

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

UNITED STATES COAST GUARD
Complainant

vs.

MICHAEL JOSEPH KORN

Respondent

Docket Number 2019-0359
Enforcement Activity No. 5770226

DECISION AND ORDER
Issued: March 22, 2023

By Administrative Law Judge: Honorable Timothy G. Stueve

Appearances:

Jennifer Mehaffey, Esq.
Suspension and Revocation National Center of Expertise
CWO Aaron Camren,
Investigating Officer
For the Coast Guard

Michael Joseph Korn, Pro se
For the Respondent

I. BACKGROUND

The United States Coast Guard (Coast Guard) brought this administrative action under 46 U.S.C. § 46 USC 7703(1)(A) and its underlying regulations at 46 C.F.R. Part 5, seeking to suspend Michael Joseph Korn's (Respondent) Merchant Mariner Credential (MMC or Credential) for three months. On September 13, 2019, the Coast Guard filed a Complaint against Respondent, alleging he operated the inspected small passenger vessel P/V FANTASEA while under the influence of alcohol in violation of 33 C.F.R. § 95.045(b).

I held the hearing on September 15-16, 2021, in San Diego, California.¹ Jennifer Mehaffey, Esq. represented the Coast Guard, while Respondent appeared pro se, representing himself. The Coast Guard called five witnesses and introduced 13 exhibits, all of which were admitted. Respondent called two witnesses including himself and offered six exhibits, four of which were admitted.²

Following the hearing, I provided the transcript to both parties and gave them the opportunity to file post-hearing briefs containing proposed findings of fact, proposed conclusions of law, and argument supporting their positions. Coast Guard filed its brief on November 18, 2021, and Respondent filed his brief on December 19, 2021. The case is now ripe for decision. For the reasons set forth in this decision, I find the Coast Guard **PROVED** Respondent operated the P/V FANTASEA while under the influence of alcohol, and Respondent's credentials shall be **SUSPENDED** outright for three months.

II. FINDINGS OF FACT

1. At all times relevant to this proceeding Respondent held MMC # [REDACTED]. (CG Ex. 1).
2. Brisa De Noche Corp., a corporation owned by [REDACTED], employed Respondent

¹ The hearing was initially set to commence March 18, 2020, with the Honorable Dean C. Metry presiding. However, due to COVID-19 restrictions, the hearing was cancelled, and the Chief Administrative Law Judge reassigned this case to me on August 7, 2020.

² Respondent's Exhibit A and Exhibit E were not admitted.

at all times relevant to this proceeding. (Tr. I at. 25, 35; CG Ex. 2, 3).

3. The P/V FANTASEA was a United States flagged small passenger vessel subject to inspection on August 3, 2019. (CG Ex. 2).
4. On August 3, 2019, Respondent served as the master, operating the P/V FANTASEA with 24 passengers onboard while underway in the vicinity of Embarcadero Marina Park, San Diego, California. (Tr. I at. 35; 85, 87, 136-137; Tr. II at 9-10; CG Ex. 3, 9, 11, 12, 13).
5. At approximately 2000, San Diego Harbor Police Officer Michael Sabbagh (Officer Sabbagh) responded to a radio call of a vessel collision near the South Marina Park Fishing Pier. (Tr. II at. 8; CG Ex. 13).
6. Officer Sabbagh pulled alongside the P/V FANTASEA at approximately 2002 while it was setting anchor off the South Marina Park Fishing Pier. (Tr. II at. 9-10; CG Ex. 13).
7. Officer Sabbagh observed active smoking coming from the rear engine compartment. (Tr. II at. 9-10; CG Ex. 13).
8. Respondent and a crewmember of the P/V FANTASEA informed Officer Sabbagh that there was no active fire, no collision, no passenger injuries, and Respondent declined assistance from Officer Sabbagh. (CG Ex. 13).
9. At approximately 2017, Coast Guard Boarding Officer Lopez-Lopez (Petty Officer Lopez-Lopez) and the Coast Guard Response Boat Medium Boarding Team responded to a possible vessel collision involving the P/V FANTASEA. (Tr. I at. 32; 85-86; CG Ex. 12).
10. At approximately 2022, prior to departing the scene, Officer Sabbagh conferred with Petty Officer Lopez-Lopez informing him the P/V FANTASEA had an engine casualty with no injuries reported and that the Harbor Police did not board the P/V FANTASEA. (Tr. I at. 86-87; CG Ex. 12.)
11. Officer Sabbagh departed without ever boarding the P/V FANTASEA. (Tr. II at. 10; CG Ex. 13).
12. At approximately 2022, Petty Officer Lopez-Lopez hailed Respondent to notify him that the Coast Guard would be boarding the P/V FANTASEA and Respondent agreed. (Tr. I at. 87; CG Ex. 11, 12.)
13. While reviewing the P/V FANTASEA's documents, Petty Officer Lopez-Lopez smelled alcohol on Respondent's breath and observed a beer can at the helm. (Tr. I at. 88-89, 119-120; CG Ex. 9, 12).
14. Respondent informed Petty Officer Lopez-Lopez that he drank mimosas earlier in the day and he had mistakenly taken a sip of vodka from a red Solo cup prior to the Coast Guard's initial boarding. (Tr. I at. 89; 94, 99; CG Ex. 9,12, 13).
15. At the Coast Guard's request, at approximately 2132, Officer Sabbagh returned to the P/V FANTASEA to administer breathalyzer testing of Respondent. (Tr. I at. 90; Tr. II at

