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

UNITED STATES COAST GUARD

Complainant,

vs.

DANIEL WALTER SCHWIEMAN

Respondent.

Docket Number 2018-0415
Enforcement Activity No. 5756087

DECISION AND ORDER

Issued: September 13, 2019

By Administrative Law Judge: Honorable Michael J. Devine

Appearances:

Jennifer A. Mehaffey, Esq.
USCG SR-NCOE

and

LT Brian M. Hennessy
USCG Marine Safety Unit Chicago

For the Coast Guard

Daniel W. Schwieman, *Pro Se*

For the Respondent

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking suspension of Daniel Walter Schwieman's (Respondent) Merchant Mariner Credential (MMC) by issuing a Complaint on November 13, 2018 pursuant to 46 U.S.C. 7703(1)(A), alleging Respondent committed a violation of law or regulation while acting under the authority of his MMC. Specifically, the Coast Guard alleged on June 16, 2018, Respondent operated the vessel ALLORA with more than six passengers on board, at least one for hire, without a valid Certificate of Inspection (COI), in violation of 46 C.F.R. § 176.100(a). The Coast Guard alleged in "aggravation" that Respondent also operated the ALLORA in violation of 46 C.F.R. § 176.100(a) on June 3, 2017, June 11, 2017, and June 30, 2017. Respondent submitted a timely Answer on December 2, 2018, denying the jurisdictional and factual allegations of the Complaint.

A hearing on the matter commenced in Chicago, Illinois on June 18, 2019. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations in 33 C.F.R. Part 20. At the hearing, LT Brian M. Hennessy and Jennifer Mehaffey, Esq., represented the Coast Guard. Respondent appeared at the hearing and represented himself (*pro se*). Five witnesses testified on behalf of the Coast Guard and Respondent testified on his own behalf. The Coast Guard moved for admission of six exhibits, and Respondent moved for admission of three exhibits, all of which were admitted into evidence. The list of witnesses and exhibits is contained in **Attachment A**.

During the hearing, the Coast Guard requested official notice of 46 C.F.R. §§ 15.515, 175.100, 175.110, 176.100, 176.103; and 46 U.S.C. § 8902. These laws and regulations pertain to small passenger vessels and specify when a COI may be required. Although parties may cite and reference relevant legal authority without official notice, Respondent had no objection, and, therefore, the undersigned Administrative Law Judge (ALJ) granted the request. See 33 C.F.R. § 20.806. The Coast Guard also requested official notice of Navigation and Inspection Circular (NVIC) No. 7-94 issued September 30, 1994 (marked as ALJ Ex. I) and an excerpt of the Coast Guard's Marine Safety Manual (marked as ALJ Ex. II). As is discussed in more detail, below, under the limited circumstances of this case, the undersigned ALJ finds it is inappropriate to take official notice of these documents which should have been provided in discovery to a *pro se* Respondent.

On July 29, 2019, the Coast Guard submitted Complainant's Post-Hearing Brief containing enumerated Proposed Findings of Fact and Conclusions of Law. To date, Respondent has not submitted a post-hearing brief; however, the undersigned considered Respondent's closing argument at the hearing as a summation of Respondent's view of the issues. The matter is now ripe for a decision.

After carefully reviewing the evidence and arguments presented at the hearing and in the Coast Guard's Post Hearing Brief, the undersigned ALJ finds the charge of violation of 46 C.F.R. § 176.100(a) **PROVEN**. In view of the purpose of these proceedings to maintain standards for competence and promote safety at sea, Respondent's MMC is **SUSPENDED FOR ONE (1) MONTH ON SIX (6) MONTHS' PROBATION**. Upon completion of the probationary period, the one-month suspension shall be remitted.

II. FINDINGS OF FACT

I find the following facts proved by a preponderance of the evidence, based on the entire record as a whole.

1. Respondent is currently, and was at all times relevant to this proceeding, the holder of Merchant Mariner Credential (MMC) #000362483. [CG Ex. 1].

2. The vessel ALLORA is a U.S. documented vessel (recreational) that is 36.2 feet long with a tonnage measurement of 20 gross registered tons. [CG Ex. 5].

3. Offshore, LLC owns the ALLORA. [CG Ex. 6].

4. On June 16, 2018, Respondent operated the ALLORA as master under the authority of his MMC on Lake Michigan, a navigable water of the United States, with Molly Nichols (charterer) and 11 passengers on board. [Tr. at 65-69, 160; CG Ex. 3 at 49-57].

