET PATRIOT was positioned close enough to the platform that was the destination of his passengers to ensure the safe swing rope transfers of the passengers, and intentionally made the swing rope transfers more difficult than necessary in order to provide “training” for the passengers that were transferring from the STARFLEET PATRIOT to the platform.

The second negligence specification alleges that Respondent, while in the same capacity, was negligent in that he failed to have the vessel’s rescue ladder/platform in a ready position during passenger transfers from the STARFLEET PATRIOT to the work platform, and failed to provide any rescue assistance to a passenger who had fallen overboard while attempting to swing from the vessel to the platform.

The misconduct specification alleges that Respondent, while in the same capacity, violated 46 U.S.C. § 2303 by wrongfully failing to render assistance to an overboard passenger after a marine casualty.

### FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 4; Transcript of the Proceedings (hereinafter “Tr.”) Vol. I at 106-107, Tr. Vol. II at 81]

The STARFLEET PATRIOT is a 261-gross-ton, 130.5-ft.-long vessel. [D&O at 4; Coast Guard Exhibit (hereinafter CG Ex.) 9] It is an offshore supply vessel that, at all relevant times herein, was engaged in the transport of oil platform workers from Cameron, Louisiana, to a platform-based living facility, and thence to a work platform, in the Gulf of Mexico. [D&O at 5; Tr. Vol. I at 22-28]

The vessel’s Coast Guard-issued Certificate of Inspection requires that the ship’s crew to include one Master, one Licensed Mate, and two deckhands. [D&O at 5; CG Ex. 9] During February 13-16, 2011, Respondent was employed as the Master of the STARFLEET PATRIOT.

[D&O at 5; Tr. Vol. I at 25, Tr. Vol. II at 80-81, 92] During the same period, Mr. Joseph P. Bruno, Sr., was one of several oil platform workers who were passengers aboard the STARFLEET PATRIOT and required transport to their duty location on the platform for a three-week-long project. [D&O at 5; Tr. Vol. I at 22-28, 36]

During February 13-16, 2011, at approximately 7:30 a.m. to 8:00 a.m., the STARFLEET PATRIOT picked up workers/passengers from their off-shore living facility and ferried them to the work platform, where they would disembark the STARFLEET PATRIOT by means of a rope swing. [D&O at 5; Tr. Vol. I at 26-30, 270]

During transfer operations, one of the STARFLEET PATRIOT's deckhands, Mr. Duplantis, assisted with the passenger disembarkation process by catching the swing rope with a 15-foot long "spike pole" or "boat hook" and then handing the rope to each passenger as each would prepare to leave the vessel. [D&O at 6; Tr. Vol. I at 242-243] Passengers disembarked from the aft deck of the STARFLEET PATRIOT, assisted by the swing rope, then landed on the area of the platform described as the "plus ten" deck, a catwalk or walkway on the platform. [D&O at 6; Tr. Vol. I at 33, 80; CG Ex. 2, 3] The aft deck of the STARFLEET PATRIOT was approximately five feet above the water and five feet lower than the "plus ten" deck. [D&O at 6; Tr. Vol. I at 34; CG Ex. 3]

On February 13, 2011, Captain Cameron Hudson, the licensed mate, was in physical control of the STARFLEET PATRIOT during the passenger disembarkation process. [D&O at 6; Tr. Vol. I at 61] On that morning, the passenger/workers asked Respondent to position the vessel closer to the platform in order to make the rope swing transfers easier, but Respondent denied their requests. [D&O at 6-7; Tr. Vol. I at 45] Several passenger/workers complained to the deckhand, Mr. Duplantis, about the manner in which the rope swing transfers were conducted. [D&O at 7; Tr. Vol. I at 243]

The vessel was situated in the same manner on February 14 and 15, 2011, and although the passenger/workers made similar requests to move the STARFLEET PATRIOT closer to the platform, Respondent continued to deny those requests. [D&O at 7; Tr. Vol. I at 45-46, 114, 183,

