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

UNITED STATES COAST GUARD
Complainant

vs.

NEIL ALAN VOELCKERS

Respondent

Docket Number 2016-0115
Enforcement Activity No. 5723447

DECISION AND ORDER
Issued: August 29, 2016

By Hon. Parlen L. McKenna

Appearances:

LCDR Graham Lanz
LT Dianna M. Robinson
CWO Israel R. Nieves
Sector Juneau

Ms. Linkea N. Quijano, Esq.
National Center of Expertise (NCOE)

For the Coast Guard

MARK C. MANNING, Esq.

For the Respondent

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) brought this proceeding against Respondent Neil Alan Voelckers' Merchant Mariner Credential (MMC) pursuant to 46 U.S.C. § 7703(1)(B) and Coast Guard regulations found at 46 C.F. R. Part 5. The case

was conducted under the Administrative Procedure Act (APA) (5 U.S.C. § 551 et seq.) and the Coast Guard's procedural and evidentiary rules found at 33 C.F.R. Part 20.

The Coast Guard sought to suspend Respondent's Coast Guard issued credential on a single charge of Misconduct as defined by 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged that Respondent served as Master of the 198 gross ton SEA RANGER without the appropriate Merchant Mariner credential in violation of 46 C.F.R. § 15.905(b). During a May 4, 2016 prehearing conference, the parties agreed that in light of the circumstances of this case, they preferred to have a hearing as soon as practicable. As such, the undersigned scheduled an in person hearing for June 1, 2016 in Juneau, Alaska. See *Prehearing Conference Report and Scheduling Order*, dated May 10, 2016.

Prior to the hearing, Respondent submitted a Motion to Dismiss arguing that the vessel at issue, the SEA RANGER, does not meet the statutory definition of "uninspected passenger vessel." Specifically, Respondent claims that because the SEA RANGER is moored at all times when passengers are aboard, it is not "carrying" passengers for hire. The Coast Guard opposed the Motion to Dismiss, claiming that "carrying" passengers should be interpreted to include passengers that are not being transported, but are being "carried" by virtue of being onboard even while the vessel is moored. During the hearing, the parties engaged in oral argument on the issues involved in the Motion to Dismiss. The undersigned declined to rule on the Motion to Dismiss at the hearing, instead informing the parties that my ruling would be included as part of this Decision and Order.

At the hearing, the Coast Guard was represented by LCDR Graham Lanz, Esq., LT Dianna M. Robinson, and CWO Israel R. Nieves. Respondent was represented by

Mr. Mark C. Manning, Esq. At the hearing, the Coast Guard provided the testimony of three (3) witnesses and Respondent testified on his own behalf. Each party proffered four (4) exhibits which were admitted into evidence without objection.[1] The facts of this case are generally not in dispute as demonstrated by the parties' stipulations of facts. See *Memorandum of Agreed Facts* dated June 1, 2016 (Joint Exhibit 1); see also *Declaration of Neil Voelckers* dated May 18, 2016; and *Joint Stipulation of Facts*.[2] Therefore, the outcome of this case turns on the legal issues presented in Respondent's Motion to Dismiss.

Subsequent to the hearing, both parties filed post-hearing briefs; neither party submitted a reply brief. Having received all pertinent information and argument, this case is now ripe for decision.

II. FINDINGS OF FACT

The following Findings of Fact are based on a thorough and careful analysis of the parties' stipulations, documentary evidence, witness testimony and the entire administrative record.

1) At all relevant times, Respondent was the holder of Merchant Mariner Credential (MMC) #139223. See Respondent's Answer at p.1.

2) Between May 2013 and September 2015, Respondent held an MMC endorsed for service as Master of Steam, Motor, or Auxiliary Sail Vessels of Not More than 100 Gross Registered Tons (Domestic Tonnage) Upon Inland Waters. See Joint Stipulation of Facts at ¶ 12; Joint Exhibit 1at p.1.

