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

UNITED STATES COAST GUARD
Complainant

vs.

RICHARD ALBERT CHESBROUGH
Respondent

Docket Number 2015-0139
Enforcement Activity No. 5066536

REVISED DECISION AND ORDER
Issued: July 26, 2016

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

LCDR Benjamin M. Robinson
Sector Columbia River
For the Coast Guard

Richard A. Chesbrough, Pro se
For the Respondent

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SUMMARY OF THE PROCEEDINGS

The United States Coast Guard (Coast Guard) has brought this administrative action under 46 U.S.C. § 7701 et seq. and its underlying regulations codified at 46 C.F.R. Part 5, seeking to revoke Richard Albert Chesbrough's (Respondent) Merchant Mariner's Credential (MMC or Credential). On May 12, 2015, the Coast Guard filed a Complaint against Respondent containing three allegations of misconduct, two allegations of a violation of law or regulation, and one allegation of a conviction that would preclude the issuance of an MMC. These charges relate to incidents which allegedly occurred on four separate occasions. Respondent filed a timely Answer in which he denied certain jurisdictional and factual allegations and requested to be heard on the proposed order.

Following several prehearing conferences and the completion of discovery, I held a formal hearing on November 3rd and 4th of 2015 at the United States Bankruptcy Court in Portland, Oregon. At the beginning of the hearing, the Coast Guard sought to withdraw Allegations 4 and 5, both of which alleged a violation of law or regulation. Respondent did not object. I permitted the Coast Guard to withdraw these allegations with prejudice, as permitted by regulation. 33 C.F.R. § 20.311. The parties offered evidence and argument pertaining to the remaining four allegations.

Both parties filed post-hearing briefs containing proposed findings of fact, conclusions of law, and argument in support of their positions. I have carefully reviewed the entire record in this case, including witness testimony, exhibits, applicable statutes, regulations, and case law, and find Allegation one NOT PROVED and Allegations two, three and six PROVED.[1]

[1] The original Decision and Order in this matter referred to allegation six in the Complaint (Conviction which would preclude the issuance of a Merchant Mariner Credential under 46 USC § 7703(2)) as

I. FINDINGS OF FACT

A. General Facts

1. At all times relevant to the allegations in this matter, Respondent held a Coast Guard-issued MMC. (Tr. Vol. 1 p. 26).
2. The M/V WILLAMETTE QUEEN is owned by Respondent's wife, Barbara Chesbrough, under a corporate structure. (Tr. Vol. II pp. 327, 336).
3. Mrs. Chesbrough also owns Sternwheeler Excursions LLC, which operates the business side of the enterprise, including hiring and paying employees. (Tr. Vol. II p. 336).
4. Sternwheeler Excursions LLC employs Respondent as Master of the WILLAMETTE QUEEN. (Tr. Vol. II p. 336).
5. The WILLAMETTE QUEEN is a fiberglass-hulled sternwheeler constructed in 1990. (Tr. Vol. I p. 22).
6. The WILLAMETTE QUEEN'S length is 87 feet overall; its hull and engine comprise 65 feet of that distance while the sternwheel and its protective girder make up the remainder. (Tr. Vol. I pp. 22, 30).
7. The WILLAMETTE QUEEN has a three-foot draft. (Tr. Vol. I p. 25).
8. The WILLAMETTE QUEEN is currently certified to carry 101 passengers. (Tr. Vol. I p. 22).
9. The vessel is used for lunch and dinner cruises and private events on the Willamette River and Willamette Slough. (Tr. Vol. I pp. 22-23).
10. The cruising route of the vessel is limited by the McLane's Island gravel bar to the north and the Traglio gravel bar to the south. (Tr. Vol. I pp. 23-24).
11. No charts or other navigational aids exist for the Willamette River between Newberg and Eugene. (Tr. Vol. I pp. 25-26).
12. Respondent uses a depth sounder and, at nighttime, a spotlight to assist him in navigating the vessel. (Tr. Vol. I p. 26).

B. Facts as to Allegation 1- Failure to report a grounding.

13. Dwayne Harris was the owner and operator of Spirit Expeditions. (Tr. Vol. I pp. 40, 65).
14. Mr. Harris was also employed as a deckhand on the WILLAMETTE QUEEN for several months, starting in approximately March 2012.[2] (Tr. Vol. I pp. 38-39).
15. On November 16, 2012, Spirit Expeditions chartered the WILLAMETTE QUEEN for a ghost tour. (Tr. Vol. I pp. 27-28, 40).

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allegation four. The renumbering was because the agency withdrew Allegations four and five at the beginning of the hearing. However, the Complaint was not amended. As a result, it appears the re-numbering has created some confusion for readers. Accordingly, I have issued this revised Decision and Order in which all references to allegations reflect the numbering found in the Complaint.
The Decision and Order remains substantively the same as originally issued. However, all further references to the Decision and Order in this matter should be to the revised version.

[2] At the hearing, Mr. Harris was unable to remember exactly when he ceased working on the WILLAMETTE QUEEN. He believed it was in November 2012. However, the other evidence in the record indicates he was still working there until at least February 2013. (EX CG-27; Tr. Vol. I pp. 78, 147-49).

16. Gregg Thompson was a passenger on board the WILLAMETTE QUEEN during the ghost tour on November 16, 2012. (Tr. Vol. I p. 89).
17. The first hour of the tour took place while the vessel was tied up at the pier. (Tr. Vol. I pp. 26, 65).
18. During this segment, the passengers boarded, had refreshments, and listened to Mr. Harris's presentation about ghost hunting, which included slide projections and equipment demonstrations. (Tr. Vol. I pp. 26-27).
19. For the second segment of the tour, Respondent took the vessel on a short trip up and down the Willamette Slough. (Tr. Vol. I pp. 27, 42).
20. The vessel stopped in the area where a Civil War skirmish supposedly occurred, to allow passengers to use ghost-hunting equipment. (Tr. Vol. I p. 27).
21. At some point in the voyage, Respondent turned off all the vessel's exterior lights and used only his spotlight so the passengers could use night-vision goggles and other equipment. (Tr. Vol. I pp. 27, 67).
22. There are many wooden pilings along the banks of the Willamette Slough, particularly near the area of the Civil War battlefield. (Tr. Vol. I pp. 27-28).
23. The pilings were originally used to moor riverboats and log rafts in the 1800s and early 1900s. (Tr. Vol. I pp. 27-28).
24. A group of pilings is sometimes referred to as a dolphin. (Tr. Vol. I p. 104).
25. There is approximately eight to twelve feet between the pilings and the shore. (Tr. Vol. I pp. 33-34, 196).
26. The grade of the bank in the area of the pilings is very steep. (Tr. Vol. I p. 33).
27. Respondent navigated the vessel near the pilings so he could stay as close as possible to Minto Island.[3] (Tr. Vol. I pp. 27-28).
28. When Respondent attempted to turn the vessel around for the return trip, the stern struck something. (Tr. Vol. I p. 28).
29. Mr. Harris and Mr. Thompson were standing near the stern at the time. (Tr. Vol. I pp. 43-44, 90).
30. Both Mr. Harris and Mr. Thompson felt a sharp but slow stopping motion. (Tr. Vol. I pp. 44-45, 92).
31. Mr. Harris and Mr. Thompson both looked at the paddlewheels and saw churning mud. (Tr. Vol. I pp. 44-45, 93, 102).
32. Mr. Harris believed the vessel had hit ground. (Tr. Vol. I p. 45).
33. The nearest piling Mr. Harris could see was 25 to 30 yards south of the vessel. (Tr. Vol. I pp. 45-46).
34. Mr. Harris went to the pilot house and asked Respondent if the vessel had grounded. (Tr. Vol. I p. 46).
35. Respondent did not necessarily agree that the vessel grounded, but acknowledged something had happened. (Tr. Vol. I p. 46).
36. Mr. Harris then asked if they should report it, and Respondent replied that he'd take care of it. (Tr. Vol. I p. 46).
37. Respondent did not report a grounding. (Tr. Vol. I p. 119).
38. The vessel was dry-docked in May 2015 and there was no damage to the bottom of the boat. (Tr. Vol. I p. 36).

[3] Also referred to in the record as Minto-Brown's Island.

39. Damage was found on a cowling, which was removed and rebuilt. (Tr. Vol. I pp. 35-36, Vol. II p. 357).

C. Facts as to Allegation 2- Making a false statement in a casualty investigation and Allegation 3 - Attempting to induce a witness, to testify falsely in connection with a marine casualty.

40. Chief Warrant Officer (CWO) Travis Nolen was, at the relevant times, a Marine Inspector in the U.S. Coast Guard. (Tr. Vol. I p. 185).
41. CWO Nolen conducted an inspection of the WILLAMETTE QUEEN on January 29, 2013.[4] (EX CG-26 pp. 29-33).
42. While CWO Nolen was there, Mr. Harris mentioned a grounding that occurred in November 2012. (Tr. Vol. I pp. 130-31, 186).
43. CWO John Nay was, at the relevant times, a U.S. Coast Guard Marine Investigator assigned to Marine Safety Unit (MSU) Portland. (Tr. Vol. I p. 115).
44. On February 4th, 2013, CWO Nolen approached CWO Nay to tell him about that conversation with Mr. Harris. (Tr. Vol. I p. 116).
45. Several days later, CWO Nolen informed CWO Nay that he also had another witness, Mr. Gregg Thompson. (Tr. Vol. I p. 116).
46. CWO Nay spoke to and received statements from Harris and Thompson. (Tr. Vol. I pp. 117-118).
47. CWO Nay conducted a review of Coast Guard databases to see if any report of a casualty involving the WILLAMETTE QUEEN was filed for a two week period before and after November 15, 2012, and did not find one. (Tr. Vol. I p. 119).
48. CWO Nay contacted Mrs. Chesbrough, stating that the Coast Guard had received a confidential report of a grounding. (Tr. Vol. I. p. 118).
49. CWO Nay requested Mr. and Mrs. Chesbrough to come to MSU Portland so a formal interview could be conducted. (Tr. Vol. I. p. 118).
50. The Chesbroughs came to the Coast Guard offices at about noon on March 21, 2013. (Tr. Vol. I p. 118).
51. Prior to their arrival, Mr. Hank Sullivan, a marine inspector at MSU Portland, notified CWO Nay that Mr. Harris had just called. (Tr. Vol. I p. 120).
52. Mr. Harris had told Mr. Sullivan that Respondent tried to contact him. (Tr. Vol. I p. 120).
53. CWO Nay then called Mr. Harris. (Tr. Vol. I p. 120).
54. Mr. Harris stated that Respondent called him to ask for a passenger manifest; said he was going to tell the Coast Guard the vessel struck a piling; and asked Mr. Harris to back him up. (Tr. Vol. I p. 120).
55. CWO Nay, CWO Nolen, and another investigating officer named CWO Michael Wireman conducted a forty-five minute recorded interview with Mr. and Mrs. Chesbrough. (Tr. Vol. I pp. 235-91).
56. Respondent described the ghost-hunting cruise and the route that he had taken that evening. (Tr. Vol. I pp. 240-44).