185] In denying their requests, Respondent told the workers that he did not want to damage the tires/bumpers and chains on the stern of his vessel. [D&O at 7; Tr. Vol. I at 42, 66, 246] During these days, Respondent knew his passengers were having difficulty transferring from the STARFLEET PATRIOT to the platform. [D&O at 8; Tr. Vol. I at 96, 122; Tr. Vol. II at 196]

Sometime during the evening of February 15, 2011, and in apparent response to the workers' concerns, Apache (owner/operator of the platform) ordered the construction and placement of a "swing platform" or a "jump platform" on the aft section of the STARFLEET PATRIOT, in an effort to ease transfers to the "plus ten" deck. [D& 5, 8; Tr. Vol. I at 25-28, 42-43, 83, 117-119; CG Ex. 2, 3, 5] The "swing platform" or "jump platform" was a welded steel structure, supported by four legs, accessed by climbing up approximately four feet to a metal platform. [D&O at 8; CG Ex. 3]

Despite the placement of the "swing platform" or "jump platform," changing sea conditions still made the rope swing transfer difficult. [D&O at 8; Tr. Vol. I at 44] On the morning of February 16, 2011, sea conditions were choppy, with one- to two-foot waves; the weather was clear. [D&O at 8; Tr. Vol. I at 48, 124, 192] Captain Hudson was in physical control of the STARFLEET PATRIOT; Respondent was also in the wheelhouse. [D&O at 8 (Finding of Fact 29); Tr. Vol. II at 61, 65, 66; Tr. Vol. I at 249, 273, 275]

On February 16, 2011, Mr. Bruno was to be the fifth or sixth person to disembark the STARFLEET PATRIOT by means of the rope swing. [D&O at 8; Tr. Vol. I at 186] After others had made the difficult transfer, Mr. Bruno climbed atop the jump platform, took the rope from Mr. Duplantis, and prepared to disembark. [D&O at 8; Tr. Vol. I at 166-167, 186, 223] Mr. Bruno had difficulty holding onto the rope swing and was visibly afraid to make the transfer. [D&O at 8; Tr. Vol. I at 49-51, 126-128]

As Mr. Bruno prepared to make the rope swing transfer, the stern of the STARFLEET PATRIOT was positioned five to seven feet laterally distant from the "plus ten" deck of the platform. [D&O at 8-9; Tr. Vol I at 48, 160, 193] Mr. Bruno signaled to the wheelhouse to "bring the boat back, bring the boat back." [D&O at 9; Tr. Vol I at 187] At the same time, other workers

attempted to communicate with the wheelhouse to “back closer to the work platform.” [D&O at 9; Tr. Vol. I at 124-125, 193] Captain Hudson later admitted that he could have moved the STARFLEET PATRIOT closer to allow Mr. Bruno to disembark safely. [D&O at 9; Tr. Vol. II at 86] When Mr. Bruno attempted to make the rope swing transfer from the jump platform to the “plus ten” deck, he failed and fell into the sea. [D&O at 9; Tr. Vol. I at 50-51, 249-251]

After Mr. Bruno fell into the sea, the STARFLEET PATRIOT either maneuvered or drifted approximately 80 to 100 feet away from the platform and held its position there as workers on the platform pulled Mr. Bruno from the sea. [D&O at 9; Tr. Vol. I at 51-57, 60-63, 129, 188, 253]

While Mr. Bruno was in the sea, no crew member from the STARFLEET PATRIOT provided rescue assistance to him. [D&O at 9; Tr. Vol. I at 58, 130-131, 189] Although Respondent had conducted drills to deploy the vessel’s “man overboard platform” in the event of an emergency, when Mr. Bruno fell into the sea, Respondent failed to deploy the “man overboard platform.” [D&O at 9; Tr. Vol. II at 210]