3) Respondent solely owns Alaskan Experiences, LLC (Alaskan Experiences) a sportfishing lodge business situated in Southeast Alaska. See Joint Exhibit 1 at p.1; Joint Stipulation of Facts at ¶ 1; Declaration of Neil Voelckers at ¶ 1.

[1] The parties' witnesses and exhibits are listed in **Attachment A** of this Decision and Order.
[2] The *Joint Stipulation of Facts* is not dated; however, the record reflects it was entered into the Coast Guard Database MISLE on May 26, 2016.

4) Alaskan Experiences uses three primary vessels in its sport fishing lodge business, the SEA RANGER, the MISS ASHLEY, and the MISS ALICIA. See Joint Stipulation of Facts at ¶ 2; Joint Exhibit 1 at pp. 1-2.

5) The MISS ASHLEY and the MISS ALICIA are twin engine, 35-foot Californian Sport Fisher cruisers used to take customers to the fishing grounds. See Joint Stipulation of Facts at ¶ 4.

6) The principal physical asset of Alaskan Enterprises is the SEA RANGER, a Coast Guard documented vessel, Official Number 298185 measuring 106 feet in registered length and 198 gross registered tons. See Joint Exhibit 1at p.2; Joint Stipulation of Facts at ¶¶ 3 and 5.

7) The SEA RANGER is an uninspected vessel and is suitable for service as an uninspected passenger vessel within the meaning of 46 U.S.C. § 2101 (42)(A). See Joint Stipulation of Facts at ¶ 6; Joint Exhibit 1 at p. 2.

8) The SEA RANGER's Certificate of Documentation (COD) sets forth that vessel's service is uninspected passenger. See CG02; Tr. at 72, 87.

9) According to Respondent, the SEA RANGER has been identified as an uninspected passenger vessel since he bought his business which included the vessel; Respondent testified that he never changed that status on his COD. See Tr. at 95.

10) The SEA RANGER's COD has endorsements for registry and coastwise; it does not have a recreational endorsement. See Tr. at 87; CG02.

11) If a vessel does not hold a recreational endorsement then it is only documented for commercial purposes. See Tr. at 87.

12) The SEA RANGER is self-propelled and powered by two 6-cylinder Enterprise diesel-electric engines. See Joint Exhibit 1at p.2; Joint Stipulation of Facts at ¶7.

13) The SEA RANGER is a retired military vessel that has been reconditioned and modified to serve as a floating lodge: it has six (6) double state rooms and a dining salon; it provides 24 hour electricity, hot and cold running water, and maid service, among other conveniences. See Joint Exhibit 1at p.2; Joint Stipulation of Facts at ¶¶ 3, 8 and 10.

14) To prepare for each business season, Respondent transits the SEA RANGER from where it winters in Auke Bay near Juneau to the Bay of Pillars, a navigable waterway of the United States as defined in 33 C.F.R. § 2.36. See Joint Exhibit 1 at pp. 2-3.

15) Alaskan Experiences' business season runs from approximately the second or third week in June to approximately the second or third week in August. See Joint Exhibit 1 at p. 2.

16) Since Alaskan Experiences acquired the SEA RANGER, that vessel has been exclusively used to house Alaskan Experiences' customers at a fixed moorage in the Bay of Pillars. See Joint Exhibit 1 at p. 2; Joint Stipulation of Facts at ¶ 13.

17) Alaskan Experiences offers its customers two experience durations: one is four days/four nights; and the other is five days/five nights. See Joint Stipulation of Facts at ¶ 9; Joint Exhibit 1 at p. 3.

18) On multiple occasions during the period May 2013 to September 2015, Respondent served as Master of the Sea Ranger, meaning he was the senior person in charge of the vessel and its business operations. See Joint Exhibit 1 at pp. 3 – 4; Joint Stipulation of Facts at ¶ 13.

19) Respondent was also the Master during the period when the SEA RANGER was moored in the Bay of Pillars with customers of Alaskan Experiences, LLC onboard, who paid for, among other things, overnight accommodations. Id.