[4] During the hearing, Mr. Nolen could not accurately remember the date, and believed it was in October 2012. (Tr. Vol. I p. 187). I note that Mr. Nolen was aboard the vessel many times and an inspection did take place on October 22, 2012. (See EX CG-16). However, that was prior to the incident at issue here, and the other evidence in the record establishes that he spoke to Mr. Harris during the January 2013 inspection.

57. Respondent said that at the time of the incident, it was "pitch black, can't see a damn thing." (Tr. Vol. I p. 248).
58. Respondent told investigators the boat was standing still and he attempted to execute a turn using his bow thruster. (Tr. Vol. I p. 248).
59. Respondent showed the investigators photos depicting the pilings in the area of the turn. (Tr. Vol. I pp. 126, 244).
60. Respondent specifically identified the dolphin he had hit. (Tr. Vol. I p. 248).
61. Throughout the interview, Respondent maintained that the water was seven to eight feet deep in this area. (Tr. Vol. I p. 274).
62. After the interview, CWO Nay received a call from Mr. Harris, who said he just received a voicemail from Mr. Chesbrough asking him to call back and to corroborate his story about the piling. (Tr. Vol. I pp. 121-22).
63. Lieutenant Commander (LCDR) Anthony Hillenbrand was, at the relevant times, the senior investigating officer at MSU Portland. (Tr. Vol. I p. 122).
64. After the interview, CWO Nay told LCDR Hillenbrand that he believed Mr. and Mr. Chesbrough had lied throughout the interview and provided false information, which was a potential criminal violation of 18 U.S.C. § 1001. (Tr. Vol. I p. 122).
65. LCDR Hillenbrand briefed the commanding officer of Sector Columbia River, Captain LeBlanc, and they decided to turn the investigation over to the criminal investigators at the Coast Guard Investigative Service. (Tr. Vol. I p. 122).
66. The marine investigators suspended their investigation. (Tr. Vol. I p. 127).
67. On or about March 21, 2013, Mr. Harris received a voicemail from Respondent asking him to call back as soon as he could. (Tr. Vol. I p. 55; EX CG-14).
68. Respondent's message said he was just leaving his Coast Guard interview and that he wanted to let Mr. Harris know what he had said "just so that we don't trip each other up here." (Tr. Vol. I p. 55; EX CG-14).
69. Respondent also left a second voicemail message for Mr. Harris. (Tr. Vol. I pp. 56-57; EX CG-13).
70. Respondent asked Mr. Harris to call back prior to getting in touch with the Coast Guard investigator so he could "tell you what -- what came -- what we did yesterday so that our stories somewhat match." (Tr. Vol. I pp. 56-57; EX CG-13).
71. Mr. Harris consented to allow CGIS special agents to listen to and record a telephone call between him and Respondent. (Tr. Vol. I pp. 57, 147).
72. On Friday, March 22, 2013 at approximately 9:09 a.m., CGIS Special Agents Austin and Lukowiak initiated that call. (EX CG-12; Tr. Vol. I p. 154).
73. Respondent answered and identified himself. (Tr. Vol. I pp. 154-76; EX CG-12).
74. Respondent and Mr. Harris discussed their conflicting versions of events. (Tr. Vol. I pp. 154-76; EX CG-12).
75. Respondent told Mr. Harris that "because it was so dark, I couldn't see anything from the pilot house, for sure." (Tr. Vol. I p. 171; EX CG-12).
76. Respondent later said, "let's keep our stories consistent on that. And, you know, I sure the hell don't need another grounding incident against my record, you know." (Tr. Vol. I p. 171; EX CG-12).
77. Mr. Harris asked Respondent what exactly Respondent wanted him to say when he spoke to the Coast Guard. (Tr. Vol. I p. 172; EX CG-12).

78. Respondent replied, “Well, basically that --I mean you can either say, ‘I didn't see anything,’ which is what I think you just said, you know. You know, you felt something, and you don't know what it was, but you definitely felt something.” (Tr. Vol. I p. 172; EX CG-12).
79. CGIS agents also interviewed Respondent. (Tr. Vol. I p. 152).
80. Respondent initially stated that the vessel had struck a dolphin. (Tr. Vol. I p. 152).
81. He later changed his story to say he was actually unsure if it was a piling and it could have been something else. (Tr. Vol. I p. 152).
82. Respondent also specifically denied that he ever called Mr. Harris or suggested they get their stories straight. (Tr. Vol. I pp. 153, 156).

E. Facts as to Allegation 6 - Conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document.

83. In February 2013, U.S. Environmental Protection Agency (EPA) Special Agents received information that Respondent was discharging wastewater into the Willamette River. (EX CG-27; Tr. Vol. I p. 206).
84. As a result, EPA agents conducted an investigation. (EX CG-27).
85. The agents observed discharges from a pipe at the stern of the WILLAMETTE QUEEN into the Willamette River. (EX CG-27; Tr. Vol. I p. 207).
86. The EPA agents recommended bringing charges against Respondent, and the Oregon Department of Justice did so. (EX CG-27; Tr. Vol. I p. 124).
87. A violation of O.R.S. 468.943 is a Class A Misdemeanor. (EX CG-28).
88. On May 7, 2015, Respondent pled guilty to two counts of violating O.R.S. 468.943, Unlawful Water Pollution in the Second Degree, Misdemeanor Class A in the Marion County Circuit Court, Marion County, Oregon. (EX CG-08).
89. Respondent was placed on bench probation for 18 months; was required to perform 80 hours of community service; and paid a criminal fine of $2,000.00 for each count. (EX CG-08).
90. James Crouse is chief of the Safety and Suitability Evaluation Branch at the National Maritime Center. (Tr. Vol. II p. 302).
91. Mr. Crouse advised the Coast Guard Investigating Office for this proceeding that a conviction for two counts of improper handling of marine pollutants or hazardous materials would prevent the issuance of an MMC. (Tr. Vol. II p. 303).
92. At the hearing, Mr. Crouse clarified that the conviction would only prevent the issuance of an officer endorsement and not the underlying MMC. (Tr. Vol. II p. 316).

II. DISCUSSION

A. Principles of Law

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges

(ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. 46 U.S.C. § 7702(a).

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. The fact-finder 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).

Evidentiary rules under the APA are less strict than in jury trials, and only irrelevant, immaterial, or unduly repetitious evidence need be excluded. See 5 U.S.C. § 556(d); Gallagher v. Nat'l. Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. Nat'l. Transp. Safety Bd., 684 F.2d 683, 688 (10th Cir. 1982). Moreover, evidence "need not be authenticated with the precision demanded by the Federal Rules of Evidence" in order to be admissible in an administrative proceeding. Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007).

The Coast Guard bears the burden of proof in a suspension or revocation proceeding. 33 C.F.R. § 20.702(a). As these proceedings are conducted under the APA, the Coast Guard must prove its case by a preponderance of the evidence. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994). In this case, the Coast Guard alleges that Respondent committed misconduct by failing to report a

grounding, making false statements during a casualty investigation, and attempting to induce a witness to testify falsely. The Coast Guard also alleges that Respondent was convicted of a crime that would prevent the issuance of MMC. The Coast Guard thus has the burden of proving each of these allegations by reliable, credible, and probative evidence showing that Respondent more likely than not committed the violation.

When evaluating the evidence in the record, an ALJ must make determinations as to its credibility and reliability. The ALJ "is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeal Decision 2519 (JEPSON) (1991). This is because, as the presiding official, the ALJ "can fully observe the response, character and demeanor of the witnesses in issue." Id. "Traditional factors in assessing credibility include such things as (1) the demeanor of the witness, (2) the inherent plausibility of the witness's testimony, (3) the consistency of the testimony of the witness with prior statements of the witness, (4) the internal consistency of the witness's statements, (5) the consistency of the testimony with other evidence, (6) the accuracy of the witness's testimony, and (7) the interest of the witness in the outcome of the proceeding. Other factors may also apply but a credibility assessment is commonly made based on the totality of the circumstances after considering any relevant fact that may impact the witnesses [sic] credibility." St. Claire Marine Salvage, Inc. v. Bulgarelli, No. 13-10316, 2014 WL 3827213, at *6 (E.D. Mich. Aug. 4, 2014), aff'd (July 22, 2015).

Here, the Coast Guard has raised questions about Respondent's credibility, while Respondent has challenged the credibility of other witnesses who testified at the hearing. I note that the salient question in determining a witness's credibility is whether the

testimony in the record is well-supported and believable; "[t]he presence of evidence which conflicts with the testimony of a witness is not, in itself, enough to conclusively show a lack of credibility of that witness when there is substantial evidence that supports his account." Appeal Decision 2017 (TROCHE) (1975).

One piece of evidence in the record is the audio recording and transcript of a phone call Mr. Harris made to Respondent. Coast Guard investigators listened to the call and recorded it with Mr. Harris's consent. At the hearing, Respondent asked that this evidence be stricken from the record because it was illegally obtained. However, this evidence had been pre-admitted at a conference call prior to the hearing and Respondent had not objected at that time, thus I found he had waived the issue. In addition, I note here that the evidence was indeed lawfully obtained. Under Oregon law, "[n]o violation of a defendant's rights occurs if a telephone recording is made with the consent of one of the parties to the conversation. ORS 165.540(1)(a); State v. Lissy, 304 Or. 455, 747 P.2d 345 (1987) (decided this date)." State v. Dimeo, 304 Or. 469, 473 (1987).

B. Jurisdiction

Jurisdiction in misconduct cases is established only if the alleged misconduct occurred while the mariner was acting under the authority of his MMC. 46 U.S.C. § 7703; see also Appeal Decision 2615 (DALE) (2000). A mariner acts under the authority of a Coast Guard-issued credential or endorsement when the holding of such credential or endorsement is required either by law or regulation or by an employer as a condition of employment. 46 C.F.R. § 5.57(a). A mariner engaged in official matters regarding the credential or endorsement may also act under its authority in situations including, but not limited to, applying for renewal, taking examinations for raises of grade, requesting

duplicate or replacement credentials, or appearing at a suspension or revocation hearing. 46 C.F.R. § 5.57(b).

Respondent denied jurisdictional element #5 of the Complaint and admitted to the remaining jurisdictional elements. Element #5 related to the allegations that were withdrawn at the start of the hearing, thus he has admitted to all jurisdictional elements relating to the remaining allegations. However, the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established).

1. Allegation One

The WILLAMETTE QUEEN is an inspected vessel in the service of Small Passenger Vessel. Its Certificate of Inspection (COI) requires the vessel's crew to include a Master. No vessel may be operated unless the complement required by the COI is in its service and on board. 46 C.F.R. § 15.515 (2012). Under 46 U.S.C. § 8902, the operators of small passenger vessels must be licensed; similarly, under 46 C.F.R. § 15.805(a)(4) (2012), every small passenger vessel must be under the command of an individual holding a valid MMC with endorsement as master. Vessels subject to inspection under 46 U.S.C. § 3301 must be under the direction and control of an individual with an appropriate license or officer endorsement while on a voyage. 46 C.F.R. § 15.515. If a law or regulation requires a person serving in a position to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner's credential, an individual cannot serve in that position unless he holds all the credentials required. 46 C.F.R. § 15.401 (2012).