Mr. Bruno was in the sea for approximately 25-30 minutes before he was lifted onto the “plus ten” deck of the platform. [D&O at 10; Tr. Vol. I at 189] After Mr. Bruno was lifted onto the “plus ten” deck, the STARFLEET PATRIOT backed all the way up to the platform to allow another worker to transfer from the vessel to the platform to perform CPR on Mr. Bruno. [D&O at 10; Tr. Vol. I at 60] Despite life-saving efforts, Mr. Bruno apparently succumbed to a heart attack and died on February 16, 2011. [D&O at 10; Tr. Vol. I at 64]

Sometime around mid-day or early afternoon on February 16, 2011, and after Mr. Bruno had been declared dead, his body was placed on a gurney for transfer. [D&O at 10; Tr. Vol. I at 65, 133, 160-161, 195; Tr. Vol. II at 106] Respondent, at the controls of the STARFLEET PATRIOT, backed the vessel all the way up against the platform, with no gap between the platform and the vessel, to effect the transfer of the gurney to the aft deck of the vessel. [*Id.*]

### PROCEDURAL HISTORY

On October 11, 2012, the Coast Guard filed a Complaint against Respondent’s Merchant

Mariner Credential with a single specification of negligence. On April 19, 2013, the Coast Guard filed its First Amended Complaint, which edited the original Complaint's specification and added a second negligence specification. On July 31, 2013, the Coast Guard filed a Second Amended Complaint, which edited factual allegations in the first negligence specification and added a specification of misconduct. On October 2, 2013, the Coast Guard filed a Third Amended Complaint, editing the factual allegations in all of the specifications.

Respondent properly answered all of the Coast Guard's Complaints and filed his final Answer in the matter on October 11, 2013. In his Answer, Respondent denied many of the jurisdictional and factual allegations contained within the Complaint and, in particular, denied that he was acting under the authority of his mariner credential by serving as the Master of the STARFLEET PATRIOT on February 16, 2011. Respondent specifically averred that, at the pertinent time, he was off-duty and could not have been acting under the authority of his mariner credential.

The hearing took place on December 18-19, 2013, and February 24, 2014, at New Orleans, Louisiana. The Coast Guard offered the testimony of five witnesses during its case-in-chief and one additional witness in rebuttal. The Coast Guard entered twelve exhibits into the record. In addition to testifying on his own behalf, Respondent offered the testimony of two other witnesses and entered four exhibits into the record.

The ALJ issued his D&O on April 23, 2014. Respondent filed his Notice of Appeal on May 16, 2014 and his Appeal Brief on June 19, 2014, thus perfecting his appeal. The Coast Guard filed a Reply on July 24, 2014. This appeal is properly before me.

### **BASES OF APPEAL**

Respondent appeals from the ALJ's D&O, which found proved two specifications of negligence and one specification of misconduct and ordered the revocation of Respondent's mariner credential. Respondent raises the following bases of appeal:

- I. The ALJ's conclusions of law and fact for specification 1 are not in accordance with*

*applicable law, fail to accurately reflect the evidence in the record, and are not supported by substantial evidence;*

- II. *The USCG failed to meet their burden of proof for Specification 2;*
- III. *The D&O stating that Specification 2 is proven fails to accurately reflect the evidence in the record and is not supported by substantial evidence;*
- IV. *The ALJ's conclusions of law and fact for Specification 2 and Specification 3 are not in accordance with applicable law, fails to accurately reflect the evidence in the record, and are not supported by substantial evidence;*
- V. *Revocation of Respondent's license was an unduly harsh sanction, in this case, given the nature of the allegations and Respondent's record of no disciplinary actions;*
- VI. *The D&O is not in compliance with applicable law (46 C.F.R. 5.567); and*
- VII. *Certain findings of fact are not supported by substantial evidence and fail to accurately reflect the evidence in the record.*

## OPINION

### I.

*The ALJ's conclusions of law and fact for specification 1 are not in accordance with applicable law, fail to accurately reflect the evidence in the record, and are not supported by substantial evidence*

Respondent first takes issue with the ALJ's conclusion of law and fact for Specification 1:

. . . Respondent could have ordered the STARFLEET PATRIOT closer to the "plus ten" deck. Nothing prohibited him from doing so, as evidenced by the fact that he positioned the vessel butt-up against the platform later in the day . . .

