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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	NO. 2680
MERCHANT MARINER LICENSE	:	
Issued to: JOHN C. McCARTHY, III	:	

This appeal is taken in accordance with 46 U.S.C. § 7701-7705, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a bifurcated Decision and Order dated November 29, 2006 (hereinafter "D&O I"), and December 28, 2006 (hereinafter "D&O II"), Judge Peter A. Fitzpatrick, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Norfolk, Virginia, found that Mr. John C. McCarthy (hereinafter "Respondent") had committed acts of *negligence* and *misconduct* and ordered that Respondent's merchant mariner license be suspended, outright, for eight months followed by a suspension of twelve months stayed on twelve months probation.

The specification supporting the *negligence* charge alleged that Respondent operated the T/V CHARLESTON negligently by exceeding the minimum safe speed in Savannah Harbor on March 14, 2006. The specification supporting the *misconduct* charge alleged that Respondent violated 33 C.F.R. § 162.65(b)(3) by proceeding at a

dangerous speed that was not consistent with the Inland Waterways Navigation Regulations for waterways tributary to the Atlantic Ocean south of Chesapeake Bay.

PROCEDURAL HISTORY

On April 27, 2006, the Coast Guard filed a Complaint against Respondent. [D&O I at 5] The Complaint alleged that Respondent violated 46 U.S.C. § 7703, 46 C.F.R. § 5.29 and 46 C.F.R. § 5.33 by failing to operate the T/V CHARLESTON at a safe speed. [Id.] On May 16, 2006, Respondent filed an Answer to the Complaint wherein he denied negligently operating the vessel. [Id.] On June 13, 2006, the Coast Guard filed an Amended Complaint alleging that that Respondent violated 46 U.S.C. § 7703 by committing *misconduct* and *negligence* under 46 C.F.R. § 5.27 and 46 C.F.R. § 5.29, respectively, based on essentially the same factual allegations. [Id.] Having received an extension of time, Respondent filed his Answer to the Amended Complaint on July 7, 2006, asserting a defense of error in judgment. [D&O I at 6] A hearing was held in Savannah, Georgia, on September 20-21, 2006, at which the Coast Guard called seven witnesses and introduced twelve exhibits into evidence. [Id.] Respondent called three witnesses and introduced seventeen exhibits into evidence. [Id.] The ALJ issued his Order in the case on November 29, 2006, and issued his Final Decision and Order on Sanction on December 28, 2006. Respondent filed his Notice of Appeal in the matter on January 4, 2007 and perfected his appeal by filing his Appellate Brief on February 26, 2007. The Coast Guard filed a timely Reply Brief in the matter on April 2, 2007. Accordingly, this appeal is properly before me.

APPEARANCE: Respondent was represented by Charles H. Raley, Jr. The Coast Guard was represented by CWO Bernard Tufts, CWO Terry Roberts, and Petty Officer Michael Rohland, of U.S. Coast Guard Marine Safety Office Savannah, Georgia.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner license at issue in these proceedings and was acting under the authority of that license by serving as a federally mandated pilot. [D&O I at 7, 37; IO Exhibit 1] The remaining pertinent facts in this case are undisputed.

At approximately 0300 on March 14, 2006, Respondent boarded the inbound T/V CHARLESTON in the vicinity of the sea buoy for the Savannah River. [D&O I at 8] After an initial meeting with the Master, Respondent proceeded to pilot the CHARLESTON up the Savannah River at full ahead. [Id.] While inbound, Respondent made passing arrangements with the pilot of the KOBE EXPRESS, and the two vessels successfully passed at Bloody Point. [Transcript (hereinafter "Tr.") at 334] Respondent reduced his speed to slow ahead while passing the Coast Guard and Pilot stations. [Tr. at 338] Respondent slowed the CHARLESTON at this point to avoid potential damage that the CHARLESTON's surge could do to the unattended vessels moored there. [Tr. at 441-42] Respondent then increased speed to full ahead. [Tr. at 339] On the CHARLESTON, slow ahead produces a speed of approximately 6 knots while full ahead produces a speed of approximately 14 knots. [Tr. at 490-3] The CHARLESTON continued upriver on about a half knot flood tide with light winds, calm seas and clear visibility. [D&O I at 7]