5. Molly Nichols entered into a charter agreement with Offshore, LLC in connection with the June 16, 2018 voyage aboard the ALLORA. [Tr. at 160-161; CG Ex. 3 at 52-55].

6. Molly Nichols paid $1,200 to Offshore, LLC in consideration for the June 16, 2018 charter of the ALLORA. [Tr. at 66, 69, 160-161; CG Ex. 3 at 49-57].

7. The passengers contributed consideration to be aboard the ALLORA for the June 16, 2018 voyage with Molly Nichols. [Tr. 109-110, 161].

8. On June 16, 2018, the ALLORA did not have a Certificate of Inspection issued by the Coast Guard to operate as a small passenger vessel. [Tr. at 69; CG Ex. 3 at 56-57; CG Ex. 4].

III. DISCUSSION

Coast Guard charged Respondent with violating 46 C.F.R. § 176.100(a),[1] operating a small passenger vessel without a Certificate of Inspection. To determine whether Respondent violated this Coast Guard regulation relating to vessel safety,[2] the ALJ must look to 46 C.F.R. §

[1] 46 C.F.R. § 176.100(a)

A vessel to which this subchapter applies may not be operated without having on board a valid U.S. Coast Guard Certificate of Inspection.

[2] The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 C.F.R. § 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. § 7703.

175.110 to determine whether ALLORA was operated as a small passenger vessel subject to the COI requirement. This in turn requires the ALJ to address the following issues:

1) whether payments made in connection with a charter agreement constituted evidence of passengers for hire; and

2) whether the charter agreement in this case constituted a charter with crew provided.

Recreational vessels have some safety requirements, but vessels that are in the business of carrying passengers are subject to substantially greater requirements and may be required to have a COI. Whether a vessel is subject to greater safety requirements is determined by applying the facts to 46 C.F.R. § 175.110, found in Subchapter T – Small Passenger Vessells (Under 100 Gross Tons). This issue is addressed in Section D, infra.

A. Jurisdiction

To prevail in a suspension or revocation case, the Coast Guard must first prove that it has jurisdiction to seek suspension or revocation. Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. See Appeal Decision 2620 (COX) (2001). In the instant case, because the Coast Guard proceeded under 46 U.S.C. § 7703(1)(A), to prove jurisdiction it must show that Respondent acted under the authority of his MMC when he operated the ALLORA on June 16, 2018.

A mariner is considered to be acting under the authority of his or her credential or endorsement when the mariner is employed in the service of the vessel and the holding of such credential or endorsement is required by law and/or for condition of employment. 46 C.F.R. § 5.57(a). At the hearing, Respondent did not dispute that he is the holder of MMC #000362483 or that he was operating the ALLORA as master on June 16, 2018. [Tr. at 21,

65-69; CG Ex. 1; CG Ex. 3 at 49-57]. Respondent did not contest that was he acting under the authority of his MMC while serving as master of ALLORA, but contended that there was a valid bareboat charter and therefore no regulatory violation. [Tr. at 79, 81-82, 124, 133]. Therefore, because there is no dispute that Respondent holds an MMC and was operating the ALLORA as a credentialed master on June 16, 2018, jurisdiction is **PROVEN**.

B. Burden of Proof

Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 C.F.R. §§ 20.701-702; see also Appeal Decision 2485 (YATES) (1989). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). See also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

C. Official Notice of Navigation and Inspection Circular and Marine Safety Manual

The Coast Guard requested official notice of Navigation and Inspection Circular (NVIC) No. 7-94, issued September 30, 1994 (marked as ALJ Ex. I). The NVIC provides compliance

and enforcement guidance following the enactment of the Passenger Vessel Safety Act of 1993.[3] The Coast Guard also requested official notice of an excerpt of the Coast Guard's Marine Safety Manual (marked as ALJ Ex. II). [Tr. at 12-21]. The ALJ questioned whether these documents were appropriate to consider for official notice since they are neither statutes nor regulations and not clearly shown to be general knowledge materials. [Tr. at 15-19]. Respondent objected to Coast Guard's request. [Tr. at 16]. At the hearing, the ALJ deferred ruling on whether official notice should be granted for NVIC 7-94. [Tr. at 16-17].