[D&O at 34] Respondent contends that this finding is "extremely misleading, does not accurately reflect the evidence in the record, and is not supported by substantial evidence." [Appeal Brief at 6] To support this contention, Respondent states that hearing testimony shows that he was only in the wheelhouse for "mere seconds" prior to Mr. Bruno's fall, that he was not in the wheelhouse long enough to observe the distance of the STARFLEET PATRIOT to the platform (or to give any orders to Captain Hudson as to the maneuvering of the STARFLEET PATRIOT), and that there was, moreover, no reason for him to give any orders to Captain Hudson as to the operation of the STARFLEET PATRIOT since Captain Hudson is "vastly experienced and holds the same license"

as Respondent. [*Id.*, citations omitted] Finally, Respondent contends that the testimony of Mr. David Scruton, an experienced and qualified mariner, shows that under the circumstances of this case, Respondent had no duty to intervene and bore no responsibility for the accident since he stepped into the wheelhouse mere seconds before Mr. Bruno's fall. [*Id.* at 6-7.]

In these proceedings, the ALJ's findings "are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." *Appeal Decision 2610 (BENNETT)* (1999) (citing *Appeal Decisions 2557 (FRANCIS)*, *2452 (MORGANDE)* and *2332 (LORENZ)*). The ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record; "where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and to resolve inconsistencies in the evidence." *Appeal Decision 2616 (BYRNES)* (2000) (citing *Appeal Decisions 2554 (DEVONISH)*, *2492 (RATH)*, *2474 (CARMENKE)*, *2460 (REED)*, *2424 (CAVANAUGH)*, *2340 (JAFFEE)*, *2333 (AYALA)*, and *2302 (FRAPPIER)*).

The evidence of record shows that Respondent was in the wheelhouse at the time that Mr. Bruno attempted to make the ill-fated rope swing transfer and that Respondent was fully aware that Mr. Bruno had had difficulties with the transfer in the days leading up to the incident. [D&O at 23; Tr. Vol. I at 249, 272-275] The record further shows that after the accident, Respondent successfully moved the STARFLEET PATRIOT all the way up to the platform to allow transfer of the gurney transporting Mr. Bruno's body from the platform to the aft deck of the STARFLEET PATRIOT. [D&O at 27; Tr. Vol. I at 65, 133, 160-161, 195; Tr. Vol. II at 106] The ALJ concluded, based on this evidence, that Respondent knew that the STARFLEET PATRIOT was not close enough to the platform, yet failed to act to fix the situation, and that there was no reason the vessel could not have been moved closer to the platform to facilitate passenger transfer.

An overarching theme of Respondent's appeal is that he should not be viewed as culpable for the accident since he was not in the wheelhouse long enough to be considered in control of the STARFLEET PATRIOT's operation at the time of the accident. Respondent's general assertions to this effect are meritless. The ALJ addressed this issue cogently in his D&O and I adopt his rationale:



The court regards Respondent as less than fully credible in his attempt to obfuscate his role as Master of the STARFLEET PATRIOT; as if the Master's duties were something that can be shared with another. When asked if he was the senior Master aboard the vessel, Respondent disingenuously responded "We both held captain's license. Nobody was deemed Master, mate. We both was licensed Master. Further, the court accepts as authoritative the testimony of Respondent's expert, Mr. David Scruton, that: "[T]here can be two captains and one Master, and typically there is one person in overall charge . . . a Master has ultimate responsibility . . . Typically, there is one ultimate Master".

[D&O at 14, n. 4] (citations omitted)

Regardless of the limited time that Respondent was in the wheelhouse, he cannot obviate his responsibility as Master of the STARFLEET PATRIOT. As the ALJ determined, Respondent was the vessel's Master. [D&O at 5] Accordingly, he may be held responsible for his acts or failures to act whether or not he was in the wheelhouse at a particular time.