20) In May 2013, the Coast Guard informed Respondent that the SEA RANGER must be under the direction and control of an individual with a 200 GT Master's Credential while operating with passengers-for-hire onboard. See Joint Exhibit 1 at p. 4; Joint Stipulation of Facts at ¶ 14.

21) Respondent did not apply to upgrade his credential until December 2015. See Tr. at 31; CG03.

III. DISCUSSION

A. Jurisdiction

The Coast Guard brought charges against Respondent under the authority of 46 U.S.C. § 7703(1)(B), which provides:

> A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder. . .when acting under the authority of that license, certificate, or document. . .has committed an act of misconduct or negligence[.]

Alleged violations of 46 U.S.C. § 7703(1)(B) are thus "acting under the authority" offenses in that the mariner needs to have been acting under the authority of his

credential in order to be subject to the Coast Guard's jurisdiction at the time of the alleged offense. The Coast Guard proceeded on the basis of one charge of Misconduct, which 33 C.F.R. § 5.27 defines as:

> Human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statues, 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.

Although not controlling as a matter of law, the parties stipulated to the jurisdictional allegations concerning Respondent's MMC. Moreover, Respondent does not contend that he was not acting under the authority of his credentials during the relevant time periods at issue. Therefore, based upon the testimony and documentary evidence adduced at hearing, I find that I have jurisdiction in this suspension and revocation proceeding.

B. Burden and Standard of Proof

Under the Coast Guard's Rules of Practice, Procedure, and Evidence, the party that bears the burden of proof shall prove their case by a preponderance of the evidence. See 33 C.F.R. § 20.701. In these proceedings, the Coast Guard bears the burden of proof, except with respect to any affirmative defenses raised by a respondent, who then bears the burden. See 33 C.F.R. § 20.702. A preponderance of the evidence is generally defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the

> jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.
> Black's Law Dictionary (9th ed. 2009).

"Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not." Greenwich Collieries v. Director, Office of Worker's Compensation Programs, 990 F.2d 730, 736 (3d Cir. 1993).

C. Motion to Dismiss

1. Parties' Arguments

As stated above, the facts of this case are generally not in dispute. The main contention between the parties involves the use and interpretation of certain words in the statutory definition of uninspected passenger vessel. Specifically, in his Motion to Dismiss (Motion), Respondent argues that the SEA RANGER is not an "uninspected passenger vessel" as currently defined because Respondent is not "carrying" passengers for hire on that vessel. Respondent interprets the definition of "carrying" to mean transport from one place to another and because the SEA RANGER is moored when it has passengers aboard, it is not "carrying" them. See Tr. at pp. 6 – 14; see also *Memorandum in Support of Motion to Dismiss*. Further, during oral argument at hearing, Respondent argued that the Coast Guard should not redefine terms through the adjudicatory process and should instead use the available formal rulemaking procedures provided for in the APA. See Tr. at pp. 39 – 41.

In his Motion and Post Hearing Brief, Respondent argues that the words "carrying" and "carriage" are not ambiguous terms. Rather, these words have a specific meaning that is commonly understood in the maritime sense as meaning transport of

goods or people from one place to another. Respondent claims that because there is no ambiguity in these terms, Congress' intent is clear and because of its use, the SEA RANGER falls outside the definition of an uninspected passenger vessel. Therefore, if the SEA RANGER is not an uninspected passenger vessel, Respondent did not commit misconduct by not having the proper licensure. Respondent further claims that the Coast Guard is effectively attempting the change the definition of "carrying" and is "straining to establish that 'carry' is not synonymous with transportation." *Voelckers' Post-Hearing Brief* at pp.2-3.

The Coast Guard opposes Respondent's Motion stating that the relevant statutes and regulations are intended to apply to vessels with passengers for hire on board regardless if the vessel is underway, anchored, or moored. The Coast Guard asserts that "carry" is not limited to the transport of passengers and should include having passengers aboard even when the vessel is moored and not moving them from one place to another. See Tr. at pp. 23 – 25; see also *Coast Guard's Response in Opposition to Respondent's Motion to Dismiss*. Further, the Coast Guard argues that interpreting "carry" or its derivations to mean only transport runs counter to the language and intent of the statutory and regulatory scheme. Id.