Pursuant to 33 C.F.R. § 20.806, the ALJ may take official notice of such matters as could courts, or of other facts within the specialized knowledge of the Coast Guard as an expert body. NVICs and the Marine Safety Manual are internal guidance for the Coast Guard. In its Post Hearing Brief, the Coast Guard cited Appeal Decision 460 (DUGAS) (1950) and Appeal Decision 2507 (WEIS) (1990) in support of its argument for official notice of the documents. These cases are not on point for application against a mariner. In DUGAS, the documents officially noticed on appeal were related to jurisdictional facts and from the Coast Guard's own reports. Appeal Decision 460 (DUGAS) at 3. In WEIS, it was the *mariner* who sought on appeal for official notice to be taken of the NVIC. Appeal Decision 2507 (WEIS) at 1. Such materials are within the knowledge of the Coast Guard for its own internal guidance. Internal guidance is not necessarily something that should be attributed as facts generally known by all mariners. Additionally, the contention that the documents are available on the internet alone does not satisfy the concept of material facts that are generally known.

While the NVIC and Marine Safety Manual may be useful for analyzing the issue of bareboat charters, the undersigned ALJ finds the failure of the Coast Guard to provide copies

[3] P.L. 103-206 (December 20, 1993); 107 Stat. 2442.

prior to the hearing to Respondent, who is self-represented, to be unfair. These documents do not appear to provide "facts," but are instead in the nature of legal analysis and guidance for compliance. Moreover, official notice of these documents would not provide any particular benefit to either party, since the law and regulations[4] apply to the facts of the case regardless of the Coast Guard's internal guidance documents. Coast Guard ostensibly seeks judicial notice to support the theory that Respondent knew or should have known that the vessel he was operating required a COI, but, as discussed below, whether Respondent had specific knowledge that the ALLORA was subject to the small passenger vessel regulations is not an element to proving a violation of 46 C.F.R. § 176.100(a).

The regulations require the Coast Guard to provide a copy of documents it intends to use in the presentation of its case to the respondent. 33 C.F.R. § 20.601(a)(2). Since these materials were not provided to respondent in discovery, they are rejected, in keeping with 33 C.F.R. § 20.607. Use of official notice to avoid providing materials in advance of the hearing, particularly with a *pro se* respondent,[5] is contrary to the proper construction of the rules for these proceedings. 33 C.F.R. § 20.103.

D. Evidence of Violation of 46 C.F.R. § 176.100(a)

In this case, the Coast Guard seeks to prove by a preponderance of the evidence that Respondent violated 46 C.F.R. § 176.100(a), which provides:

> A vessel to which this subchapter applies may not be operated without having on board a valid U.S. Coast Guard Certificate of Inspection.

[4] The Coast Guard's website for NVICs includes noting that NVICs are non-directive and do not have the force of law and that non-compliance with a NVIC is not a violation of law in and of itself. See https://www.dco.uscg.mil/Our-Organization/NVIC/.

[5] The ruling in Appeal Decision 2697 (GREEN) (2011) provides that reasonable latitude is to be given *pro se* litigants.

It is undisputed that on June 16, 2018, the ALLORA did not have a valid COI. [Tr. at 69; CG Ex. 3 at 56-57; CG Ex. 4].

The types of vessels that fall under Subchapter T, and therefore require a COI, are set forth in 46 C.F.R. § 175.110:

> (a) Except as in paragraph (b) of this section, this subchapter applies to each vessel of less than 100 gross tons that carries 150 or less passengers, or has overnight accommodations for 49 or less passengers, and that—
>
> (1) Carries more than six passengers, including at least one for hire;
>
> (2) Is chartered with a crew provided or specified by the owner or the owner's representative and is carrying more than six passengers;
>
> (3) Is chartered with no crew provided or specified by the owner or the owner's representative and is carrying more than 12 passengers; or
>
> (4) If a submersible vessel, carries at least one passenger for hire; or
>
> (5) Is a ferry carrying more than six passengers.

Section 175.110 contains exceptions in subsection (b), however none of the exceptions apply to ALLORA. As discussed more fully below, only subparts (1) and (2) of 46 C.F.R. § 175.110(a) potentially apply to the ALLORA because it was carrying no more than 12 passengers, and is neither a submersible vessel nor a ferry.

The Coast Guard focused on presenting evidence to show that the ALLORA was not operated under a valid bareboat or demise charter. While operating the ALLORA under a bareboat charter may be a defense[6] for Respondent, the regulations describe what types of vessels must comply with 46 C.F.R. Subchapter T. To prove a violation of 46 C.F.R. § 176.100(a)(1) the Coast Guard bears the burden of proof to show (1) that on June 16, 2018 the

[6] The caselaw cited by the Coast Guard predates the passage of the Passenger Vessel Safety Act of 1993. Therefore, cases such as Appeal Decision 2490 (PALMER) (1989) and Appeal Decision 2496 (MCGRATH) (1990) are of some value but do not address the current regulations. However, if the charter had been a valid bareboat charter and carried 12 or fewer passengers, then ALLORA would not fall under Subchapter T and would only need to comply with recreational vessel requirements.