In this case, the evidence clearly establishes that Respondent was the holder of an appropriate MMC and was acting as master of the WILLAMETTE QUEEN during its excursion on November 16, 2012, as required by law and regulation. The evidence also establishes that he is the only master of the WILLAMETTE QUEEN and serves in this position as a condition of employment. A casualty occurred during the November 16, 2012 voyage; the question of whether it was a reportable casualty under 46 C.F.R. § 4.05-1 is fact-specific and, even if Respondent did not have a duty to report it, he nevertheless had a duty as a license holder to cooperate with any ensuing investigation. 46 U.S.C. § 3315. Jurisdiction attached by his serving as Master of the WILLAMETTE QUEEN on November 16, 2012.

2. Allegations Two and Three

As to allegations two and three, which involve making a false statement and attempting to induce a witness to falsely testify, the Coast Guard alleges that Respondent acted under the authority of his MMC by engaging in official matters via his participation in a Marine Casualty Investigation. Participating in a marine casualty investigation is not an enumerated matter under 46 C.F.R. § 5.57(b). However, "46 U.S.C. § 6301 authorizes the immediate investigation of marine casualties to determine, among other things, the causes of casualties, whether an act of misconduct or negligence occurred, whether violations of law occurred, and whether there is a need for new laws or regulations, or amendment or appeal of existing laws or regulations, 'to prevent the recurrence of the casualty.'" Credle v. Smith & Smith, Inc., 42 F. Supp. 3d 596, 598 (D. N.J. 2013).

In light of the Coast Guard's statutory duties to promote safety at sea and to issue licenses and other documents indicating a seaman's qualifications, the Commandant

concluded that "Congress intended the jurisdictional limitation of 'acting under authority' only for the purpose of precluding action in cases of negligence, misconduct and incompetence which are totally unrelated to a seaman's profession." Appeal Decision 1400 (HUGHES) (1963). Thus, Congress did not intend to limit suspension and revocation proceedings only to instances where an MMC is required by federal law or regulation. Id.

When the Coast Guard charges misconduct while acting under authority, "the particular act must be related to the particular document or license and to the person's employment thereunder." Appeal Decision 2025 (ARMSTRONG) (1975). "The character of the particular employment at hand, and its relation to the scope of the license must also be examined to determine if jurisdiction lies." Appeal Decision 2620 (COX) (2001). Respondent serves as the Master of the WILLAMETTE QUEEN and is responsible for direction and control of the vessel when underway and whenever passengers are aboard. He is also responsible for maintaining the vessel and operating in compliance with the COI. While not specifically pled, the evidence also establishes that Respondent operated as Master as a condition of employment. The acts alleged in allegations two and three clearly relate to his function as a credentialed mariner and his employment as Master of the WILLAMETTE QUEEN. Therefore, I find Respondent was acting under the authority of his MMC all times relevant to these allegations, and find jurisdiction established pursuant to 46 C.F.R. § 5.57(a) and (b).

3. Allegation Six

Allegation six does not involve misconduct, but rather a conviction for a violation of law that would prevent the issuance or renewal of an MMC. Thus, the "acting under

the authority" analysis is unnecessary, as being a holder of an MMC is a sufficient nexus to establish jurisdiction for this allegation. The record clearly establishes that, at all relevant times, Respondent was the holder of a United States Coast Guard Merchant Mariner's Credential with an officer's endorsement. Jurisdiction is established as to this allegation.

C. Misconduct

The Coast Guard has charged Respondent with three counts of misconduct. The regulations define misconduct as "human behavior which violates some formal, duly established rule . . . found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 C.F.R. § 5.27.

1. Failure to report a grounding

The basis of this allegation is that Respondent unintentionally grounded the WILLAMETTE QUEEN in the Willamette Slough near Minto Island on November 16, 2012 and failed to notify the Coast Guard. A grounding is a reportable marine casulty, which must be timely reported to the Coast Guard in accordance with 46 C.F.R. § 4.05-1. I must determine whether the evidence shows it is more likely than not that the WILLAMETTE QUEEN grounded on that date, giving rise to a duty to report. If the evidence supports a grounding, I must then determine whether Respondent failed to report the incident.

United States law requires licensed individuals to report "at the earliest opportunity, any marine casualty producing serious injury" to a vessel subject to

inspection. 46 U.S.C. § 3315. The Coast Guard has promulgated regulations in this area at 46 C.F.R. § 4.05-1. These rules require state, in pertinent part:

> a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—
> (1) An unintended grounding, or an unintended strike of (allision with) a bridge . . .

The remaining paragraphs in 46 C.F.R. § 4.05-1 deal with intended groundings or strikes of bridges that create navigational or environmental hazards or compromise the safety of a vessel; loss or reduction of systems related to vessel maneuverability of the vessel; incidents such as fire, flooding, or damage to safety systems; loss of life; injury requiring medical treatment beyond first aid; property damage in excess of $25,000, including labor and material costs; and incidents involving significant harm to the environment. This case does not appear to implicate any of these provisions.

The Coast Guard argues that the preponderance of the evidence supports a finding that the vessel grounded, stating that both Mr. Thompson and Mr. Harris were on the main deck when the incident occurred and could see silt churning up; Mr. Thompson and other witnesses also described what the vessel felt like during the incident. (CG Post-Hearing Brief at 8). CWO Nay also determined, during his investigation, that the vessel grounded. (Id.) The Coast Guard discounted the thruster cowl damage, arguing that the damage was below the waterline and that any contact with the cowling would have very likely been the result of a grounding. (Id. at 10).

Respondent argues that the vessel could not have grounded because it has a shallow draft and was in 12 to 14 feet of water. (Resp. Post-Hearing Brief at 3). He

further asserts that numerous pilings line the bank of Minto Island in the Willamette Slough. (Id.)Although he initially indicated a specific piling he believed the vessel had hit, he now asserts that it may have struck any of those pilings. Respondent also questions the witnesses' ability to differentiate between an allision and a grounding. (Id. at 4-5). He posits that any mud they observed being churned up in the water at the vessel's stern was generated by the thrusters. Respondent says the results of the vessel's dry-dock inspection support his position, since there was no damage on the bottom to indicate a grounding but the thruster cowling was damaged. (Id.)

In addition, Respondent has raised particular concerns as to Mr. Harris's general credibility. (Id. at 5-6). These are based on Mr. Harris's alleged criminal record, numerous unfavorable reviews of the company he owned from publicly-available websites such as TripAdvisor, and personal interactions between Mr. Harris and Respondent or other members of the community. The record is clear that Respondent and Mr. Harris had, at one time, a cordial employer-employee relationship. It is not clear why the relationship soured, but after observing Mr. Harris's demeanor and hearing his testimony, I do not find him to be so biased that it affects his credibility. Any legal trouble he may have experienced does not adversely affect his ability to give reliable testimony in this case, particularly since his testimony was largely corroborated by other witnesses. Insofar as Mr. Harris's testimony constituted an eyewitness account of the events of November 16, 2016, I find it credible. I also find the eyewitness testimony of Mr. Thompson, which is substantially similar to Mr. Harris's, to be credible.

At the hearing, Respondent also questioned the source of the report to the Coast Guard that a potential grounding had occurred. The Coast Guard stated the report had

come from Mr. Harris, but Mr. Harris testified that he thought it was from a passenger who had been on board that night. (Tr. Vol. I p. 49). Although the record does not clearly establish the source, the evidence shows Mr. Harris likely brought it up unintentionally during Mr. Nolen's January 2013 visit to the WILLAMETTE QUEEN. (Tr. Vol. I pp. 49, 75, 130-31, 186). Mr. Nolen then elicited more information during their conversation and initiated the investigation. (Tr. Vol. I pp. 130-31, 186). However, I do not find this issue particularly relevant to the question of what actually occurred on the date in question.

It is undisputed that the WILLAMETTE QUEEN struck something during its voyage on the evening of November 16, 2012. What is unclear is whether the vessel struck the river bottom, a piling, or another unknown object. All witnesses, including Respondent, agree they felt something. The incident lasted a few seconds, but the WILLAMETTE QUEEN did not strand and continued its voyage after the strike occurred.

A "grounding is generally defined as when a vessel contacts the bottom of the sea. *See* Webster's Third New International Dictionary (1976) ('to place on or cause to touch the bottom'); The Marine Encyclopaedic Dictionary, Eric Sullivan, (5th Ed. 1996) ('when a vessel contacts the bottom of the sea or the ground')." Appeal Decision 2586 (GREEN) (1997) aff'd sub nom. Commandant v. Scott R. Green, NTSB Order EM-184 (1999).

Additionally, the USCG Marine Safety Manual (MSM) defines "grounding" as the drifting, driving, or running aground of a ship on a shore or a strand. "Accidental grounding takes place where a ship is driven on shore by the winds and the waves." The MSM lists in great detail the information IOs should attempt to collect following a grounding. This includes, but is not limited to, information about the voyage plan; the

vessel's last accurate position and how it was obtained; whether there were opportunities to fix position by various means; data about any charts that were used; data about the weather, tides, currents, and notices or warnings to mariners; whether magnetic cargo, electrical disturbances, or other events could have affected the compass; evidence of radar use, depth soundings, or other such data; the draught of the ship before grounding and how it was determined; information about equipments and systems aboard the ship and whether they functioned properly; the position of the grounding; and resulting damage. MSM E.11. Presumably because the investigation was turned over to CGIS, most of the above information is not in the record and is therefore not available for me to consider.

These waters are uncharted, but the photographs in the record show numerous pilings bordering Minto Island and the testimony corroborates this. Some pilings are tall, while others are just above the water's surface. (CG EX-21 though 25; R EX C-1 through 3). Mr. Harris testified that the pilings are "definitely not all above water." (Tr. Vol. I p. 84). Mr. Nolen also testified that some pilings were above water, some were just at the waterline, and some were just below the surface. (Tr. Vol. I p. 193). Respondent submitted evidence from NOAA that the river height was above nine feet on November 16, 2012. The WILLAMETTE QUEEN has a three-foot draft. Mr. Nolen testified that the water level when the drone photos were taken was within a foot of the level on the date of the alleged grounding. (Tr. Vol. I p. 196).

Neither party has presented convincing evidence about what exactly the vessel struck. In Appeal Decision 2302 (FRAPPIER) (1983), the Commandant considered a similar issue, stating "the shudder and the damage were both equally consistent with

either grounding or striking of a submerged object. There is also evidence that floating debris was common in the area. These facts alone would not support the finding that the vessel had grounded." However, in FRAPPIER, the appellant himself admitted the vessel had likely touched bottom and, after the shudder, he drifted the boat until the fathometer showed greater water depth. Thus, the totality of the evidence in that case supported a finding that the vessel had grounded.