Respondent's Motion raises two distinct legal issues. First, can the Coast Guard use the administrative suspension and revocation proceedings to address the definition of "carrying" or must it utilize formal rulemaking procedures? Second, if the Coast Guard is capable of defining the term "carrying" through administrative adjudication, what is the meaning of "carrying?"

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2 Does the Coast Guard Have the Authority to Define Terms through Adjudication or Must it Use Formal Rulemaking Procedures?

During oral argument, Respondent asserted that "if the Coast Guard feels that a statutory gap now exists, the way to fill that gap is to ask for legislation. …" Tr. at 41. Further, Respondent argued that this administrative hearing is an inappropriate forum to define a term enacted by Congress without utilizing the formal rulemaking processes delineated in the APA. In this regard, Respondent argues that the establishment of a definition should only occur thru a process that allowed for industry input and comment. See Tr. at 40. Therefore, Respondent asserts that the Coast Guard should not be entitled to deference with its proposed interpretation of the statutory language because it is in effect changing the law enacted by Congress. I disagree.

Relevant precedent is clear that filing statutory gaps "should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." Securities and Exchange Comm'n v. Chenery Corp., et al, 332 U.S. 194, 202 (1947). However,

> [A]ny rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the

> boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. And **the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency**.
> Id. (Internal citations omitted) (emphasis added).

In the instant situation, which appears to be a case of first impression, the Coast Guard elected to proceed through administrative adjudication instead of a formal rule-making process. Indeed, this situation perhaps is "so specialized" that the Coast Guard could not have foreseen this situation arising at the time the general rules were established. Moreover, when the Coast Guard first learned of this problem, it instructed Respondent to obtain his 200 GRT ton MMC. Since the Coast Guard was working with Respondent to resolve the issue and this was a unique case, it is apparent that it did not feel the necessity to commence a rulemaking proceeding. In any event, as set forth above, the Coast Guard has the discretion to handle novel cases on a case by case basis and utilize the adjudicatory process to address such a situation.

3. What does "carrying" mean?

The Coast Guard is the federal agency responsible for administering the relevant parts of 46 United States Code. See H.R. Rep. No. 98-338 at 113 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 1983 ("The purpose of S.46 is to revise, consolidate, and enact into positive law as a subtitle of Title 46 of the U.S.C. (Shipping) the maritime safety laws administered by the United States Coast Guard."). Title 46 U.S.C. § 2101(42)(A)(i) defines "uninspected passenger vessel" in relevant part as an "uninspected vessel - - of at least 100 gross tons …carrying not more than 12 passengers, including at least one passenger for hire." (Emphasis added). The statute defines a "passenger for hire" as "a

passenger for whom consideration is contributed as a condition of carriage on the vessel …." 46 U.S.C. § 2101(21a) (emphasis added). The terms "carrying" and "carriage" (or any derivations thereof) are not further defined in the statute or relevant regulations.

To decide Respondent's Motion involves the Coast Guard's construction of a statute it administers and the analysis is therefore governed by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). As the Supreme Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
> Chevron, 467 U.S. at 842-3 (1984).

Therefore, under Chevron, the first inquiry is whether Congress has directly addressed the precise issue. If the answer is yes, then we "must give effect to the unambiguously expressed intent of Congress." Id. at 843; United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999). If Congress has not specifically addressed the precise issue at hand, then we must determine whether the Coast Guard's statutory construction is permissible. Further, we must respect an agency's permissible statutory construction. See Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131 (2000); see also INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999). Deference to the agency's construction is justified because "[t]he responsibilities for assessing the wisdom of such

policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." Brown & Williamson, 529 U.S. at 131 (internal citations omitted).

a. Chevron Step 1: Did Congress directly address the precise issue of what "carrying" means?