After passing the Coast Guard and pilot boat stations, Respondent made the second of two required security radio broadcasts on VHF Channels 13 and 16. [Tr. at 339] Savannah River Pilot Captain Spencer Edelman, aboard the outbound tug TARPON pushing an asphalt barge, responded. The two captains agreed to meet and pass below the Fig Island Turning Basin, after the CHARLESTON would have passed the LNG facility on Elba Island where the tankship GOLAR FREEZE was moored. [Tr. 164-5, 67] In determining where to pass each other, the captains were constrained by the following factors: (1) the interim policy in effect for the Regulated Navigation Area (hereinafter "RNA") prohibited meeting or overtaking within 1,000 yards of the LNG facility, (2) a Chatham County ordinance prohibited passing near a dredge and the dredge ARLINGTON was moored off Elba Island,[1] and (3) it was not desirable to pass in the Bight Channel as the River curved around Elba Island. [Tr. at 345] After the CHARLESTON passed through this area where it would be difficult or prohibited to pass the TARPON, the CHARLESTON traveled another two nautical miles before it reached the Fig Island Turning Basin. [Respondent's Exhibit D] Captain Edelman testified, and the ALJ found, that the Fig Island Turning Basin would have been the best place to pass under the circumstances, but the vessels could have passed at another location on the river. [Tr. at 168-69]

At approximately 0418, the CHARLESTON passed the moored GOLAR FREEZE still at full ahead. [D&O I at 7] The surge from the CHARLESTON caused the GOLAR FREEZE to surge along the dock parting mooring lines, damaging the gangway, and causing an emergency shutdown of the LNG transfer operations. [Id.] The interim

[1] Respondent was not aware of the ordinance at the time, but both pilots agreed that passing near the

policy governing the RNA required that vessels such as the CHARLESTON transit the area within 1,000 yards of the LNG facility at minimum safe speed. [Respondent's Exhibit K] The policy also required the LNG facility to have two standby towing vessels while a LNG tankship was moored in the slip. [Id.]

BASES OF APPEAL

Respondent appeals both the findings that *negligence* and *misconduct* were proved and the sanction imposed by the ALJ on the following basis:

I. The ALJ abused his discretion by finding that "minimum safe speed" is the equivalent of "bare steerageway" in determining the standard of care in this case;

II. With regard to the error of judgment defense, the ALJ abused his discretion by (a) finding that Respondent had actual knowledge of the active LNG transfer, (b) refusing to acknowledge that the Respondent had three speed choices as he approached the LNG slip, (c) by refusing to consider all the circumstances facing the Respondent at the time he made his decision to proceed at full speed, (d) by applying a hindsight standard in determining the reasonableness of Respondent's speed decision, (e) by finding that the Respondent was required to presume that the LNG Bridge Watch Tender would violate positive regulatory duties and (f) by refusing to credit Captain Edelman's testimony regarding areas in which it was safe to pass;

III. The misconduct count is subsumed by the Negligence count since both arise from the same operative facts;

IV. The sanction of eight months suspension outright is excessive.

OPINION

I.

The ALJ abused his discretion by finding that "minimum safe speed" is the equivalent of "bare steerageway" in determining the standard of care in this case.

On appeal, Respondent argues that the term "minimum safe speed" is undefined, and that the ALJ abused his discretion in determining that minimum safe speed and bare

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dredge should be avoided.

steerageway are synonymous. Instead, Respondent argues that minimum safe speed must take into account numerous other factors including his passing arrangements with the tug TARPON. This assignment of error fails on two accounts. First, the ALJ's understanding of minimum safe speed is a reasonable definition consistent with how the other pilots testifying at the hearing used the term. Second, and more important, the ALJ analyzed the facts "as if minimum safe speed encompasses a range of factors" as proposed by Respondent and still found the allegations proven. Consequently, even if the ALJ erred in equating the two terms, that error had no impact on his decision.