Here, the evidence is inconclusive. At the hearing, Respondent identified a particular dolphin consisting of three pilings as the one the vessel struck. (EX CG-24; Tr. Vol. I p. 32). He had identified the same large dolphin during his interview with Coast Guard investigators. However, Mr. Harris and Mr. Thompson both testified that this large dolphin was some distance away from the stern at the time of the strike. On the other hand, there is no evidence the vessel was positioned such that, in nine-foot waters with a three-foot draft, it could have struck bottom.

Mr. Harris and Mr. Thompson believed the vessel grounded because they felt a jolt and observed muddy water, but this evidence is not determinative of a grounding. Witness accounts of what the jolt felt like are mixed, with Respondent saying it was sharp and sudden while Mr. Harris said it was a jerking motion leading to a slow stop. (Tr. Vol. I p. 85). Mr. Thompson described it as akin to when "you're coming up to a stop sign and you hit the brakes, it's a little hard, just kind of that nudge stop . . . It wasn't a big jostle." (Tr. Vol. I p. 92). Mrs. Chesbrough testified that it did not feel like other groundings she had experienced; it was a sideways motion and caused coffee she was pouring to slosh. (Tr. Vol. II p. 333). Other witnesses interviewed during the CGIS investigation described the sensation as shaking a little bit or wiggling. (Tr. Vol. I. pp. 150-51). These

observations could either indicate a strike of a partially- or fully-submerged object or a grounding.

Likewise, I cannot conclude that the vessel grounded from the damage observed when the vessel was dry-docked. Indeed, I have no way of knowing whether that damage was sustained on November 26, 2012 or on some other date.

While the totality of the evidence does not establish whether the casualty was a grounding or an allision, it *does* lead to the conclusion that the vessel did not allide with the dolphin Respondent claimed many times to have hit. The strike occurred at night and Respondent was in the wheelhouse. Respondent even stated, "[i]t is impossible to know exactly which piling/dolphin was struck or even whether it was above or below the surface as there are many of each along this bank." (Resp. Post-Hearing Brief at 4). Given Mr. Thompson's and Mr. Harris's position at the stern of the vessel, their testimony that the dolphin was actually several yards away is more credible than Respondent's. Nevertheless, based on the depth of the water and the number of pilings in the area, I find it probable that the WILLAMETTE QUEEN allided with one of the low pilings in the area.

Accordingly, based on the evidence in the record, I find Respondent negligently allided with a fixed object that he knew or should have known was located off Minto Island. The Coast Guard has not charged Respondent with negligence in connection with the November 16, 2012 incident, only with the failure to report a grounding.[5] As the "agent, master, operator, or person in charge," Respondent was required to report an unintended grounding or an unintended strike of a bridge in accordance with 46 C.F.R. §

4.05-1.[6] Here, there is no credible evidence that the vessel struck bottom, and it clearly did not allide with a bridge. The reporting requirement in 46 U.S.C. § 3315 is a separate duty, but is limited to marine casualties producing serious injury to inspected vessels. The record does not show that the WILLAMETTE QUEEN suffered such injury. By his own admission, Respondent could not see the pilings at the time of this incident and thus he did not know with certainty what had happened. The prudent course for a master of an inspected passenger vessel would have been to report the casualty. However, on the facts of this case and given the specific language of 46 C.F.R. § 4.05-1(a)(1), I cannot find that a reportable casualty occurred. I therefore find Allegation One NOT PROVED.

2. Making a false statement in a casualty investigation

The Coast Guard has also alleged that Respondent committed misconduct by making a false statement in a casualty investigation. According to the Coast Guard, on March 21, 2013 Respondent was interviewed by U.S. Coast Guard Investigating Officers who were investigating the alleged November 16, 2012 grounding of the WILLAMETTE QUEEN. The interview was conducted under the authority of 46 U.S.C. Chapter 63. During the interview, the Coast Guard alleges, Respondent willfully and knowingly made false, fictitous, and fraudulent statements to Investigating Officers by stating the WILLAMETTE QUEEN struck pilings and did not run aground. The making of false, fictitous, and fraudulent statements to an Investigating Officer is a violation of 18 USC §1001(a)(2) and consitutes an act of misconduct as described by 46 USC §7703(1)(B) and defined in 46 CFR §5.27. The Coast Guard argues that Respondent was acting under

[5] Respondent made admissions in the investigation that he unintentionally struck a piling. "No person may testify regarding admissions made by the respondent during an investigation under 46 C.F.R. Part 4, except to impeach the credibility of evidence offered by the respondent." 33 C.F.R. § 20.1311.

the authority of his MMC by engaging in official matters regarding that license when he was interviewed by the Investigating Officers.

In support of its position, the Coast Guard points to voicemail messages Respondent left for Mr. Harris. In these recordings, Respondent said he did not need another grounding on his record and "made assurances that the investigators would not be verifying their statements such that their false statements would be caught." CG Post-Hearing Brief at 10. He also told Mr. Harris that "the investigator would be 'satisfied' and assured [him] the investigators were 'not going to interview all the passengers or anything like that,'" and said Mr. Harris's statement would be the end of it. Id. at 10-11.

Respondent adamantly denies that he made any false statement. He says he simply reported, truthfully, that his vessel had only experienced a minor striking of a piling/dolphin while he was turning it, and that the vessel never grounded. (Resp. Post-Hearing Brief at 5).

To prove misconduct, the Coast Guard must show that Respondent behaved in a way that violated a "formal, duly established rule," committed a forbidden act, or failed to do something that was required. See 46 C.F.R. § 5.27. The Complaint expressly alleged that Respondent violated 18 U.S.C. § 1001 by making of false, fictitous, and fraudulent statements in a casualty investigation. This statute reads:

> **Statements or entries generally**
> **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

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[6] As the owner of the vessel, Respondent's wife, Barbara Chesbrough, was also required to report these types of incidents. See 46 C.F.R. § 4.05-1.

> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
> **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> 18 U.S.C.A. § 1001.

The Commandant has held that a "plain-language reading of the definition of 'misconduct' shows that it includes behaviors that violate statutes." Appeal Decision 2658 (ELSIK) (2006). Title 18 U.S.C. § 1001 "is an appropriate source of a 'formal, duly established rule'" that may form the basis for a misconduct allegation. Appeal Decision 2610 (BENNETT) (1999); see also Appeal Decisions 2570 (HARRIS). The fact that the Coast Guard could have sought criminal penalties for the charged offenses does not preclude a suspension or revocation action for those same offenses. See ELSIK.

During the marine casualty investigation, Respondent told the investigators he was "just laying right up alongside of one of those [pilings], just standing still," when Mr. Harris asked him to reposition the vessel. Respondent continued, "keep in mind it's pitch black, can't see a damn thing, so when I pulled away I used my bow thruster, and --and like I said, the boat was absolutely still, and when I pulled the bow thruster out, the stern of the boat swung in and -- and just bumped that piling right there, that dolphin…" (Tr. Vol. I p. 248). After the strike occurred, Respondent asked Mr. Harris if any of the passengers noticed and if he needed to explain it. According to Respondent, Mr. Harris told him they did not, since "nobody's -- you know, nobody's upset about it or anything." (Tr. Vol. I p. 254).

In addition to making these statements, Respondent brought photographs of the area and pointed out a particular large dolphin as the one he had hit. At the hearing, even

after Respondent had admitted that he could have bumped other pilings instead, he continued to identify the large dolphin as the one the vessel bumped. (EX CG- 24; Tr. Vol. I p. 32). However, he also told Harris in the recorded phone call, "I couldn't see anything from the pilot house, for sure." (Tr. Vol. I p. 170).

After Respondent's interview with Coast Guard investigators, he recorded voicemail messages to Mr. Harris saying, "because it was so dark, I couldn't see anything from the pilot house, for sure." (Tr. Vol. I at 170). He also said, "And that's honestly what I -- what I believe really happened that night. I – I know the two, but it -- it definitely felt like the piling, because I couldn't see anything, neither, from the pilot house, but I -- but I know I was right up alongside of that piling on the -- on the starboard side." (Tr. Vol. I pp. at 175-76). Respondent's own words are inconsistent with the statement he had just given to the Coast Guard. He also was recorded saying "So, you know, let's keep our stories consistent on that. And, you know, I sure the hell don't need another grounding incident against my record, you know." (Tr. Vol. I p. 171).

Testimony regarding admissions made by a respondent during an investigation under 46 CFR part 4, such as the statements Respondent made to the Investigating Officers here, is usually prohibited in suspension or revocation proceedings. The exception is when it is used to impeach the credibility of evidence offered by the respondent. 33 C.F.R. § 20.1311. This policy is intended to "promote the cooperation of those who are best able to contribute to the investigation." In this fashion, as a public policy, the Coast Guard has somewhat subordinated the proving of charges at a suspension or revocation proceeding to the more important goal of promoting marine safety. Appeal Decision 2174 (TINGLEY) (1980).

However, this case involves statements that the Coast Guard alleges are not credible and do not assist in promoting marine safety. Since testimony regarding admissions made by a respondent during an investigation under 46 C.F.R. Part 4 may be used to impeach the credibility of evidence offered by the respondent, it is logical and consistent with public policy that such testimony may be used to prove that a mariner gave a false statement.

The Commandant has held that if a respondent "had reason to know that the representation he made … was false, then he may be considered to have constructive knowledge of the falsity of the statement made." See Appeal Decision 809 (MARQUES) (1955). Specific intent to make a fraudulent statement is not required; rather, the focus is on whether the person making a statement knows it is likely to be false. Id. "Whether Respondent had reason to know, or should have known, that the statement was false, is a determination driven by the specific facts of the case." Appeal Decision 2663 (LAW) (2007) (internal citations omitted).

In this case, Respondent gave Coast Guard investigators a self-serving explanation for the incident that occurred on November 16, 2012. He continually identified a specific group of pilings as the object the vessel struck, provided photos of the area to the Coast Guard, and marked a particular piling on a hearing exhibit consisting of photo of the area as the one he had hit. (EX CG-24). However, the evidence firmly establishes that he could not see the pilings in question, both because it was dark and because his vantage point would not have given him a clear view. Therefore, Respondent had reason to know or should have known that the statement he gave was false. Even if he had a good-faith belief he hit that specific piling, he could not have been certain about

it and should have disclosed that to the Coast Guard. Instead, he positively identified the piling and gave unqualified statements about what happened that night.

Other statements Respondent made to Coast Guard investigators appear to be untrue. For example, Respondent told Mr. Austin that he never called Harris or suggested they get their stories straight. (Tr. Vol. I p. 153). Mr. Austin said Respondent specifically denied having done so and was lying about it. (Tr. Vol. I p. 156). Since the voicemails and recorded phone call are a matter of record, it is clear that such statements were false. Respondent also gave testimony at the hearing that was untrue, such as when he said not a single person on board approached him about the jolt. (Tr. Vol. I p. 37). However, other testimony shows that Mr. Harris did speak to him about it in the pilot house immediately after it occurred. (Tr. Vol. I pp. 46, 254, Vol. II p. 349). Although the discrepancies in his hearing testimony are not a charged offense, they nevertheless reflect poorly on his credibility and willingness to give an accurate account of the incident.