The ALJ's findings as to Respondent's role as Master of the STARFLEET PATRIOT, despite Respondent's protestations to the contrary (raised in basis of appeal VII), are supported by substantial evidence in the record.

Because the record evidence supports the ALJ's conclusions, Respondent's first basis of appeal is rejected.

## II.

### *The USCG failed to meet their burden of proof for Specification 2*

Respondent's second basis of appeal concerns a major portion of the second negligence specification, the allegation that Respondent was negligent in that he failed to have the rescue ladder/platform in a ready position. In this regard, Respondent notes the requirement for substantial evidence of a reliable and probative character, and contends:

Here, the D&O failed to refer to any evidence, other than unqualified opinion testimony, that the rescue platform was not in the proper "ready" position. Further confusing this matter is the fact that hearing testimony indicated that prior to the accident, the USCG inspected and approved the location of the rescue

2711

platform. The USCG failed to meet its burden of proof, and therefore, the D&O stating specification 2 proven should be overturned on appeal.

[Respondent's Appeal Brief at 7] (citations omitted)

The Coast Guard bears the burden of proof and must prove its case by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702. On appeal, a party may raise as an issue whether each finding of fact is supported by substantial evidence. 33 C.F.R. § 20.1001(b)(1). *See* 5 U.S.C. § 706(2)(E).<sup>1</sup>

Contrary to Respondent's assertion, there was substantial evidence to support the ALJ's finding the second specification proved.

The record shows that Captain Hudson testified that Respondent never directed him to have the rescue ladder/platform in the ready position during swing rope transfers. [D&O at 36; tr. Vol. II at 90] The record further shows that although Respondent's vessel and personnel trained and conducted drills to deploy the platform during emergencies such as that involving Mr. Bruno, the platform was never deployed when Mr. Bruno went into the water. [D&O at 26; Tr. Vol. II at 211] The ALJ's finding on this point is strongly, if not conclusively, supported by the testimony of Mr. Ryan Ramgoolie, a passenger aboard the STARFLEET PATRIOT, who stated that, during the incident involving Mr. Bruno, "The rescue ladder was on top, but it was bolted to the boat." [Tr. Vol. I at 190] He further testified: "I think the deckhand was trying to get it out, but he had to undo some bolts or fasteners that was holding the rescue ladder in place." [*Id.*] Mr. Ramgoolie's testimony is corroborated by that of the STARFLEET PATRIOT's deckhand, Mr. Joey Duplantis, who testified that he had to unbolt the rescue platform, and continued: "It took us ten minutes or maybe a little bit more to get it fully down on the deck." [Tr. Vol. I at 255]

As to the allegation at issue, that Respondent failed to have the rescue ladder/platform in a ready position during the passenger transfers, the ALJ finding of proved was supported by substantial evidence in the record. Accordingly, Respondent's second basis of appeal is rejected.

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<sup>1</sup> Properly understood, "substantial evidence" is a standard of review, not a burden of proof.

## III.

*The D&O stating that Specification 2 is proven fails to accurately reflect the evidence in the record and is not supported by substantial evidence*

Respondent next contends that the ALJ failed to refer to any evidence to support his conclusion that Specification 2—that Respondent was negligent in that he failed to have the rescue platform/ladder in the ready position during personnel transfers and by failing to provide rescue/assistance to the overboard passenger—was proved. I do not agree.

As I discussed above, there is substantial evidence in the record to support a conclusion that the rescue ladder/platform was not in the ready position during Mr. Bruno's transfer to the platform. Similarly, the record contains substantial evidence to support the ALJ's conclusion that Respondent failed to provide assistance to Mr. Bruno when he fell overboard. Mr. Eric Petry testified that the STARFLEET PATRIOT did not provide any rescue assistance to Mr. Bruno during the 25 minutes that he was in the water, despite the fact that rescue equipment, such as the rescue deck, life rings and life buoys were available aboard the vessel. [Tr. Vol. I at 58-59] Instead, as the ALJ stated, "After Mr. Bruno fell into the sea, the STARFLEET PATRIOT was either maneuvered and/or allowed to drift approximately 80 to 100 feet away from the platform and held its position there as other workers [from the platform] pulled Mr. Bruno from the sea." [D&O at 25-26 (citing Tr. Vol. I at 51-57, 60-63, 129, 188, 253)] Thus, "No crew member from the STARFLEET PATRIOT provided actual rescue assistance to Mr. Bruno when he was in the water." [D&O at 26 (citing Tr. Vol. I at 58, 130-131, 189)] There was clearly substantial evidence to support the ALJ's conclusion that Respondent failed to provide rescue/assistance in this case.