"In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. Id. Often "the meaning, or ambiguity, of certain words or phrases may only become evident when placed in context." Id. "Ambiguity is a creature not of definitional possibilities but of statutory context." Brown v. Gardner, 513 U.S. 115, 118 (1994). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). Therefore, the court must interpret the statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole." Brown & Williamson, 529 U.S. at 131 (internal citations omitted). Finally, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

Here, Congress did not define the terms "carry" and "carriage" in the statute. Respondent argues that "carry" and its various forms "are simple, unambiguous words whose meanings … are well-established in the maritime context." *Voelckers' Post-Hearing Brief* at p.2. Respondent also argues that his position is supported because the

dictionary definition of "carry" is "to move while supporting (as in a vehicle or in one's hands or arms)," or "to sustain as a burden or load and bring along to another place." See *Memorandum Supporting Motion to Dismiss* at p. 6 (citing *Webster's Third New International Dictionary* at 344 (Merriam –Webster 1993). The Coast Guard notes, however, "carry" can also be defined as "to sustain the weight or burden of." See *Coast Guard's Response in Opposition to Respondent's Motion to Dismiss* at fn. 14 (citing Webster's Online Dictionary, http:www.merriam-webster.com/dictionary/carry).

Although Congress did not define "carry" or any of its various forms, the Supreme Court has addressed the definition in a different context. In Muscarello v. United States, the Supreme Court addressed the issue of whether "carries a firearm" was limited to carrying a firearm on the person or included conveying firearms in a vehicle, including in a locked glove compartment or a trunk. 524 U.S. 125, 126-7 (1998). While deciding this issue, the Court took time to address what "carry" means and its use in a statutory scheme.

In Muscarello the Court recognized that the primary meaning of "carry" is to "convey" or to "move while supporting." Id. at 128-9. However, the Court also recognized the application of additional secondary meanings such as "to bear, wear, hold up, or sustain, as one moves about." Id. at 130. The Court stated "these special definitions embody a form of an important, but secondary, meaning of 'carry' a meaning that suggests support rather than movement or transportation, as when, for example a column 'carries' the weight of an arch." Id. at 131. As an example the Court opined that "a gangster might 'carry' a gun … even though he does not move from his chair." Id. In the context of the criminal statute at issue in Muscarello, the Court held that the word

"carry" is not equated with "transport." Id. at 134. Rather, "'[c]arry' implies personal agency and some degree of possession …." Id. "Transport" the Court stated "is a broader category that includes 'carry' but also encompasses other activity." Id. at 135.

In the context of the case at issue here, the Supreme Court's analysis of "carry" is extremely helpful. The Court specifically contemplated a situation where a person could "carry" a weapon but not move. Would this situation change if the person were handed a weapon while sitting and he/she handed it back before standing up and moving about? It seems much more likely that under the language of Muscarello, the Court would consider the seated person to carry a weapon during the time he or she was seated and stationary. While the instant situation involves carrying passengers, not firearms, the language and analysis is directly analogous.

Respondent would have me decide that because the paying passengers embark when the SEA RANGER is moored and disembark before the vessel moves it is not "carrying." I reject this argument because when put into the context of the statutory scheme, Congress clearly did not intend to limit the definition of "carrying" in the manner which Respondent proposes.

As discussed above, Congress' stated purpose concerning the statute at issue was "to revise, consolidate, and enact into positive law as a subtitle of Title 46 of the U.S.C. (Shipping) the maritime safety laws administered by the United States Coast Guard." H.R. Rep. No. 98-338 at 113 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 1983 (emphasis added). Clearly, the general Congressional intent was to enact a regulatory scheme that would protect life, property, and safety at sea. Throughout the definitions in 46 U.S.C., Congress used the word "carrying" when referring to three particular things:

passengers, oil, and hazardous materials. See 46 U.S.C. §§ 2101(19), (23), (38), (39), and (42). It would run counter to Congressional intent to enact "safety laws" if those laws concerning passengers, oil and hazardous materials applied to vessels moving with the cargo aboard but not moored vessels with the same cargo aboard. Congress used the terms "transport" and "transportation" when defining "ferry" which necessarily involves movement of passengers. See 46 U.S.C. § 2101(10b). Clearly, Congress could have used "transporting" or "moving" when defining uninspected passenger vessel; however, it did not. An empty vessel, whether at sea or tied to a dock may be subject to some safety controls or rules, but as soon as oil or hazardous materials or paying passengers are on board, the need for additional safety measures necessarily increases. This is true whether the vessel is moving or stationary. To find otherwise would contradict the over arching purpose of protecting life and safety at sea.

Moreover, as the Coast Guard argued in its opposition, the 1983 enactment of the relevant portions of Title 46, Congress stated that "the words 'operate on' or 'on' are used instead of 'operate upon,' 'navigate in,' 'on,' or 'below,' 'operate on or enter,' or 'use,' and are intended to cover all operations of a vessel when it is at the pier, idle in the water, at anchor, or being propelled through the water." H.R. Rep. No. 98-338 at 121, *reprinted in* 1983 U.S.C.C.A.N. 924, 1983. Thus, while not defining "carrying," Congress' language concerning "operate" provides further insight into the purpose of the overall statutory scheme. Specifically, that these "safety laws" are intended to protect life and safety at sea and are not necessarily dependent on whether the vessel is moving with passengers aboard or not.

The Coast Guard directly incorporated Congress' language into its regulatory definitions stating, "*operate, operating,* or *operation* (as applied to the manning requirements of vessels carrying passengers) refers to a vessel any time passengers are embarked whether the vessel is underway, at anchor, made fast to shore, or aground." 46 C.F.R. § 10.107. Indeed, if Respondent's limited definition were accepted, a moored vessel that embarked passengers while moored would not be considered "operating" because that definition is dependent on the vessel "carrying passengers." In other words, because the court must interpret the statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole," Respondent's argument that "carrying" is limited to movement of passengers aboard a vessel must be rejected. See Brown & Williamson, 529 U.S. at 133.

Moreover, if the SEA RANGER is not defined as an uninspected passenger vessel because it is not "carrying" passengers, the regulatory impact would be incongruent with protecting life and safety at sea. If Respondent's vessel were determined to not fall within the statutory definition of an uninspected passenger vessel, then none of the regulations mandating the minimum safety requirements would apply.[3] These regulations include: ensuring there are suitable public announcements or instructive placards concerning locations of and information concerning life preserves (46 C.F.R. § 26.03-1); requiring at least three approved lifebuoys (46 C.F.R. § 25.25-5(b)(3)); requiring the vessel to have an Emergency Position Indicating Radio Beacon that will float free if the vessel sinks (46 C.F.R. § 25.26-10(b)); mandating the number and location of fire extinguishers (46 C.F.R. § 25.30-20(b), 46 C.F.R. § 76.50-10, Table

[3] Although Respondent describes the use of the SEA RANGER as a "floating lodge," there is no evidence in the record that the SEA RANGER is regulated under other federal or state safety laws as a hotel, motel, lodge or other entity in the business of providing overnight accommodations to paying customers.

76.50-10(a)); and, requiring that heating, lighting and cooking systems are approved (46 C.F.R. § 25.45-1).[4]

These regulations are in place to ensure that certain minimum safety requirements are met for any vessel before passengers put their lives and safety into the hands of the owners and operators of the vessel. While there may be more risks if the vessel is involved in transporting passengers, there is still risk associated with being on board a vessel and the clear intent of the regulatory scheme is to ensure the safety of those on board. It is in this context that Congress provided that an uninspected passenger vessel is one that is "carrying" at least one passenger for hire.