The evidence shows that Respondent has given statements to Coast Guard investigators, as well as testimony under oath at the hearing, that he knew or should have known were false. I find his statement to Mr. Harris that he could not see what he hit but merely assumed it was a piling more credible than his statements to Coast Guard investigators that he definitely hit a specific dolphin. He also falsely represented to Coast Guard investigators that he had not attempted to contact Mr. Harris. I find that Respondent was well aware that the statements he gave to the Coast Guard investigator were not entirely true, and I do not find Respondent's hearing testimony to be fully credible. Accordingly Allegation Two is found PROVED.

3. *Attempting to induce a witness, to testify falsely in connection with a marine casualty*

The Coast Guard's third allegation is that Respondent attempted to induce Mr. Harris to falsely report that the WILLAMETTE QUEEN had struck a dolphin piling, not grounded, on November 16, 2012. Attempting to coerce a witness, or to induce a witness to testify falsely in connection with a marine casualty, is a violation of 46 U.S.C. §6306 and constitutes an act of misconduct.

The Coast Guard argues that Respondent's intent to coerce Mr. Harris's testimony is evident in his two voicemail messages and the recorded phone call with Mr. Harris. Respondent was particularly concerned that Mr. Harris would tell the Coast Guard that the boat struck gravel or something similar, since that would be a reportable marine casualty. (Tr. Vol. 1 p. 175). The Coast Guard believes Respondent made efforts to ensure that Mr. Harris gave statements consistent with his own, or at least not contrary to Respondent's interests, even if Mr. Harris did not concur with Respondent.

Respondent argues that he was within his rights to discuss the incident with his employee, particularly since he believed Mr. Harris would be a defense witness. Respondent argues he never asked Mr. Harris to lie. He also says the recordings show he told Mr. Harris what he truly believed had happened. (Resp. Post-Hearing Brief at 6).

As noted above, misconduct includes behaviors that violate statutes. Here, the statute in question is 46 U.S.C. § 6306, which requires in pertintent part that a "person attempting to coerce a witness, or to induce a witness, to testify falsely in connection with a marine casualty, or to induce a witness to leave the jurisdiction of the United States, shall be fined $5,000, imprisoned for one year, or both." In the complaint, the Coast

Guard alleged that Respondent attempted to "induce" Mr. Harris to falsely report. However, the statute does not define either "coerce" or "induce."

"In the absence of legislative guidance, a principle canon of statutory construction is that words in a statute are to be interpreted as having their ordinary, contemporary or common meaning. Perrin v. United States, 444 U.S. 37 (1979), Sutherland's Statutory Construction, 47.28 (1973)." Appeal Decision 2375 (CLEMENT) (1985). The meaning of "induce" was interpreted by United States v. Anyanwu, 598 F. App'x 618, 621 (11th Cir. 2015), to mean "to influence or persuade. So induced would mean influenced or persuaded." In United States v. McQueen, 670 F.3d 1168, 1170 (11th Cir. 2012), the court examined numerous English-language dictionaries and held that "[t]o 'induce' means '[t]o lead (a person), by persuasion or some influence or motive that acts upon the will, to ... some action, condition, belief, etc.' or '[t]o bring about, bring on, produce, cause, give rise to.'"

The record includes recordings of two voicemail messages from Respondent to Mr. Harris and one phone call between the two men that was observed by Coast Guard personnel. In the first voicemail, Respondent said:

> Hey, Dawane, Richard here. Give us a call as soon as you can. The -- just wanted to let you know, we just left the Coast Guard up here in Portland and they are going to be calling you, and *I just wanted to let you know what -- what we told them about the course we took that evening and stops we made, and -- just so that we don't trip each other up here.* And, you know, like I told them, we -- we were -- (unintelligible) right there in the -- in the slough, and I was using my bow thruster to turn from one side, the -- the Minto-Brown Island side over to the – to the other side, and -- when we bumped that – that dolphin right there. *So at any rate, I just wanted to go over that stuff with you just so that we're both in sync.* So give me a call as soon as you can. Thanks, Marine, bye-bye.

(Tr. Vol. I p. 55; EX CG-14) (emphasis added).

In the second voicemail, Respondent said, “Hey, Dawane, it's Richard again. Good morning, Friday morning here. Just wanted to touch base with you. Give me a call before you call that Coast Guard investigator back, you know, Okay, Dawane, thanks, bye-bye.” (Tr. Vol. I p. 56-57; EX CG-13).

During the recorded phone call, Mr. Harris asked Respondent what he was supposed to say when he spoke to the Coast Guard investigators. Respondent replied, “Well, basically that --I mean you can either say, ‘I didn't see anything,’ which is what I think you just said, you know. You know, you felt something, and you don't know what it was, but you definitely felt something.” (Tr. Vol. I p. 172; EX CG-12). Respondent then told Mr. Harris to “just, you know, play dumb.” (Tr. Vol. I p. 173; EX CG-12). Later, Respondent said, “certainly don't tell them that you think we struck, you know, gravel or anything. That -- that's the -- that's the big thing, and you -- and -- and if I'd have thought I'd have done that, I certainly would have reported it, not that it's any big deal, but it -- that is a reportable marine casualty, they call it. . . . But bumping a – bumping a piling is not.” (Tr. Vol. I p. 175; EX CG-12).

The evidence clearly shows that Respondent wanted to speak to Mr. Harris in advance of Mr. Harris’s interview with Coast Guard investigators. While Respondent never outright stated that he wanted Mr. Harris to lie to the investigators, he did specifically suggest that Mr. Harris say he hadn’t seen anything and did not know what caused the jolt he had felt. He also specifically told Mr. Harris not to tell the Coast Guard that he suspected a grounding.

At the hearing, Mr. Harris stated, "It seemed to me at that point that the captain had a different view of what happened that night. And it also seemed like he wanted me to kind of follow his lead on -- on what had happened." (Tr. Vol. I p. 52). Later, when asked whether he felt Respondent wanted him to lie about the incident, Mr. Harris said, "I -- I feel that I was trying to be pushed to say something that I didn't believe was true, yes. 'Lie' is a -- if you want to use the word 'lie,' yeah I feel like that was the case from the phone calls and the voice mails that I received." (Tr. Vol. I p. 59).

In reviewing the statements Respondent made to Mr. Harris, I find that they were intended to induce Mr. Harris to testify in a manner inconsistent with his own beliefs as to what happened that night. It is clear from Mr. Harris's testimony that he felt pressured by Respondent to present a certain version of events he felt was inaccurate. Respondent's actions do not rise to the level of coercion, but certainly demonstrate his attempts to influence or persuade Mr. Harris to provide only the information Respondent wanted the Coast Guard to have. I therefore find this allegation PROVED.

D. Conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document

The final allegation concerns whether Respondent has been convicted of an offense that would prevent the issuance or renewal of a Merchant Mariner Credential, as described in 46 USC § 7703(2). There is no dispute that, on May 7, 2015, the Marion County Circuit Court convicted Respondent of two counts of violating Oregon Revised Statute 468.943, Unlawful Water Pollution in the Second Degree, a Misdemeanor Class A. That statute reads as follows:

> **468.943. Unlawful water pollution, second degree**
> (1) A person commits the offense of unlawful water pollution in the second degree if the person with criminal negligence violates ORS chapter 468B or any rule,

> standard, license, permit or order adopted or issued under ORS chapter 468B.
> (2) Subject to ORS 153.022, unlawful water pollution in the second degree is a Class A misdemeanor. Notwithstanding ORS 161.635, the maximum fine for a violation is $25,000.
> Or. Rev. Stat. Ann. § 468.943 (West)

ORS 468B.025 prohibits any person, with certain exceptions, from causing pollution of any state waters; placing waste (or causing waste to be placed) in a locations where it is likely to enter the waters of the state by any means; or discharging any wastes into state waters if the discharge causes the water quality to fall below the standards set by the Environmental Quality Commission.

The Coast Guard argues that Respondent's pollution conviction would prevent the issuance of an MMC, even if aggravating and mitigating factors were taken into consideration in a reconsideration appeal. (Tr. Vol. 2 pp. 9, 12). The Coast Guard's expert witness, James Crouse, made this determination based on the state court judgment documenting the conviction. (Tr. Vol. 2 pp. 14, 22). Mr. Crouse opined that "[i]f additional factors were considered, they would demonstrate that Respondent's criminal conduct included acts more egregious than the conduct generally described in the judgment. There was significant evidence that Respondent discharged sewage into the water, including evidence that his sewage tank was not discharged ashore for a period of one year." (CG Post-Hearing Brief at 12).

Respondent does not deny the conviction, but maintains that he chose to plead guilty to the charges for financial reasons and not because he actually committed the acts. He stated that the discharges were dishwater, not sewage, and offered evidence that minor discharges of dishwater from an overflow pipe were environmentally safe and not

pollutants. He also represented that he has taken precautions to prevent a repeat overflow from occurring. (Resp. Post-Hearing Brief at 6-7).

The issues presented here are whether (1) a violation of Oregon Revised Statute 468.943, Unlawful Water Pollution in the Second Degree, a Misdemeanor Class A, constitues a "criminal conviction" as contemplated by 46 C.F.R. § 10.211 and its accompanying Table, and (2) such convictions are of a nature that that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document as described in 46 USC § 7703(2).

1. *Respondent's Conviction Constitutes a "Criminal Conviction" Under 46 C.F.R. § 10.211*

Title 46 C.F.R. § 10.211, entitled "Criminal Records Review," is used to evaluate whether applicants for an MMC are safe and suitable to hold the credential and any endorsements thereto. If an applicant fails the criminal record review set out in 46 C.F.R. § 10.211, the Coast Guard will not issue a new MMC, reissue an MMC with a new expiration date, or issue a new officer endorsement. 46 C.F.R. § 10.209(e)(1). The Coast Guard may decline to renew an MMC "[w]hen a criminal record review leads the Coast Guard to determine that an applicant is not a safe and suitable person or cannot be entrusted with the duties and responsibilities of the MMC or endorsement applied for . . . " 46 C.F.R. § 10.211(d). A person is considered "safe and suitable" for an MMC when a review of his or her character and prior record, including by not limited to any criminal activity, does not indicate that the person would be "a threat to the safety of life or property, detrimental to good discipline, or adverse to the interests of the United States." 46 C.F.R. § 10.107(b); see also Cota v. United States, 2013 WL 6234574, at *5 (N.D. Cal. Dec. 2, 2013), aff'd, 2015 WL 9584400 (9th Cir. Dec. 31, 2015).

Table 1 of 46 C.F.R. § 10.211(g) is entitled "Guidelines for Evaluating Applicants for MMCs Who Have Criminal Convictions." It lists major categories of criminal activity, along with the minimum and maximum assessment periods for each. One of the listed categories is "criminal violations of environmental laws involving improper handling of pollutants or hazardous materials." Id. The minimum assessment period for such offenses is one year.