The term bare steerageway is commonly understood to mean the slowest speed a vessel can maneuver without being out of control. *See, e.g.*, Trico Marine Assets Inc. v. Diamond B Marine Services Inc., 332 F.3d 779, 784 (5th Cir. 2003). Consequently, at a speed below bare steerageway, a vessel could not be controlled. In other words, such a speed would not be safe. Since minimum is defined as the least possible quantity, amount or value,[2] the minimum safe speed is the same as the lowest speed at which a vessel can safely operate. As the ALJ found, the two terms are linguistically synonymous, and the pilots who testified in this case understood them to mean the same thing. [Tr. at 112, 113, 136, 162] This included Captain Harvey, who testified on behalf of Respondent that minimum safe speed "is different on every vessel that you go on, so there's no definition other than maybe the slowest speed you could go and have complete control over the vessel." [Tr. at 503]

It is well settled that the decision of the ALJ may only be reversed if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence.

[2] Funk & Wagnalls Standard College Dictionary 1973.

Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). The findings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to support their justification. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSEN), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD) and 2614 (WALLENSTEIN). The standard of proof for suspension and revocation proceedings is that the ALJ's findings must be supported by reliable, probative, and substantial evidence. Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF), and 2575 (WILLIAMS). Given the common sense equivalence of the terms "bare steerageway" and "minimum safe speed" and their interchangeable use in the maritime community, the ALJ did not err in finding them synonymous.

Even if the ALJ accepted Respondent's argument that minimum safe speed could only be determined by considering all applicable factors including his passing arrangements with the TARPON, a careful review of the record shows that the ALJ did not err in holding that Respondent failed to operate CHARLESTON at the minimum safe speed. Indeed, during testimony at the hearing, Respondent admitted as follows:

> Q. You could have still cut it back to half passed [sic] the terminal and still achieved your objective of passing [TARPON] in that section of the river that you wanted to pass him in, is that right or not?
>
> A. I could, in hindsight you can.

[Tr. at 433] Later, Respondent again admitted that he could have reduced speed and still passed TARPON in a safe place, but chose not to because standby tugs and a Docking

Pilot were at the LNG terminal. [Tr. at 451-52] This was consistent with Captain Edelman's testimony that the two vessels could still have passed in a safe place if Respondent had slowed CHARLESTON to pass the LNG terminal. [Tr. at 169] As the ALJ pointed out, both vessels could also have slowed if necessary to ensure the meeting took place in a safe part of the river. [D&O at 24] The record shows that Respondent felt that given the CHARLESTON's light load, the minimal wake that it was throwing, and the presence of the standby tugs, he could safely pass the LNG terminal at full ahead; however, even if full ahead was a safe speed, by his own admissions it was not the *minimum* safe speed. Accordingly, Respondent's first assignment of error is not persuasive.

II.

With regard to the error of judgment defense, the ALJ abused his discretion by (a) finding that Respondent had actual knowledge of the active LNG transfer, (b) refusing to acknowledge that the Respondent had three speed choices as he approached the LNG slip, (c) by refusing to consider all the circumstances facing the Respondent at the time he made his decision to proceed at full speed, (d) by applying a hindsight standard in determining the reasonableness of Respondent's speed decision, (e) by finding that the Respondent was required to presume that the LNG Bridge Watch Tender would violate positive regulatory duties and (f) by refusing to credit Captain Edelman's testimony regarding areas in which it was safe to pass.

Respondent next argues that the ALJ abused his discretion in reaching a number of factual findings or in applying certain evidentiary standards in connection with his error of judgment defense. Although I find that the ALJ did not abuse his discretion,[3] none of the allegations matter because the ALJ concluded that the error of judgment defense simply does not apply in this case, and I agree.

[3] As for the specific allegations raised by Respondent, they either mischaracterize the ALJ's findings, or are irrelevant, or both. For example, the ALJ found that Respondent was "aware of the LNG tankship's presence in the slip and of the impending transfer" not that he was aware of an actual transfer. In addition,

> Error in judgment is an affirmative defense to negligence. It recognizes that:
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> > there are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgement [sic] in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not the measure of compliance.