As such, Congress' intent is clear that the purpose of the statute and regulatory scheme is to protect life and safety at sea. Limiting the definition of "carrying" to only include vessels that are moving with passengers aboard is inconsistent with Congress' clear intent. Therefore, "carrying" must include situations where a vessel is moored, docked, or otherwise not moving while passengers for hire are embarked.

b. Chevron Step 2: Was the Coast Guard's statutory construction permissible?

Assuming, for the sake of argument, that I found Congress' unambiguous intent did not clearly require "carrying" to be defined to include situations where a vessel never moved while passengers were embarked. Even under that circumstance, the Coast Guard's statutory construction was still permissible and entitled to deference. "[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its

[4] Given the numerous potential catastrophic events that may befall a vessel of this size (i.e., fire, loss of power, boiler room explosion, and any other life-threatening event), Congress clearly would fault the Coast Guard for not exercising its statutory mandate if it were to adopt Respondent's position and a significant marine causality occurs.

statutory authority." City of Arlington, TX v. F.C.C., 133 S.Ct. 1863, 1868 (2013). While Respondent relies only on the primary meaning of "carrying" and states the Coast Guard is attempting to redefine the word, the Coast Guard is doing no such thing. By the Coast Guard's statutory interpretation, any vessel that has at least one passenger for hire (but not more than 12 passengers) embarked is considered an uninspected passenger vessel. This interpretation applies whether the vessel is moving with passengers aboard or not.

The Coast Guard is not attempting to limit the definition of "carrying" to the exclusion of Respondent's proposed interpretation. Rather, the Coast Guard's statutory interpretation encompasses multiple permissible and relevant meanings of "carrying" and protects life and safety at sea anytime passengers are on board. The statutory purpose and regulatory scheme support this interpretation and the Coast Guard is clearly within the bounds of its statutory authority to interpret "carrying" in this way. The Coast Guard's definition of "carrying" is not an impermissible interpretation of the statute and is therefore entitled to deference.

D. Misconduct for Violation of 46 C.F.R. § 15.905

As stated above, misconduct is human behavior which violates a formally established rule. See 46 C.F.R. § 5.27. The regulations set forth that "an individual holding a license or MMC endorsed as a master or pilot of an inspected self-propelled vessel is authorized to serve as master … of an uninspected passenger vessel of 100 GRT or more within any restrictions, including gross tonnage and route, on the individual's license or MMC." 46 C.F.R. § 15.905(b).

In this case, the parties do not dispute that during the relevant time period Respondent held and was acting under the authority of an MMC endorsed for service as Master of Steam, Motor or Auxiliary Sail Vessels of Not More Than 100 GRT Upon Inland Waters. The parties also do not dispute that the SEA RANGER, upon which Respondent served as Master is a 198 GRT vessel. Respondent did not have the appropriate license, MMC or endorsement to serve as Master of the SEA RANGER. By serving as Master of an uninspected passenger vessel without the proper license, MMC or endorsement, Respondent violated 46 C.F.R. § 15.905(b). Therefore, the charge for Misconduct is found **PROVED**.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard in accordance with 46 U.S.C. § 7703(1)(B); 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

2. At all relevant times, Respondent was acting under the authority of his credential while serving as Master of the SEA RANGER.

3. The SEA RANGER is an uninspected passenger vessel pursuant to 46 U.S.C. § 2101(42).

4. The SEA RANGER is "carrying" passengers and/or passengers for hire by virtue of passengers embarking on the vessel even though the vessel is moored at all times.

5. At all relevant times, Respondent did not possess the proper license, MMC, or endorsement to serve as Master aboard the SEA RANGER while at least one passenger for hire (but no more than 12 passengers) were on board.

6. The allegations in the Coast Guard's Complaint with respect to the single charge of Misconduct are found **PROVED**.

V. SANCTION

Suspension and Revocation proceedings are remedial, not penal in nature and are intended to promote safety at sea. See 46 C.F.R. § 5.5. Pursuant to 46 C.F.R. § 5.569(a) the decision as to the appropriate penalty is the responsibility of the Administrative Law Judge. Recommended sanctions proposed by either party are suggestions and are not binding. Further, the recommended penalty for misconduct based on failure to comply with U.S. law or regulation is between one (1) and three (3) months. See 46 C.F.R. § 5.569(d) and Table. Importantly, in determining the appropriate sanction, the judge must consider any aggravating or mitigating circumstances. Appeal Decision 2455 (WARDELL) (1987); 46 C.F.R. § 5.569(b)(3).