An assessment period commences when an applicant is no longer incarcerated, and may include supervised or unsupervised probation or parole. If a person with a criminal conviction chooses to apply before the minimum assessment period has elapsed, the applicant must provide evidence of suitability for service in the merchant marine. 46 C.F.R. § 10.211(i). The Coast Guard will consider the evidence submitted with the application and may issue the MMC and/or endorsement in less than the listed minimum assessment period if satisfied that the applicant is suitable to hold the MMC and/or endorsement for which he or she has applied. Id.

The word "conviction" encompasses any situation where a person is found guilty of a felony, misdemeanor, or offense described in section 205 of the National Driver Register Act of 1982, as amended (49 U.S.C. 30304), either by judgment or plea, in a federal, state, territorial, foreign, or military court. 46 C.F.R. § 10.107. The regulations specifically state that the Coast Guard considers it a conviction if a person pleaded guilty or no contest to a charge, was granted deferred adjudication, or was "required by the court to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of a trial court's conviction." Id.

Even if a conviction is later expunged, the Coast Guard will still consider it a conviction unless there is satisfactory evidence that the original conviction was in error. Id.

Respondent does not dispute that he was convicted of these charges pursuant to a plea arrangement. In a proceeding under Part 20, a judgment of conviction is conclusive in a suspension and revocation proceeding if it alleges an offense that would prevent the issuance or renewal of an MMC. 33 C.F.R. § 20.1307. While the Part 20 rules do not define "conviction," the Commandant has held that 33 C.F.R. § 20.1307 and 46 C.F.R. § 10.107 "substantially mirror each other, with minor exceptions. The regulatory history set forth above strongly suggests they should be read consistently." Appeal Decision 2699 (MAXWELL) (2012).

Table 1 to 46 C.F.R. § 10.211(g) specifically includes criminal violations of environmental laws involving improper handling of pollutants or hazardous materials. After carefully considering the language of Oregon Revised Statute 468.943, Unlawful Water Pollution in the Second Degree, I conclude that Respondent's conviction qualifies as a listed violation with a minimum assessment period of one year.

2. Convictions Within the Scope of 46 C.F.R. § 10.211 Would Prevent the Issuance or Renewal of an MMC Under 46 USC § 7703(2).

One basis for suspension or revocation is if the holder "is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document." 46 U.S.C. § 7703(2). Although 46 U.S.C. § 7703(2) has been the law since 1990, the Coast Guard has not yet issued any implementing regulations. The Coast Guard Marine Safety Manual (MSM) Vol. V does contain some relevant policy provisions; in particular, section A.2.b. states:

> 46 USC 7703(2) authorizes S&R action if the holder of a MMC was convicted of an offense that would prevent the issuance or renewal of the MMC. The Commandant considers convictions for offenses detailed in 46 CFR 5.59 and 5.61 to be convictions that would preclude the issuance or renewal of MMCs. The Commandant also considers a conviction for an offense listed in tables 46 CFR 10.201(h) or 46 CFR12.02-04(c), to be a conviction that would prevent the issuance or renewal of a MMC. See section B.9 for guidance on appropriate sanctions.

For offenses similar to those contained in 46 C.F.R. §§ 5.59 and 5.61, or if the offense is listed in the tables of 46 C.F.R. Subchapter B[7] and the minimum assessment period is more than one year, the appropriate sanction is revocation. However, "[w]hen the minimum assessment period in the tables of 46 CFR Subchapter B is 1 year, IOs may propose a sanction of a reasonable number of months based on the overall conviction record of the mariner."

Title 46 C.F.R. § 20.211, which falls under 46 C.F.R. Subchapter B, implements three separate statutory requirements: 46 U.S.C. § 7101(h) (the Secretary may review the criminal record of an individual who applies for a license or certificate of registry under this section); 46 U.S.C. § 7109 (the Secretary may review the criminal record of each holder of a license or certificate of registry issued under this part who applies for renewal of that license or certificate of registry.); and 46 U.S.C. § 7302(d) (the Secretary may review the criminal record of an individual who applies for a merchant mariner's document under this section).

All of these requirements were enacted as part of the Oil Pollution Act of 1990 (OPA), PL 101–380, August 18, 1990, 104 Stat 484. In particular, they implicate sections

[7] I note that the specific tables referenced in the MSM (46 C.F.R. Parts 10 and 12) have been replaced by Table 1 to 10.211(g), Guidelines for Evaluating Applicants for MMCs Who Have Criminal Convictions, which was discussed above. See 46 C.F.R. § 10.211.

4101, 4102, and 4103 of the OPA.[8] Sections 4101 and 4102 dealt primarily with the need to discover alcohol-related convictions. As to a general criminal record review, the Conference Report stated, "[t]he Coast Guard is currently checking Federal Bureau of Investigation records. This provision codifies existing procedure." H.R. CONF. REP. 101-653, 129, 1990 U.S.C.C.A.N. 779, 807.

As to the provisions regarding 46 U.S.C. § 7703(2), the conference report stated:

> Subsection 303(b) of the Senate amendment permits the Coast Guard to suspend or revoke a license or document if it is shown after an opportunity for hearing that the holder was convicted of a serious criminal offense that would reflect adversely on the offender's character and fitness to serve consistent with the interest of safety at sea; …; or fails to meet the standards for issuance of the license or document.
> Section 4103(b) of the House bill has similar provisions.
> Section 4103(b) of the Conference substitute combines provisions of both bills. It expands the existing bases in law for suspending or revoking a license, certificate, or document by adding two new grounds: (1) the individual is convicted of an offense that would prevent the issuance of the license, certificate, or document; or (2) the individual is convicted of an offense described in the National Driver Register Act (such as driving under the influence of alcohol or dangerous drugs, reckless driving, or leaving the scene of an accident), within the three-year period immediately before the suspension or revocation

H.R. CONF. REP. 101-653, 130-31, 1990 U.S.C.C.A.N. 779, 809.

The rules in 46 C.F.R. Subchapter B specifically contemplate new MMC applications, renewals, and requests for upgrade; there is no discussion about the effect on existing credentials. However, based on the clear language of the rules and the Coast Guard MSM policy provisions, criminal convictions for certain offenses can form the basis for a suspension or revocation proceeding. See 46 C.F.R. § 10.209(e)(1) ("No

[8] Codified as 46 U.S.C. § 7101(h) and 46 U.S.C. § 7302(d); 46 U.S.C. § 7109; and 46 U.S.C. § 7703(2).

MMC will be issued as an original or reissued with a new expiration date, and no new officer endorsement will be issued if the applicant fails the criminal record review"); ("The Commandant considers convictions for offenses detailed in 46 CFR 5.59 and 5.61 to be convictions that would preclude the issuance or renewal of MMCs. The Commandant also considers a conviction for an offense listed in tables 46 CFR 10.201(h) or 46 CFR12.02-04(c), to be a conviction that would prevent the issuance or renewal of a MMC"). Even in the absence of specific regulations implementing 46 USC § 7703(2), the agency has made adequate policy statements in this area.

The Commandant has previously considered the deference due to an agency's construction of a statute it administers. Quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), the Commandant stated, "when a reviewing court considers an agency's construction of a statute which it administers, the court is confronted with two questions: (1) whether 'Congress has directly spoken to the precise question at issue;' and (2) if 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible reading of the statute.'" Appeal Decision 2678 (SAVOIE) (2008).

Congress has not specifically detailed what convictions would prevent issuance of a credential, but 46 U.S.C. § 7101 grants the Coast Guard broad-based authority to promulgate regulations and requirements for credentialing mariners:

> The Coast Guard's regulation interpreting Section 7101 is clearly entitled to *Chevron* deference. Because Congress did not explicitly speak to the requirements for licensing, the Court proceeds to step two in the *Chevron* analysis. As the Supreme Court held in *Mead*, *Chevron* deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming

> deference was promulgated in the exercise of that authority." 533 U.S. at 226–27, 121 S.Ct. 2164. Here, the statute states that the agency shall issue licenses "[u]nder regulations prescribed by the Secretary," and more importantly, that "the Secretary shall establish ... other qualifying requirements" when issuing licenses for masters. 46 U.S.C. § 7101. Because Congress explicitly delegated authority to the agency to promulgate regulations and requirements for licensing masters, this Court "is obliged to accept the agency's position" as long as "the agency's interpretation is reasonable." *Mead,* 533 U.S. at 229, 121 S.Ct. 2164.

Clifford v. U.S. Coast Guard, 915 F. Supp. 2d 299, 309 (E.D.N.Y.), aff'd 548 F. App'x 23 (2d Cir. 2013).

Likewise, the Coast Guard has broad authority to promulgate regulations and requirements for suspending or revoking credentials under 46 U.S.C. §§ 7701-7705. Although the statute does not specifically define "conviction" and the Coast Guard has not promulgated regulations on point, they have made policy statements and issued rules at 46 C.F.R. Part 10 that address convictions and whether a mariner is a safe and suitable person who can be entrusted with the duties and responsibilities of the MMC.

"A similar deference [to the Chevron standard] applies when an agency interprets its own regulations." Auer v. Robbins, 519 U.S. 452 (1997). More specifically, "[t]hat interpretation, regardless of the formality of the procedures used to formulate it, is 'controlling unless plainly erroneous or inconsistent with the regulation [s].'" Id. at 461. Also, an agency's interpretation is still entitled to respect if there is evidence of thoroughness in its consideration, validity in its reasoning, consistency throughout time, and other factors "which give it power to persuade." Clifford v. U.S. Coast Guard, 915 F. Supp. 2d 299, 306 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

The Commandant has not directly addressed this issue by regulation, but has made clear policy provisions in directives that are binding on Coast Guard investigating officers. Added to the clear regulatory statements in 46 C.F.R. § 10.107(b) and 46 C.F.R. § 10.209(e)(1), these establish reasoned consideration in interpreting 46 USC § 7703(2). Several other ALJs have reached similar conclusions; while these decisions are not binding on me, they are certainly persuasive. See, e.g., U.S.Coast Guard v. Neil, SR-2005-21; U.S.Coast Guard v. Ryerse, SR-2010-4; U.S.Coast Guard v. Garcia, SR-2011-16; and U.S.Coast Guard v. Blackwell, SR-2011-20.

Accordingly, I find that offenses listed in table 1 of 46 C.F.R. § 10.211 are convictions that would preclude the issuance or renewal of MMCs. As noted above, the purpose of 46 U.S.C. § 7703(2) is to permit the Coast Guard to suspend or revoke an MMC if it proves, after opportunity for a hearing, that the holder was convicted of a serious criminal offense that would reflect adversely on his or her character and fitness to serve consistent with the interest of safety at sea. Most ALJ decisions in this area concern felony convictions rather than misdemeanors, but the regulations do encompass both felonies and misdemeanors, as well as offenses described in section 205 of the National Driver Register Act of 1982. 46 C.F.R. § 10.107.

Respondent was convicted of Class A misdemeanors. In Oregon, a Class A misdemeanor can subject a defendant to twelve months imprisonment and a $25,000 fine. An offense other than a petty offense gives rise to a right to jury trial. Under federal law, a Class B misdemeanor—which carries a penalty of up to six months incarceration or a $5,000 fine—or any lower offense is considered a petty offense. An Oregon Class A

misdemeanor clearly carries more substantial penalties than a federal Class B misdemeanor, and I therefore find it qualifies as serious offense.