Appeal Decision 2173 (PIERCE), *aff'd* NTSB Order EM-81. *See also* Appeal Decisions 2500 (SUBCLEFF), 2325 (PAYNE) and 1940 (HUDDLESTON). Error of judgment, however, does not apply in this case since the evidence shows that the position in which Respondent found himself was one of his own making, and that he did not respond in a reasonable fashion. *See, e.g.*, Appeal Decision 2601 (MCCARTHY) (evidence shows that the position in which Respondent found himself upon entering the squall was one of his own making, and that he did not respond in a reasonable fashion).

On appeal, Respondent argues the factors that went into his decision to pass the LNG facility at full ahead were not of his own making. I do not agree. The characteristics of Bight Channel, the presence of the LNG ship and the dredge, and the need to pass other vessels are not circumstances of Respondent's making, but they are the everyday aspects of a Savannah River pilot's working environment. Respondent had the ability to exercise control over the place where the CHARLESTON and the TARPON met by slowing his speed and also by asking Captain Edelman to slow TARPON's speed, and his decisions placed the vessel in his charge and himself in the precarious position that is the subject of this action.

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the requirement to transit the area at minimum safe speed was triggered when an LNG tankship was present in the slip regardless of whether transfer operations were underway.

More importantly, the record supports a conclusion that Respondent did not choose between reasonable alternatives but rather ignored the prudent alternative available to him. Respondent and Captain Edelman both testified that Respondent could have slowed the CHARLESTON and still arranged to meet the TARPON in a safe place, thereby reducing the potential for damaging the GOLAR EXPRESS without increasing the risk of a collision with the TARPON. [D&O at 11, 24; Tr. at 169; 451-452] In addition, passing the LNG facility at full ahead was not a prudent alternative since the same interim requirements that prohibited passing within 1,000 yards of the facility also mandated transiting that area at the minimum safe speed. [Marine Safety Unit Charleston Marine Safety Information Bulletin 13-05 dated December 20, 2005] Finally, several Savannah River pilots testified that their procedure for passing a moored vessel such as the LNG ship was to maintain bare steerageway. [Thompson Tr. at 102, 104; Edelman Tr. at 162; Brown Tr. at 192.]

In sum, Respondent did not simply err in a choice between two reasonably prudent alternatives after being placed in a position not of his making. Instead, although he had the option to reduce his speed while passing the LNG facility and still pass TARPON in a safe place, Respondent chose to maintain full ahead, ignoring the requirement to maintain minimum safe speed, because he believed that it was safe enough to proceed at full ahead. This was not a reasonably prudent alternative. Accordingly, I find that the ALJ correctly found that the error of judgment defense did not apply.

III.

The Misconduct count is subsumed by the Negligence count since both arise from the same operative facts.

Respondent listed this as a basis for appeal, but provided no supporting argument other than improperly characterizing Misconduct as "a lesser included offense" of Negligence. A lesser included offense is a concept of criminal law in which all the elements of the lesser offense are included in the greater offense and the common elements are identical. Misconduct is human behavior which violates some formal, duly established rule whereas negligence is an act that a reasonably prudent person under the same circumstances would not commit. 46 C.F.R. §§ 5.27 and 5.29. Since the "elements" of these two charges differ, Misconduct cannot be characterized as a lesser included offense of Negligence. Nevertheless, I will consider the fact that the gravamen of both charges is piloting the CHARLESTON at excessive speed past the LNG facility in considering whether the sanction imposed is excessive.

IV.

The sanction of eight months suspension outright is excessive.

Respondent's final assertion of error centers on the eight-month outright suspension imposed by the ALJ. Respondent asserts that "[i]n rejecting the Coast Guard's request for revocation…the ALJ necessarily rejected the concept that Respondent is a threat to marine safety." [Appeal Brief of Respondent at 27] In addition, Respondent notes that the Coast Guard's Chief ALJ expressly noted the "depth and sincerity of Respondent's remorse" in his Order that Granted Respondent a Temporary License during the pendency of this case. [Id.] At the same time, after noting that the ALJ elected to treat Respondent as a "First-Time Offender," Respondent asserts based on his analysis of enforcement actions taken after other incidents on the Savannah River, that there is a "lack of parity" in cases that result from incidents on the Savannah