Having determined that the record contains substantial evidence to support the ALJ's conclusion that Respondent failed to have the rescue ladder/platform in the ready position and that Respondent failed to render rescue/assistance, the remaining issue to be determined is whether the ALJ was correct to conclude that these failures amounted to negligence.

As the ALJ stated:

Negligence is defined in 46 C.F. R § 5.29 as the commission of an action which a reasonable and prudent person of the same station, under the same circumstances,

would not commit or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform. In short, to prove negligence, the Coast Guard is obliged to establish a duty and a breach of that duty.

[D&O at 28]

In his D&O with regard to the first portion of the specification—that Respondent was negligent in failing to deploy the rescue ladder/platform—the ALJ, after discussing the Respondent’s failure to deploy the rescue ladder, generally determined that “Respondent knew he should have deployed the rescue ladder; however the ladder was never deployed.” [D&O at 37]

The record shows that on the relevant morning, “sea conditions were choppy” with larger waves and “a 15 to 18 knot wind.” [D&O at 22] Respondent was obviously aware of the sea conditions and obligated to keep them in mind during personnel transfers. The record also shows that Respondent was aware that the passengers in general, and Mr. Bruno specifically, were having difficulties conducting the swing rope transfers. [D&O at 24] However, despite rough sea conditions and personnel difficulties in conducting the transfer, as has already been discussed, Respondent failed to deploy the rescue ladder platform, even though the crew had, at Respondent’s direction, practiced doing so. [D&O at 26]

In his D&O, the ALJ identified the Master’s duty of care with respect to his passengers, stating: the Master owes a “high degree of care . . . as a reasonably safe means of boarding and leaving the vessel.” [D&O at 30 (citing *Smith v. Southern Gulf Marine Company No. 2*, 791 F. 2d 416, 419-420 (5<sup>th</sup> Cir. 1986))] The ALJ also found that the Master has a duty to intervene when a dangerous situation presents itself. [D&O at 31 (citing *Appeal Decision 2113 (HINDS)* (1978))] Under the circumstances of this case and based upon these duties, the ALJ would be correct to conclude that a reasonably prudent mariner under circumstances similar to those of Respondent would have, in the exercise of caution and good seamanship, deployed the rescue ladder/platform during similar personnel transfers and that, as a consequence, Respondent was negligent in failing to do so. Although the ALJ did not specifically address the issue with respect to deployment of the rescue platform, I infer such duty based on a reading of the ALJ’s analysis of the Master’s duties in general. Since a duty of care towards the transferring passengers was established, the ALJ did not

err in finding Respondent negligent in failing to deploy the rescue platform/ladder during personnel transfers.

With regard to the second portion of Specification No. 2, that Respondent was negligent in failing to provide rescue assistance to the overboard Mr. Bruno, a review of the D&O shows that the ALJ thoroughly explained the Master's absolute duty to aid an overboard passenger. *See D&O at 37-40.* Since the record shows that Respondent failed to render *any* assistance towards Mr. Bruno when he fell overboard, Respondent breached his duty to render assistance and the ALJ was correct to find his breach negligent.

For these reasons, Respondent's third basis of appeal is rejected.

#### IV.

*The ALJ's conclusions of law and fact for Specification 2 and Specification 3 are not in accordance with applicable law, fails to accurately reflect the evidence in the record, and are not supported by substantial evidence*

Specifications 2 and 3 generally concern Respondent's failure to render assistance, specification 2 as that failure constituted negligence, and specification 3 as the failure constituted misconduct.