Here, the record contains a copy of the Judgment in Case No 15CR10554, dated May 7, 2015, in which it is adjudged that the defendant Richard A. Chesbrough has been convicted on two counts of Unlawful Water Pollution in the Second Degree. Under 33 C.F.R. § 20.1307(c), this is conclusive evidence of a conviction. However, I do not agree with the Coast Guard's position that each count constitutes a separate conviction. Rather, this is a single conviction encompassing two counts of violating ORS 468.943; it is clear from the judgment that these two counts were considered collectively and the penalty the court assessed took both counts into consideration. This allegation is PROVED.

III. SANCTION

Having found the allegations proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). "An Administrative Law Judge has wide discretion to formulate an order adequate to deter the [a mariner's] repetition of the violations he was found to have committed." Appeal Decision 2475 (BOURDO) (1988).

A. Factors Considered in Determining an Appropriate Order

Coast Guard regulations detail the factors to be considered in determining an appropriate order. 46 C.F.R. § 5.569. "The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence." 46 C.F.R. § 5.569(a). I am not bound by the Coast Guard's recommendations.

In determining an appropriate sanction, an ALJ may consider the following factors: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

These rules include a Table entitled "Suggested Range of an Appropriate Order," stating Table 5.569 "is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits." 46 C.F.R. § 5.569(d).

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) (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) (citing Appeal Decision 1937 (BISHOP)).

However, in Coast Guard v. Moore, NTSB Order No. EM-201 (2005), the National Transportation Safety Board (NTSB) disapproved an order of revocation in a refusal to test case because the Coast Guard did not prove, and the ALJ did not find, specific aggravating factors sufficient to depart from the guidance in 46 C.F.R. Table 5.569. The NTSB stated that "unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors." The

Commandant recognized this policy in Appeal Decision 2694 (LANGELY) (2011), and the NTSB reiterated its position in Commandant v. Ailsworth, NTSB Order No. EM-211 (2012).

B. The Parties' Arguments Regarding Sanction.

The Coast Guard seeks revocation of Respondent's MMC, arguing that this is an appropriate sanction not only based on the charges found proved here, but also in light of Respondent's extensive prior record. This includes two suspension and revocation proceedings, USCG v. Richard Chesbrough, SR-2012-12, Docket Number 2011-0224, aff'd by Appeal Decision 2706 (2015) and USCG v. Richard Chesbrough, SR-2013-12, Docket Number 2012-0288, aff'd by Appeal Decision 2707 (2015), and a 2013 civil penalty for violating the vessel's COI. The Coast Guard argues that "suspension is an inappropriate means of ensuring safe operation by the Respondent in the future as he has been suspended in the past, without an apparent remedial change in behavior."

The Coast Guard advances two additional arguments as to why revocation is appropriate. First, by coercing a witness in violation of § 6306, Respondent demonstrated a willingness to circumvent the regulatory system put in place to establish minimum levels of safety on commercial vessels. The Coast Guard also argues that a finding of proved to allegation six (conviction preventing the issuance of Respondent's license) is alone sufficient to justify revocation. They point to Coast Guard policy set out in Paragraph B.9.g. of Chapter 4 of the MARINE SAFETY MANUAL VOLUME 5. This paragraph states that revocation is the appropriate sanction for cases involving a conviction wherein the assessment period is greater than one year. According to the Coast Guard licensing regulations, the "assessment period for officer endorsements" for criminal violations of environmental laws is a minimum of one year and a maximum of

10 years. 46 C.F.R. § 10.211(g). The Coast Guard contends that Respondent was convicted on two counts of environmental law violations, which would result in an assessment period of two years.

Respondent has denied the allegations, asserting that the Coast Guard is taking extreme measures in an attempt to force a small company into financial bankruptcy and to take his MMC away after 33 years of hard work in the industry. He points to testimony in mitigation from just a few of the many people who know their reputation and argues that over the past 17 years, they have built a wonderful reputation in the community. Citing 46 C.F.R. § 5.61, he argues that the Coast Guard has failed to prove with any preponderance of evidence any of these allegations as required, and that he committed no act or offense that justifies a sanction of revocation or even suspension.

C. Analysis as to Sanction

The initial issue I must address is the probationary order I imposed on Respondent as a result of my decision in USCG v. Richard Chesbrough, SR-2012-12, Docket No. 2011-0224, affirmed by Appeal Decision 2706 (2015). To deter repeat violations, I ordered Respondent to serve a probationary period of eighteen months after completion of his outright suspension, and any violation of the conditions of probation would result in an additional two month suspension. Probationary violations that would trigger the two-month additional suspension included failing to operate the WILLAMETTE QUEEN in accordance with its COI or committing a violation of 46 U.S.C. §§ 7703 or 7704, or any other navigation or vessel inspection law during the period of suspension for eighteen months thereafter.

The probationary order went into effect upon completion of the outright suspension assessed in SR-2012-12, Docket No. 2011-0224, which went into effect upon

the issuance of Appeal Decisions 2706 and 2707 on February 25, 2015. Only allegation six in the current proceeding triggers the probationary order because the conduct that formed the basis for the other allegations occurred before the effective date of that order.

The minimum suspension that I can issue, therefore, is two months outright. I must also issue sanctions for Allegations 2, 3, and 6, all of which I have found proved. Two of these allegations involve truthfulness. The Coast Guard relies on credentialed mariners to be truthful in the performance of their duties, including reporting casualties and operating vessels in accordance with all applicable rules and regulations. Here, Respondent represented to Coast Guard investigators, as well as at the formal hearing, that he knew the precise circumstances of a casualty in which his vessel supposedly allided with a piling. As previously discussed, he knew at the time he made these statements that he had not actually seen the vessel allide with a piling and did not know with certainty which piling he had hit. Nevertheless, he affirmatively identified a particular group of pilings and made unqualified statements about what had occurred.

In my decision in SR-2013-12, Docket No. 2012-0288, I noted that I was "concerned with the disparity between Respondent's statements about complying with the COI and his actions. Despite his earlier assurances, he has not demonstrated he takes the restriction on the COI seriously enough that he will use the best available measures to ensure compliance." I considered that to be an aggravating circumstance when determining the sanction in that case. Likewise, I continue to be very concerned with Respondent's attitude towards regulation. Here, he only had to tell the truth during the Coast Guard investigation, which was that the vessel hit something he believed to be a

piling, but he was not certain. Instead, he concocted a story and attempted to induce a witness to support that story.

Although the Coast Guard is seeking revocation in this matter, none of the offenses as charged are enumerated offenses for which revocation of credentials is sought under 46 C.F.R. § 5.61. Arguably, making false statements in a Coast Guard investigation or inducing a witness to witness to testify falsely could constitute interference with government officials in performance of official duties, which may qualify as an enumerated offense under 46 C.F.R. § 5.61(a)(10) (interference with the master, ship's officers, or government officials in performance of official duties). The Commandant has considered the meaning of "interference," holding that it is "generally intended to encompass affirmative acts (e.g., a physical motion or verbal pronouncement) . . ." Appeal Decision 2608 (SHEPHERD) (1999). In the context of a false statement on a mariner's license renewal application, the Commandant did not find interference. However, he left open the possibility that under a different factual scenario, a written falsification might be considered interference with a government official in his official duties. Id.

Here, The Coast Guard has not specifically raised interference with a government official in his official duties under 46 C.F.R. § 5.61(a)(10) as grounds for revocation. Additionally, the false statements did not significantly hamper the Coast Guard's investigation. Accordingly, I do not believe the facts in this case establish interference.

In addition to the 11 enumerated offenses for which revocation is routinely sought, however, the rules also permit an investigating officer to "seek revocation of a respondent's credential or endorsements when the circumstances of an act or offense

found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline." 46 C.F.R. § 5.61(b). Here, the Coast Guard has articulated why it considers the combination of Respondent's prior record and the acts found proved here poses a threat to safety at sea.

Passenger safety is of paramount concern, and a mariner should act with the highest level of care when transporting passengers. Appeal Decisions 2698 (HOCKING) (2012) and 2618 (SINN) (2000); see also Huron Portland Cement Co. v. City of Detroit, Mich. 362 U.S. 440, 445 (1960). Effective investigation of marine casualties is an essential part of the Coast Guard's duty to maintain and improve the safety of the nation's waterways. Appeal Decision 2261 (SAVOIE) (1981). In particular, Congress mandated such investigations in 46 U.S.C. § 6301, which requires "immediate investigation of marine casualties under this part to decide, as closely as possible:

> **(1)** the cause of the casualty, including the cause of any death;
> **(2)** whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any individual licensed, certificated, or documented under part E of this subtitle has contributed to the cause of the casualty, or to a death involved in the casualty, so that appropriate remedial action under chapter 77 of this title may be taken;
> **(3)** whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any person, including an officer, employee, or member of the Coast Guard, contributed to the cause of the casualty, or to a death involved in the casualty;
> **(4)** whether there is evidence that an act subjecting the offender to a civil penalty under the laws of the United States has been committed, so that appropriate action may be undertaken to collect the penalty;
> **(5)** whether there is evidence that a criminal act under the laws of the United States has been committed, so that the

> matter may be referred to appropriate authorities for prosecution; and
> **(6)** whether there is need for new laws or regulations, or amendment or repeal of existing laws or regulations, to prevent the recurrence of the casualty.
>
> 46 U.S.C. § 6301.

False statements in casualty investigations and inducing false testimony are not among the enumerated offenses in Table 5.569. Of the listed offenses, "Failure to comply with U.S. law or regulations" and "Failure to perform duties related to vessel safety" are closest to the facts of this case. Given the respondent's prior record and the impact of his actions on the Coast Guard's marine safety mission, allegations two and three would each warrant at least a six-month outright suspension.

The Coast Guard argues that revocation is appropriate for allegation six, citing its policy—set out in the MSM—that revocation is the appropriate sanction where the assessment period is greater than one year. First, the MSM is not binding on ALJs. Second, the two year assessment period cited by the Coast Guard applies only to multiple convictions. As stated previously, I have found that Respondent's guilty plea constituted a single conviction encompassing two counts. The relevant assessment period for such a conviction is one year. Thus, I do not accept the Coast Guard's argument that revocation is warranted for allegation six.

The table of average orders does not reflect specific recommendations for a conviction of this type. Based on the MSM, the convictions here do not relate to 46 C.F.R. § 5.61 offenses, and the Commandant has not yet issued any binding guidance in this area. I have reviewed other ALJ decisions involving similar issues and note that the sanctions assessed run from a two-month suspension to revocation. I have considered

Table 5.569, as well as whether Respondent failed to comply with U.S. law or regulations and/or failed to perform duties related to vessel safety. I have further considered the fact that the convictions are misdemeanor convictions and did not result in Respondent being incarcerated. However, this conviction was the result a plea bargain and could have carried a far more serious penalty. Moreover, the $4,000 fine is not insubstantial and is particularly significant for the owner/operator of a small business.[9] Respondent has not shown any remorse for allowing the discharges, stating that it was cheaper to pay the fine than to contest the case. Considering all these factors, I would assess at a minimum a six-month suspension for this allegation.