20; CG Ex. 12, 13).

16. Officer Sabbagh administered two back-to-back breathalyzer tests on Respondent using Alco-sensor IV, PAS (serial #032752). At approximately 2146 and 2150, results showed Respondent had a 0.059% Blood Alcohol Content (BAC) and 0.057%, respectively. (Tr. I at. 91; Tr. II at 21; CG Ex. 12, 13).
17. Petty Officer Lopez-Lopez is trained to administer afloat Field Sobriety Tests (FSTs) while onboard a marine vessel. (Tr. I at. 79-80, 83-84; CG Ex. 8).
18. At approximately 2207, Petty Officer Lopez-Lopez administered an afloat field sobriety test to Respondent. The test indicated physical signs of intoxication by Respondent including avoiding eye contact, glassy eyes, and mumbled speech. (Tr. I at. 91, 94-95; CG Ex. 9).
19. Petty Officer Lopez-Lopez then directed Respondent to undergo a chemical test. (Tr. I at. 101; CG Ex. 9, 12).
20. At approximately 2237, Petty Officer Lopez-Lopez administered a breathalyzer chemical test on Respondent using Coast Guard Alco-Sensor Serial #088986. The test showed Respondent's BAC was .05% and the test was witnessed by [REDACTED]. (Tr. I at 96-97, 98, 101, 108, 112, 114; CG Ex. 7, 9, 10, 11, 12).
21. Petty Officer Lopez-Lopez sent a picture of Alco-Sensor Serial #088986 and the results of Respondent's breathalyzer test to the marine investigator on duty at Sector San Diego, Chief Warrant Officer (CWO) Yancy Plascencia (Ret.). (Tr. I at 111-114, 135, 137-142; CG. Ex. 7, 10).
22. At all times relevant, and on August 3, 2019, the Coast Guard Sector San Diego law enforcement petty officer properly maintained and calibrated Alco-Sensor Serial #088986. (Tr. I at. 48-50, 59-60, 62-66, 105, 107, 125; CG Ex. 4, 5, 6, 7).
23. At approximately 2358, Deck Hand [REDACTED] relieved Respondent of duty. (CG Ex. 12).

III. DISCUSSION

A. Jurisdiction

Under Coast Guard case law, jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). Like federal courts, the undersigned has an "independent obligation to ensure" it does not exceed the scope of its jurisdiction and therefore ". . . must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011); see also Appeal Decision 2656 (JORDAN) (2006).

When the Coast Guard charges violation of a law or regulation under 46 U.S.C. § 7703(1)(A), the violation must have occurred while the mariner was acting under the authority of his merchant mariner credential. Likewise, a vessel employee is considered to be acting under the authority of a credential or endorsement when they are required to hold it by either law or regulation, or by their employer as a condition of employment. 46 C.F.R. § 5.57(a). Title 46 C.F.R. § 15.515(c) requires passenger vessels subject to inspection to be under the direction and control of an individual who holds the appropriate officer endorsement on the MMC. See also 46 U.S.C. § 3301.