The Coast Guard proposes a six (6) month outright suspension of Respondent's MMC for the 1 count of Misconduct found proven herein. The Coast Guard argues in aggravation that it informed Respondent as early as 2013 that he did not have the proper licensure to operate the SEA RANGER. See Tr. at 30, 55-7; Joint Exhibit 1; Joint Stipulated Facts at ¶ 14. According to Respondent, in May 2013 the Coast Guard told him he needed to get a two hundred ton upgrade. See Tr. at 30. Coast Guard witnesses testified that they probably said something to the effect that before Respondent carries passengers for hire he needs to get someone with the proper license to serve as master. See Tr. at 55-7. Importantly, contrary to the Coast Guard's admonition, Respondent did not apply for an upgrade to his MMC until December 2015, two-and-a-half (2.5) years after he was first approached by the Coast Guard. See Tr. at 30-1; CG03.

Conversely, there are mitigating factors that must be considered in determining the appropriate sanction. In this case, while Respondent did commit misconduct by

serving as Master aboard the SEA RANGER without the proper license, he did so under the mistaken belief that he was not "carrying" passengers. Indeed, because of the nature of Respondent's operation, it was not unreasonable for him to think that he was not doing anything wrong. However, he was clearly put on notice that he had a problem and he failed to proactively resolve it in a timely fashion. Accordingly, weighing all the facts and circumstances, I find a penalty of a one (1) month outright suspension is warranted. This determination is predicated on the unique facts presented herein. In addition, subsequent to the close of the hearing, the Coast Guard informed the Court that Respondent's application for a 200 ton upgrade has now been granted.

VI. ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is **DENIED**.

IT IS HEREBY FURTHER ORDERED that the allegations in the Complaint are found **PROVED** with respect to the charge of Misconduct in that Respondent did not have the proper license, MMC or endorsement to serve as Master of the 198 GRT uninspected passenger vessel, the SEA RANGER.

IT IS HEREBY FURTHER ORDERED that all of Respondent Neil Alan Voelckers' Coast Guard-issued credentials are **SUSPENDED FOR THIRTY DAYS OUTRIGHT**.

IT IS HEREBY FURTHER ORDERED that Respondent immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard's Investigating Officer.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, a copy of which can be found in **Attachment B**.

SO ORDERED.

Hon. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard
Date: August 29, 2016

Attachment A

Joint Exhibits:

Joint Exhibit 1 – Memorandum of Agreed Facts, dated June 1, 2016

Coast Guard Witnesses:

1. LCDR Patrick Drayer
2. LCDR Jason Boyer
3. CWO Israel Nieves

Coast Guard Exhibits:

CG01 – MISLE Incident Investigation Report
CG02 – Vessel Certificate of Documentation for the SEA RANGER
CG03 – Application for MMC Upgrade
CG04 – Alaskan Experience Website printout

Respondent Witnesses:

Respondent, Neil Alan Voelckers

Respondent Exhibits:

Ex. A – Alaskan Experiences Information
Ex. B – Not Offered
Ex. C – Not Offered
Ex. D – Articles of Organization; withdrawn following the hearing. See *Notice of Errata* dated August 22, 2016.
Ex. E – Email between CWO Israel Nieves and Respondent dated March 21, 2016
Ex. F – Not Offered
Ex. G – Not Offered
Ex. I – Photo of the SEA RANGER moored at Bay of Pillars

Attachment B – Notice of Appeal Rights

33 C.F.R. Part 20 - Subpart J—Appeals

§ 20.1001 General.
(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.
(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,—

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.
(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the—

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless—

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.