River and, as such, contends that Respondent "has been discriminated against (due to his status as a federal-only pilot)…in terms of the sanction levied by the ALJ." [Appeal Brief of Respondent at 29] Respondent concludes by noting that the sanction imposed as a result of the catastrophic EXXON VALDEZ oil spill was only one month greater than the sanction imposed in this case and asserts that because only $110,000 in property damage occurred as a result of the incidents given rise to this case—not an actual disaster and billions of dollars in environmental and other losses—the record supports a conclusion that the sanction imposed by the ALJ was "impermissibly penal in nature." [Appeal Brief of Respondent at 27-30] I do not agree.

In Coast Guard suspension and revocation cases, the sanction imposed in a particular case is exclusively within the authority and discretion of the ALJ. *See* 46 C.F.R. § 5.569(a); Appeal Decisions 1998 (LE BOEUF), 2543 (SHORT) , 2609 (DOMANGUE), 2618 (SINN), and 2622 (NITKIN). While the ALJ may look to 46 C.F.R . Table 5.569 for information and guidance as to the typical order associated with a charge, he may increase or decrease the sanction as he sees fit. *See* 46 C.F.R. § 5.569(d); Appeal Decisions 2173 (PIERCE), 2362 (ARNOLD), 2391 (STUMES), 2455 (WARDELL), 2618 (SINN), and 2622 (NITKIN). As a result, on appeal the sanction imposed by the ALJ will only be modified if it is clearly excessive or involves an abuse of discretion. Appeal Decisions 2245 (MATHISON), 2256 (BURKE), 2313 (STAPLES), 2362 (ARNOLD), 2366 (MONAGHAN), 2391 (STUMES), 2422 (GIBBONS), 2423 (WESSELS), and 2618 (SINN).

In this case, the record shows that the ALJ carefully considered the issue of sanction. Indeed, the record shows that to do so, the ALJ took the extraordinary step of

holding a second hearing to allow both Respondent and the government the opportunity to submit evidence in aggravation and mitigation. After hearing such argument and noting his inherent authority to select an appropriate order in the case, the ALJ stated as follows with regard to the sanction:

> In this case, the Coast Guard is seeking revocation. In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider a Respondent's prior records. As previously discussed, since there was no evidence that Respondent has had a prior incident less than ten years ago, he will be treated as a first time offender for the strict purpose of determining the appropriate sanction in this case. For first time offenders and without considering other factors, the Table of Average Orders suggests a suspension of up to six months for negligently performing duties related to vessel navigation and up to three months for misconduct predicated on a failure to comply with U.S. law or regulations.
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> In this case, the damage and potential damage that Respondent caused by his actions must be weighed against Respondent's good record and apparent remorse for his actions. Respondent's actions indeed caused significant damage, and I cannot stress enough that Respondent's actions could have resulted in massive disaster. However, Respondent's good track record and apparent remorse are sufficient to convince me that he is not a danger to life and property at sea. While not enough to reduce the sanction to a warning as Respondent proposed, these mitigating factors are sufficient to keep the sanction within the standard range of sanctions for these offenses as contemplated by the Table of Average Orders. Revocation is therefore not appropriate in this case. (citations omitted)

[D&O II at 5-6]

Therefore, the record shows that although revocation was a permissible sanction, the ALJ chose to exercise leniency and impose only an eight month suspension. Since the sanction imposed by the ALJ is within the range articulated by the Coast Guard's Table of Average Orders and because the record shows that the ALJ considered all aggravating and mitigating evidence presented in settling on the appropriate duration of the sanction, I do not find it to be either excessive or involving an abuse of the ALJ's

discretion. Accordingly, Respondent's final argument is wholly unpersuasive.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

The orders of the ALJ, issued at Norfolk, Virginia, on November 29, 2006, and December 28, 2006, are **AFFIRMED.**

/S/

Signed at Washington, D.C. this 8th of April, 2008.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

The orders of the ALJ, issued at Norfolk, Virginia, on November 29, 2006, and December 28, 2006, are **AFFIRMED.**

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 8th of April, 2008.