Applying the rules above, the record shows Respondent admitted to all jurisdictional allegations, however, I must still analyze the facts of this case to determine if the Coast Guard established jurisdiction. Appeal Decision 2656 (JORDAN) (2006). Here, according to the vessels Certificate of Inspection (COI), the P/V FANTASEA is a passenger vessel that requires a person with a master's endorsement to operate it. See CG Ex. 2. Respondent was the master of the P/V FANTASEA at all times relevant to this case. Thus, I conclude Respondent was acting under the authority of his license on August 3, 2019, when he operated the P/V FANTASEA as the master of an inspected vessel with passengers for hire. Furthermore, I find the misconduct that occurred in this case transpired while Respondent was required to hold an MMC.

B. Burden of Proof

Pursuant to 46 U.S.C. § 7702(a), Title 5 U.S.C. §§ 551-559 of the Administrative Procedure Act (APA) applies to Coast Guard suspension and revocation (S&R) proceedings. The APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. 5 U.S.C. § 556(d). In an S&R proceeding, the Coast Guard bears the initial burden of proof, however, Respondent bears the burden to prove any affirmative defenses. 33 C.F.R. § 20.702.

Under the APA, the factfinder must consider the “whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial

evidence” before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the “preponderance of the evidence” standard, meaning a party must prove that “a fact’s existence is more likely than not.” Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers’ Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Here, the Coast Guard must prove by preponderant evidence that Respondent violated a law or regulation when he operated the P/V FANTASEA while under the influence of alcohol. 33 C.F.R. § 20.702; 46 C.F.R. § 5.33. Further, the Coast Guard must prove by preponderant evidence Respondent was acting under the authority of his credential when he violated 33 C.F.R. § 95.045(b). 46 U.S.C. § 7703(1)(A). As stated above, Respondent bears the burden to prove any affirmative defense, however, Respondent did not ultimately identify any affirmative defenses throughout this proceeding but did assert general defenses, which I will discuss below. 33 C.F.R. § 20.702. Having established the burden of proof in this case, I now turn to the specific allegations in this case.

C. The Coast Guard Proved Respondent Violated 33 C.F.R. § 95.045(b)

Here, the Coast Guard charged Respondent with a violation of 33 C.F.R. § 95.045(b), alleging he was under the influence of alcohol while aboard the P/V FANTASEA. Accordingly, the Coast Guard must prove Respondent was intoxicated/under the influence of alcohol. For the reasons set forth below, I find the Coast Guard proved its prima facie case.

Title 33 C.F.R § 95.045(b) specifically prohibits a crewmember from being intoxicated at any time while aboard an inspected vessel. Before I can determine whether Respondent was intoxicated on board the P/V FANTASEA in violation of § 95.045(b), I must define the term intoxication, as well as analyze the law regarding how the Coast Guard proves a person is intoxicated.

At the outset, I note that the Coast Guard regulations do not specifically define the term intoxication, however the regulations define “under the influence” as when a mariner is intoxicated by alcohol as a matter of law. 33 C.F.R. § 95.010. “Under the influence” is used throughout Title 33 and is synonymous with intoxication. The standards set forth in § 95.020(b) state that an individual is “under the influence of alcohol or a dangerous drug” in several instances. First, a mariner is considered to be under the influence when the individual is operating a vessel other than a recreational vessel, with a blood alcohol concentration of 0.04 percent or higher. An individual is also under the influence when they are operating any vessel and “the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.” 33 C.F.R. § 95.020(c). Having defined intoxication, I now turn to the evidence the Coast Guard relies on to prove Respondent was intoxicated.

Here, the Coast Guard relies on chemical tests as evidence of Respondent’s intoxication, thus, I must address whether the Coast Guard has reasonable cause to administer a chemical test before I discuss the validity of the results.³ Title 33 C.F.R. § 95.035 explains reasonable cause exists if the individual is suspected of violating the standards in sections 95.020 or 95.025.⁴

I find the Coast Guard had reason to suspect Respondent was under the influence of alcohol as set forth in § 95.020 (c). When Petty Officer Lopez-Lopez boarded the P/V FANTASEA he immediately observed red Solo cups, open beer cans, and Respondent’s breath smelling of alcohol. (Tr. I at. 88-89, 119-120; CG Ex. 9, 12). As a result, he conducted a Field Sobriety Test on Respondent, who promptly failed it. (Tr. I at. 79-80, 83-84; CG Ex. 8). I find

³ A “chemical test” is defined as “a test which analyzes an individual’s breath, blood, urine, saliva, and/or other bodily fluids or tissues for evidence of drug or alcohol use.” 33 C.F.R. § 95.010.