On appeal, Respondent contends that "the Master's responsibility to render assistance can be overcome if rendering such assistance would place the vessel in serious dangers" and avers that Respondent's "obligation was to render assistance to the same extent as this would have been done by a reasonably prudent Master under the same circumstances." Appeal Brief at 9. Respondent insists that because the record shows that Mr. Bruno was underneath the platform seconds after his fall, it was not possible to safely maneuver the STARFLEET PATRIOT into position to safely effect rescue operations and, therefore, he did not err in failing to render assistance.

The record shows that the ALJ carefully considered this argument in his D&O:

Respondent counters, arguing that the platform workers directed him to stand off, thus preventing him from coming to the aid of Mr. Bruno. But Respondent's assertion that he was told to stand off by platform workers rings

hollow. No independent witness testified that the STARFLEET PATRIOT was told to stand off from the emergent scene of Mr. Bruno's rescue. Moreover, his argument fails in light of *Smith v. Tidewater, Inc.*, 918 S.2d 1 (La. App. 4th Cir. 2005), where the court, concerned with issues similar to those at bar, said that even the commencement of a Coast Guard search and rescue operation did not lessen the duty of a ship's Master to the one who fell overboard. "Prior to the time of the Roman Empire, the duty to search and rescue a seaman gone overboard was recognized as a natural obligation of the Master of a ship." *Id.* at 7-8.

Respondent also suggests that he could not place the bow, or the stern, of his vessel inside the oil platform structure—thus preventing him from participating in a rescue operation. The court regards the mandate of 46 U.S.C. § 2302 to be absolute. There was no evidence offered by any person that Respondent would have imperiled his vessel or others by attempting a rescue. Neither is Respondent's suggestion credible that exhaust from his engines would have complicated the rescue effort. Apparently, the exhaust did not impair the twice-daily passenger transfer to and from the platform.

Nor is Respondent's suggestion that he could not position his vessel safely near the platform credible. He could have brought his vessel broadside to one of the four sides of the platform, lowered his rescue ladder or thrown a ring to the imperiled man. At the very least, Respondent and/or his crew could have personally disembarked to the "plus ten" deck and rendered hands and muscles to the effort to extract Mr. Bruno from the sea.

Respondent was the senior mariner on the scene; the platform workers were tradesmen of other backgrounds—but none were mariners. Respondent was the one person with the ostensible background, training and experience to participate in the rescue of a man overboard. He failed in that regard.

[D&O at 39-40 ] (citations omitted) The record shows that in reaching this conclusion, the ALJ gave appropriate consideration to the high responsibility of the master of a vessel. The ALJ rejected the arguments Respondent now reiterates on appeal and was supported by both the evidence in the record and the law in reaching his conclusion. Based on the evidence in the record and in consideration of the high duty placed on a ship's Master, the ALJ did not err; Respondent's fourth basis of appeal is rejected.

## V.

*Revocation of Respondent's license was an unduly harsh sanction, in this case, given the nature of the allegations and Respondent's record of no disciplinary actions*

Respondent argues that the sanction of revocation is unduly harsh under the facts and

circumstances of this case. Respondent notes that he has worked in the maritime industry for sixteen years, that he does not have a prior record with the Coast Guard, and that because the sanction assessed is well beyond that authorized in 46 C.F.R. Table 5.569, Suggested Range of an Appropriate Order, the sanction of revocation is arbitrary and capricious and should be reversed or reduced on appeal because it is clearly excessive and amounts to an abuse of the ALJ's discretion. I do not agree.