D. Conclusions as to Sanction

At a minimum, any suspension assessed in this case would be 20 months (a minimum of six months each for allegations two, three, and six, plus two months based on the earlier probationary order). However, in considering the lengthy minimum suspension plus the aggravating and mitigating factors in this case, I have determined that revocation is more appropriate.

The Commandant found revocation to be appropriate in Appeal Decision 2524 (TAYLOR) (1991) where the "record clearly reflects an intentional, calculated course of conduct to circumvent or disregard a previous suspension order of the Administrative Law Judge." Additionally, the Commandant approved revocation in Appeal Decision 2593 (MOWBRAY) (1997), where a mariner who has not and will not abide by the fundamental rules of good seamanship and the requirements of federal law and regulation was considered unfit for service under a Coast Guard license on any vessel, and Appeal

[9] I note that Respondent's wife, through a LLC, is actually the owner of the business. However, the record is also clear that Respondent often represents himself as owner of the WILLAMETTE QUEEN, and that

Decision 2654 (HOWELL) (2005), where a mariner's cavalier attitude or total disregard for safety warranted revocation.

It is settled policy that the ALJ has wide discretion to choose the appropriate sanction based on the individual facts of each case. See Appeal Decision 2695 (AILSWORTH) (2011) at 16. "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 Appeal Decision 2708 (TROSCLAIR) (2015), the ALJ had found two negligence charges and one misconduct charge proved. Although none of these charges, standing alone, would warrant revocation, the totality of the facts showed that revocation was an appropriate sanction. This case involves violation of a probationary order, two proved misconduct charges, and one proved allegation of conviction of an offense that would prevent the issuance or renewal of credential. Additionally, Respondent's prior record consists of two previous suspensions and a civil penalty. At this time, permitting Respondent to continue serving under his credential or endorsements would be contrary to the Coast Guard's mission to ensure safety at sea.

In light of the evidence presented, I find the aggravated sanction sought by the Coast Guard clearly appropriate. I therefore assess a sanction of REVOCATION.

ORDER

IT IS HEREBY ORDERED that the Allegation numbered one in the Complaint is found **NOT PROVED**; and

IT IS HEREBY FURTHER ORDERED that the Allegations numbered two, three and six in the Complaint are found **PROVED**; and

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his decision to accept a plea agreement was based on both family and business finances.

IT IS HEREBY FURTHER ORDERED that the Allegations numbered four and five in the Complaint have been **WITHDRAWN WITH PREJUDICE**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's Credential is **REVOKED**. In accordance with 5 C.F.R. § 5.567(d), Respondent should surrender his MMC to the Coast Guard immediately.

_____

George J. Jordan
US Coast Guard Administrative Law Judge
Date: July 26, 2016

Originally issued July 6, 2016/revised July 26, 2016.

The parties have a right to appeal this Decision and Order, as set forth in 33 C.F.R. §§ 20.1001 – 20.1004 (Attachment A). If Respondent chooses to appeal, he may file a request for a temporary credential pursuant to 46 C.F.R. § 5.707.

Respondent should be aware that an order of revocation may be modified within three years of the date of the order if the mariner properly files a motion for reopening and provides sufficient justification for modification, as described in 33 C.F.R. § 20.904(f). Alternatively, he may seek administrative clemency under the provisions of 46 C.F.R. Subpart L (46 C.F.R. §§ 5.901-5.905).

APPENDIX A: APPEALS

Procedural Rules for 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

Additional Rules Concerning Appeals from 46 C.F.R. Part 5

46 C.F.R. § 5.701 Appeals in general.

A party may appeal the decision of an ALJ under the procedures in subpart J of 33 CFR part 20. A party may appeal only the following issues:
(a) Whether each finding of fact rests on substantial evidence.
(b) Whether each conclusion of law accords with applicable law, precedent, and public policy.
(c) Whether the ALJ committed any abuses of discretion.
(d) The ALJ's denial of a motion for his or her disqualification.

46 C.F.R. § 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary credential or endorsement.

(a) A person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in §5.59, may file a written request for a temporary credential or endorsement. This request must be submitted to the Administrative Law Judge who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.
(b) Action on the request is taken by the ALJ unless the haring transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.
(c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary credential or endorsement may be denied for that reason alone.

(d) All temporary credentials or endorsements will provide that they expir4e not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary credential expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.
(e) If the request for a temporary credential or endorsement is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.
(f) Copies of the temporary credential issued become a party of the record on appeal.

§ 5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of credentials or endorsements are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.
(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances. Communications should be addressed to Commandant (CG–094), U.S. Coast Guard, 2100 2nd St. SW., Stop 7121, Washington, DC 20593–7121.
(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated of counsel.

§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary credential and/or endorsement pending appeal to National Transportation Safety Board.

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Commandant's opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary credential and/or endorsement may be denied for that reason alone.
(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).
(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary credential and/or endorsement as specified in the stay order. This credential and/or endorsement is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

APPENDIX B: LIST OF WITNESSES AND EXHIBITS

Witnesses:

For the Coast Guard:

Richard Chesbrough, Respondent
Dawane Harris
Gregg Thompson
John Edward Nay
Daniel C. Austin
Travis Nolen
James Crouse

For the Respondent:

Barbara Chesbrough
Michael Pearson
Larry McDonald
Timothy King
Terry Sol
Noel Grefenson

Exhibits:

For the Coast Guard:

CG-01	Statement by Mr. Dawane Harris
CG-02	Statement by Mr. Gregg Thompson, passenger
CG-03	Drawing of the incident submitted by Mr. Harris
CG-04	Passenger list provided by Cindy Myers
CG-05	Audio recording of Respondent's interview conducted on March 21, 2013 at MSU Portland
CG-06	Documents used during Respondent's interview, including a Google Map printout of the Willamette Slough
CG-07	Evidence relating to withdrawn allegations four and five
CG-08	Judgment of Marion County Circuit Court in State v. Chesbrough, dated May 7, 2015
CG-09 through 11	Evidence relating to withdrawn allegations four and five
CG-12	Audio of recorded telephone call between Respondent and Mr. Harris
CG-13	Audio of second voicemail from Respondent to Mr. Harris
CG-14	Audio of first voicemail from Respondent to Mr. Harris
CG-15	Civil Penalty Documents for EA 4756817
CG-16	Record of deficiencies for PV WILLAMETTE QUEEN
CG-17	Memorandum 16722/1941831 dated October 21, 2015

CG-18	River gauge chart for 15-17 November 2012
CG-19	River gauge chart for 27-29 October 2015
CG-20	Willamette Slough photo (DJI_0044.jpeg)
CG-21	Willamette Slough photo (DJI_0048.jpeg)
CG-22	Willamette Slough photo (DJI_0049.jpeg)
CG-23	Willamette Slough photo (PA290516.jpeg)
CG-24	Willamette Slough photo with markings made by Respondent at the hearing
CG-25	Willamette Slough photo with markings made by Mr. Harris at the hearing
CG-26	Coast Guard Activity Summary Reports, various dates
CG-27	EPA-CID Summary of Investigation
CG-28	Marion County Circuit Court Amended Information for Case No. 15CG10554, State v. Chesbrough

For Respondent:

R-A	Instructions for Completion of Form CG-2692 Report of Marine Casualty and Form CG-2692A, Barge Addendum, 1 page
R-B	Copy of National Weather Service Advanced Hydrologic Prediction Service, dated September 14, 2015, 2 pages
R-C	Pictures – C 1 of 3 aerial picture of pilings that were struck, C 2 of 3 picture of river bank and pilings, and C 3 of 3 picture of river bank and pilings, 3 pages
R-D	Pictures – D 1 of 3 picture of pilings, D 2 of 3 up close picture of pilings, D 3 of 3 picture of fathometer reading next to pilings, 3 pages
R-E	Picture of starboard stern thruster cowling showing damage from striking piling, 1 page
R-F	Summary of findings from Abegweit Marine Surveyors, 1 page
R-G	G 1 of 9 Cruise of the Dead, G 2 of 9 Cruise of the Dead advertisement from internet, G 3 – 6 of 9 e-mails btw R & customer, G7 -8 of 9 e-mails btw R & customer, G 9 of 9 e-mail btw R & customer, 9 pages
R-H	Information regarding Dawane Harris , 2 pages
R-I	I 1 of 15 Information from Groupon, I 2 -15 reviews of ghost tour, 15 pages
R-J	Copy of The Tombstone News, dated September 10, 2015, 2 pages
R- K	Customer Reviews of Spirit Expeditions, 4 pages
R-L	Facebook posts from Spirit Expeditions pulled June 26, 2015, 10 pages
R-M	Spirit Expeditions Reviews, 3 pages
R-N	Trip Advisor Reviewer Highlights, 7 pages
R-O	Criminal Records of Dawane Harris, dated Sep 10, 2015, 17 pages
R-P	Criminal print out on Dawane Harris, dated Sep 10, 2015, 6 pages
R-Q	Manifest, dated Mar 17, 2015, 1 page

R-R	E-mail from Office Manager, Karen Landers, dated Feb 24, 2015, 1 page
R-S	Statement from Karen Landers, dated Sep 4, 2015, 1 page
R-T	Letter from LCDR B.P. Russell, dated Mar 17, 2015, 1 page
R-U	Statement signed by 6 passengers , 1 page
R-V	Statement from Sonya Goldman, dated Sep 15, 2015, 1 page
R-W	Statement from Gary & Karen Smith, dated Oct 31, 2015, 1 page
R-X	X 1-5 of 9 Letters from R to Noel Grefenson, X 6-9 R's court documents, 9 pages
R-Y	Pictures showing dishwasher plumbing overflow system, 5 pages
R-Z	Pictures showing common occurrence of scum around vessel and dock caused by back flowing river hydrology due to location of function of Willamette slough & river itself, 11 pages
R-AA	Photos of homeless camps adjacent to boat dock, 3 pages
R-AB	Newspaper article about contamination in park, 2 pages.
R-AC	Photo of sign near boat dock warning of contaminated water, 1 page
R-AD	Google search for E. Coli, 1 page
R-AE	Information from Autochlor, dated Sep 17, 2015, 5 pages
R-AF	EPA report, 1 page
R-AG	Inspection logs, 16 pages
R-AH	Legislative Report article, dated May 16, 2015, 4 pages
R-AI	Exhibits presented as mitigation, 4 pages
R-AJ	Profit & Loss 2014 records, 2 pages
R-AK	Letters presented as mitigation, 8 pages
R-AL	Two articles, 1 page
R-AM	NMA Report #R-448, Revision 1, 10 pages
R-AN	Letter to Commandant from Ron Wyden, Jeffrey A. Merkley, and Kurt Schrader, 1 page
R-AO	Draft Legislative Language, 2 pages
R-AQ	Picture of Willamette Queen on land, 1 page
R-AR	Newspaper articles, 2 pages & 2 pictures of river, 4 pages
R-AS	Salem Magazine article, 3 pages