⁴ I note 33 C.F.R. §§ 95.035 also states reasonable cause exists when an individual was directly involved in the occurrence of a marine casualty, however, there was not a marine casualty in this case.

Respondent's failure of the Field Sobriety Test gave Petty Officer Lopez-Lopez suspicion to order a reasonable cause chemical test in accordance with 33 C.F.R. § 95.035. Having found the Coast Guard properly ordered Respondent to submit to a chemical test, I now turn to the Coast Guard's prima facie case.

There are numerous ways the Coast Guard can prove a prima facie case of intoxication, including, but not limited to: personal observation of the mariner's manner, disposition, speech, muscular movement, general appearance, or behavior; or a chemical test. 33 C.F.R. § 95.030. Here, the Coast Guard relies on both personal observations and a chemical test as evidence Respondent was under the influence of alcohol. First, Petty Officer Lopez-Lopez administered a Field Sobriety Test because he smelled alcohol on Respondent's breath and observed a beer can at the helm where Respondent was operating the vessel. (Tr. I at. 88-89, 119-120; CG Ex. 9, 12). The Field Sobriety Test revealed Respondent avoided eye contact, used abusive language, had glassy eyes, and mumbled speech. (CG Ex. 9). Petty Officer Lopez-Lopez's observations are consistent with the types of personal observations listed in § 95.020(c).

In addition to the Field Sobriety Test and Petty Officer Lopez-Lopez's observations, the Coast Guard also performed a chemical test. This test yielded a blood alcohol content of 0.05%, which is 0.01% higher than is allowed by the regulations. 33 C.F.R. § 95.020. Given the personal observations and the results of the chemical test, I find Respondent was intoxicated under the standards set forth in 33 CFR 95.020, and therefore in violation of 33 CFR 95.045. Given the analysis above, I find Respondent was intoxicated while aboard and serving as master of the inspected P/V FANTASEA in violation of 33 C.F.R. § 95.045(b). Having found the Coast Guard proved its prima facie case, I now turn to Respondent's defenses.

D. Respondent's Defenses

Respondent raised two defenses during this proceeding: 1) a request for a retrial due to his lack of legal representation throughout this proceeding, and 2) the results of the

breathalyzer are invalid. Specifically, Respondent requests a new hearing because he asserts he was unaware he could hire any lawyer and was under the mistaken impression he could only hire a maritime lawyer. The Coast Guard is required to notify a Respondent that he or she may have counsel or other representation during these proceedings. Appeal Decision 2561 (CARTER) (1995); 46 C.F.R. 5.107(b)(2). On, November 26, 2019, Judge Metry issued a Scheduling Order Memorializing the Pre-Hearing Conference; that Order specifically states “The undersigned [Judge Metry] informed Respondent he has the right to be represented by *an attorney or a qualified non-attorney*.” Accordingly, Respondent’s argument does not hold water and is rejected.

I now turn to Respondent’s challenge of the validity of the results. Respondent argues the tests are invalid for multiple reasons. First, Respondent argues he had an accidental drink of vodka, which caused his BAC to rise, and thus, invalidated the results. Respondent testified he accidentally drank from a red cup he thought was water during the chaos of the engine casualty, which occurred at approximately 2000. (Tr. II at. 9-10; CG Ex. 13). At approximately 2207, Petty Officer Lopez-Lopez administered his Alco-Sensor test, an hour and forty-five minutes after Respondent states he took an accidental drink. According to Respondent, this accidental drink is reason for his BAC of .05%.

It is the “ALJ’s responsibility to determine whether the evidence presented, including evidence involving the administration of the chemical test and the qualification of the technician, was sufficient to show that Respondent was ‘under the influence of alcohol.’” Appeal Decision 2659 (DUNCAN) (2006); see also Appeal Decision 2692 (CHRISTIAN) (2011). Here, Respondent asserts involuntary intoxication is a complete defense to the allegations in the Complaint. Although Respondent fails to cite any authority for his assertion, I will still address Respondent’s argument as it relates to the validity of the breathalyzer results.

Even assuming Respondent’s argument is correct and an accidental drink before taking a

breathalyzer affects the results, Respondent did not prove his accidental ingestion of alcohol affected the test results in this case. Specifically, Respondent provided no authority to show that an accidental sip of alcohol could affect the results of a test taken approximately an hour and forty-five minutes after the accidental sip of alcohol. As such, I cannot find an accidental drink an hour and forty-five minutes prior to Petty Officer Lopez-Lopez's administration of the breathalyzer test as cause to invalidate the test's BAC results. Thus, Respondent's defense fails.