The ALJ has wide discretion to choose the appropriate sanction based on the individual facts of each case. *Appeal Decision 2695 (AILSWORTH)* (2011) at 16 (citing *Appeal Decision 2654 (HOWELL)* (2005)). "The ALJ may consider the sanction recommended by [46 C.F.R. Table 5.569], but Respondent's remedial actions, his prior record, and other aggravating and mitigating factors may justify a tougher or more lenient order." *Id.*

In this case, in setting the sanction, the record shows that the ALJ accorded great weight to Respondent's failure to render assistance to an overboard passenger. In that regard, the ALJ stated as follows:

The duty to aid an overboard passenger has been a constant in maritime law—if not human morality—for as long as men have gone down to the sea in ships. Respondent clearly failed in this regards, just as he failed to safely position his vessel at the time Mr. Bruno attempted to make the rope-swing transfer on the morning of February 16, 2011. Both of these two distinct failures separately warrant REVOCATION as the appropriate sanction in this case.

[D&O at 42]

In consideration of this failure, and in consideration of the record as a whole, the ALJ did not abuse his discretion in assessing a sanction beyond that set out in 46 C.F.R. Table 5.569. It is also worth noting that the Table identifies sanctions recommended in cases with singular offenses. In this case, Respondent was charged with two counts of negligence and one count of misconduct. Given the multiple offenses, notwithstanding that the ALJ found the second and third specifications multiplicitious, departure from the recommended sanction is certainly not arbitrary and capricious, and Respondent's fifth basis of appeal is rejected.

## VI

*The D&O is not in compliance with applicable law (46 C.F.R. 5.567)*

Respondent next contends that the ALJ erred when he assessed the sanction of revocation against Respondent's "Merchant Mariner Credential," rather than against a specific credential or endorsement, as is mandated by 46 C.F.R. 5.567.

While the Coast Guard formerly issued Merchant Mariner Documents and Merchant Mariner Licenses separately, it now issues one all-inclusive credential, the Merchant Mariner Credential. See the definition of "credential" in 33 C.F.R. § 20.102 and 46 C.F.R. § 10.107. The Complaint in this case was brought against Respondent's Merchant Mariner License and his Merchant Mariner Credential, but at present, Respondent is the holder of one Merchant Mariner Credential. Thus, in revoking Respondent's Merchant Mariner Credential, the ALJ revoked the entire credential, including any associated endorsements.

Under 46 C.F.R. § 5.567, the order in a negligence case is to be assessed against specific endorsements. While the ALJ did not specify which endorsement or endorsements were being revoked, he made clear that the most severe sanction available was appropriate under the circumstances of the case. I view the ALJ's Order as revoking any and all endorsements associated with Respondent's singular credential. Further, I view this action as warranted by the record. Respondent's sixth basis of appeal is rejected.

## VII

*Certain findings of fact are not supported by substantial evidence and fail to accurately reflect the evidence in the record.*

Respondent contends that Finding of Fact Nos. 5<sup>2</sup> and 29<sup>3</sup> are not supported by substantial

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<sup>2</sup> Finding of Fact No. 5: "On February 16, 2011, Respondent . . . was the Master of the STARFLEET PATRIOT. Captain Cameron Hudson was the Licensed Mate, as evidenced by his admissions that he did not fill out the ship's log book, that he was obliged to follow the Respondent's orders, and that he was, in fact, the Licensed Mate." (citations omitted)



evidence and should be overturned. I do not agree. Finding of Fact 5, that Respondent was the Master, is well supported by testimony of two witnesses, including a passenger and the licensed mate. [Tr. Vol. I at 25, Tr. Vol. II at 80-81, 92] Finding of Fact 29 was discussed earlier in this opinion under I. These findings are supported by substantial evidence in the record and will not be disturbed.

### CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The Order imposed by the ALJ, revoking Respondent's Merchant Mariner Credential, is **AFFIRMED**.

### ORDER

The ALJ's Decision and Order dated January 7, 2013, is **AFFIRMED**.

Carol S. Miller VADM, USCG

Signed at Washington, D.C., this 1<sup>st</sup> day of December, 2015.

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<sup>3</sup> Finding of Fact No. 29: "On the Morning of Wednesday, February 16, 2011, and at the time Mr. Bruno made his unsuccessful attempt to use the rope swing, Respondent . . . was standing in the aft-facing wheelhouse with Captain Hudson at the controls." (citations omitted)