Finally, I turn to Respondent's argument that the results of the breathalyzer are not reliable because the machine used by the San Diego Harbor Police had no calibration records. The evidence shows the San Diego Harbor Police did not maintain calibration and maintenance records for Alco-sensor IV, PAS serial #032752 on August 3, 2019. Therefore, I do not find the two tests administered by Officer Sabbagh to be valid. (Tr. II at 21).

However, even agreeing with Respondent's arguments regarding the San Diego Harbor Police's test results validity, I still find the breathalyzer test administered by Petty Officer Lopez-Lopez valid, and thus, Respondent does not prevail on his defense. The record contains ample evidence the breathalyzer test administered by Petty Officer Lopez-Lopez is reliable. CWO Plascencia confirmed with ME2 Paige Willis the Alco-Sensor Serial #088986 was properly maintained and calibrated, and a picture of the Alco-Sensor FST used by Petty Officer Lopez-Lopez was also admitted into the record.⁵ (Tr. I at. 141-142. CG Ex. 10). Accordingly, I conclude the alcohol test administered by Petty Officer Lopez-Lopez gave reliable and valid results.

Having considered Respondent's defenses and determined that he failed to rebut the Coast Guard's prima facie case, I find the Coast Guard proved Respondent violated 33 C.F.R. §

⁵ Petty Officer Lopez-Lopez incorrectly transcribed the serial number of the Alco-Sensor on the Field Sobriety Test Performance Report; however, I find the information on the report to be nevertheless credible because both Lopez-Lopez and CWO Plascencia testified the picture of Alco-Sensor Serial #088986 sent electronically was a picture of the Alco-Sensor used to breathalyze Respondent on August 3, 2019. (Tr. I at. 140; CG Ex. 7, 10).

95.045(b). Specifically, Coast Guard established that Respondent was intoxicated based on personal observation and a chemical test consistent with 33 C.F.R. § 95.020 and 95.030.

Additionally, there was reasonable cause to test as defined by 33 C.F.R. § 95.035. Given that the Coast Guard presented preponderant evidence for the elements above, I find the Coast Guard proved Respondent was intoxicated while serving as master aboard the inspected P/V FANTASEA. Having determined the Coast Guard violated 33 C.F.R. § 95.045(b), I now turn to the appropriate sanction.

IV. SANCTION

Having found the allegation proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). What constitutes an appropriate sanction depends on the type and circumstances of the offense. 46 C.F.R. § 5.569. In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ,” who is not bound by the scale of average orders. Appeal Decision 2628 (VILAS) (2002) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). “In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review.” Appeal Decision 2628 (VILAS) (2002) (citing Appeal Decision 1937 (BISHOP)).

In the Table of Suggested Range of an Appropriate Order under 46 C.F.R. § 5.569, an offense of violation of regulation only includes circumstances under which a mariner refuses to take a chemical drug test or required alcohol test. However, under misconduct, there is category for violation of U.S. law or regulation which suggests a range of 1-3 months suspension. This case does not involve a refusal but does involve a violation of U.S. regulation. Therefore, I am construing Respondent’s offense as most similar to the misconduct offense of failure to comply with U.S. law or regulation for purposes of determining an appropriate sanction.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: 1) any remedial actions undertaken by a respondent; 2) respondent's prior record; 3) and evidence of mitigation or aggravation. 46 C.F.R. § 5.569(b)(1)-(3). Because the Coast Guard is seeking a 3-month suspension and revocation is not mandatory for the most similar offense of violation of law or regulation, an analysis of these three factors is appropriate. I will address each below in turn.

1. Remedial Actions Undertaken by Respondent

Here, there is no indication Respondent took any remedial action or was remorseful for his actions. For example, Respondent did not take any courses or classes in alcohol/substance abuse. Respondent admitted to drinking mimosas the morning of August 3, 2019 and an accidental sip of vodka on board but did not appear to regret either one of these actions. (Tr. 1 at 89). Respondent maintained his lack of culpability throughout the course of hearing, recognized that he needed to hold himself to a high standard but did not appear to appreciate how drinking any alcohol at any time on a day he had to work could risk the lives of the 24 people he had on board the P/V FANTASEA. (Tr. 2 at 43). I have considered this factor and give it some weight in determining the sanction.

2. Respondent's Prior Record

The Coast Guard did not provide any evidence of previous adverse S&R proceedings against Respondent's record. A lack of prior actions against Respondent is considered in Respondent's favor when determining an appropriate sanction. 46 C.F.R. § 5.569(b)(2). Therefore, this factor has been considered in mitigation and is given some weight in determining the sanction.

3. Evidence of Mitigation or Aggravation

Lastly, in considering aggravating and mitigating circumstances, I note that intoxication while serving as a master of a passenger vessel risks not only the safety of the vessel and crew,

but also that of the embarked passengers. Weighed against this aggravating circumstance, I note Respondent maneuvered the vessel in a crowded harbor without causing damage to other vessels or injury to crewmembers or passengers. Given that Respondent was dealing with an engine casualty, I recognize that Respondent handled the situation well under immense pressure. Further, even though Respondent was impaired, his BAC was only slightly above the legal limit at .05%. Therefore, I find the sanction of suspension for three months to be appropriate and reasonable.

ORDER

IT IS HEREBY ORDERED, Respondent's MMC, including # [REDACTED], and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent are **SUSPENDED FOR 3 MONTHS**.

IT IS FURTHER ORDERED, upon service of this Order, Respondent shall **within 5 days** surrender his credentials and all other valid licenses, documents, and endorsements issued by the Coast Guard to the United States Coast Guard, to CWO Aaron Camren, USCG Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101.

PLEASE TAKE NOTICE, pursuant to 33 C.F.R. § 20.904 and/or 46 C.F.R. § 5.901, Respondent may file a motion to reopen this matter. The filing of a motion to reopen the record of a proceeding does not affect any period for appeals.

PLEASE TAKE FURTHER NOTICE, 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.

Done and dated March 22, 2023, at Alameda, California



Timothy G. Stueve
Administrative Law Judge
U.S. Coast Guard

Attachment A

List of Exhibits and Witnesses

Coast Guard's Witnesses

1. [REDACTED]
2. Carlos Lopez-Lopez
3. Michael Sabbagh
4. Paige Willis
5. [REDACTED]

Coast Guard's Exhibits

- Ex. CG-01 – Copy of Respondent's Merchant Mariner Credential (MMC) (**admitted**)
- Ex. CG-02 – Certificate of Inspection for the passenger vessel FANTASEA (O.N. 516403) (**admitted**)
- Ex. CG-03 – Coast Guard Report of Marine Casualty (CG-2692) for the FANTASEA loss of propulsion occurring on August 3, 2019 (**admitted**)
- Ex. CG-04 – San Diego Harbor Police Report (No. 19-03957.1) documenting the August 3, 2019, FANTASEA loss of power and interactions with Respondent (**admitted**)
- Ex. CG-05 – Coast Guard Report of Boarding (CG-4100) of FANTASEA on August 3, 2019 (**admitted**)
- Ex. CG-06 – Coast Guard Field Sobriety Test Performance Report completed by Boarding Officer Lopez-Lopez on August 3, 2019 (**admitted**)
- Ex. CG-07 – Picture of results of Alco-Sensor Intoximeter (serial # 088986) from field sobriety test administered by Boarding Officer Lopez-Lopez (**admitted**)
- Ex. CG-08 – Picture of Alco-Sensor Intoximeter (serial # 088986) (**admitted**)
- Ex. CG-09 – Boarding Officer Lopez-Lopez's Statement (**admitted**)
- Ex. CG-10 – Coast Guard Boarding Officer Lopez-Lopez training/qualification record

(admitted)

Ex. CG-11 – Coast Guard Calibration Log Sheet for Alco-Sensor Intoximeter (serial # 088986)

(admitted)

Ex. CG-12 – Alco-Sensor Intoximeter operators manual (dated June 2007) **(admitted)**

Ex. CG-13 – Coast Guard Petty Officer ME2 Paige Willis training/qualification record

(admitted)

Respondent's Witnesses

1. [REDACTED]

2. Michael Korn

Respondent's Exhibits

Ex. A – Notes from phone call with Plascencia **(rejected)**

Ex. B – Statement Bartender [REDACTED] **(admitted)**

Ex. C – Character letter [REDACTED] **(admitted)**

Ex. D – Statement [REDACTED] **(admitted)**

Ex. E – Transcribed Voicemails **(rejected)**

Ex. F – American Family Care Report **(admitted)**

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

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.