ALLORA was within either 46 C.F.R. § 175.110(a)(1) or 46 C.F.R. § 175110(a)(2) and therefore subject to the COI requirement of 46 C.F.R. Subchapter T, and (2) that the ALLORA did not have a valid COI on June 16, 2018.

1. <u>Analysis of Section 175.110(a)(1) for Application of Subchapter T</u>

To fit within 46 C.F.R. § 175.110(a)(1), the ALLORA had to carry more than six passengers on board, at least one for hire.

Title 46 U.S.C. section 2101 provides the definition of "passenger:"

> (A) means an individual carried on the vessel except—
>
> (i) The owner or an individual representative of the owner, or, in the case of a vessel under charter, an individual charterer or individual representative of the charterer;
>
> (ii) The master; or
>
> (iii)A member of the crew engaged in the business of the vessel who has not contributed consideration for carriage and who is paid for on board services.

46 U.S.C. § 2101(29).

Title 46 section 2101 also defines "passenger for hire" as

> …a passenger for whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel.
>
> 46 U.S.C. § 2101(30).

Here, the record shows that on June 16, 2018, the ALLORA got underway with Respondent and a crew member, a charterer named Molly Nichols, and eleven passengers on board. [CG Ex. 3 at 49-50; Tr. at 168, 221-222]. A Coast Guard maritime enforcement specialist, Petty Officer Jacob Ruhe, boarded the ALLORA that day after receiving a 911 call regarding an injured passenger. [Tr. at 159]. Upon boarding, Respondent provided Petty Officer Ruhe with a copy of the charter agreement executed by Molly Nichols and Offshore, LLC. [Tr.

at 160; CG Ex. 3 at 52-55]. The copy of the written agreement contained in the record does not mention the amount of $1,200, but includes the language, "[Owner] acknowledges receipt from hereinafter [sic] Molly Nichols the amount set forth on the face of this Vessel Charter Agreement…" [CG Ex. 3 at 52-55]. Officer Ruhe spoke with Ms. Nichols who stated she paid $1,200 to charter the ALLORA. [Tr. at 66, 69, 160-161; CG Ex. 3 at 49-57]. The statutory and regulatory definitions of "passenger" do not include the charterer. 46 U.S.C. § 2101(29); 46 C.F.R. § 175.400. Therefore, evidence of the payment by Molly Nichols to Offshore, LLC to charter the vessel does not prove the vessel carried a passenger for hire.

The Coast Guard did not present any testimony or written statements from Ms. Nichols or anyone else aboard the ALLORA on June 16, 2018. The Coast Guard presented minimal evidence regarding the issue of whether the ALLORA carried at least one passenger for hire. The Coast Guard demonstrated that Molly Nichols paid $1,200 for the charter of the ALLORA but Ms. Nichols as charterer is not within the definition of passenger and that payment alone is not sufficient for the Coast Guard to meet its burden of proof.

Petty Officer Ruhe testified that when he boarded ALLORA, he determined that the passengers paid to be aboard the vessel. [Tr. at 161]. Further, Coast Guard Lieutenant Katherine Woods, Chief of Inspections for Marine Safety Unit Chicago, confirmed that Petty Officer Ruhe determined the other passengers had paid consideration to be aboard the ALLORA. [Tr. at 110, 116]. Under the statutory definition contained in 46 U.S.C. § 2101(30), the other passengers were "passengers for hire," whether their consideration flowed to the ALLORA's owner, to Molly Nichols as the charterer, to Respondent as operator, or to anyone else with an interest in the vessel. Therefore, the Coast Guard evidence, though minimal, was sufficient to show that at least one passenger on board ALLORA was a passenger for hire on June 16, 2018. Accordingly,

I find the ALLORA was operated as a small passenger vessel within the meaning of 46 C.F.R. § 175.110(a)(1) on June 16, 2018.

Respondent asserted throughout the hearing that he was not a party to the charter agreement. However, Respondent and the owners of the ALLORA cannot circumvent the requirements of the regulations by contending a lack of knowledge of payments by passengers. In Appeal Decision 2505 (TAYLOR) (1990), the operator argued that the passengers on his vessel were not passengers for hire under the law, because neither he nor the boat's owner directly accepted payment from them. The Commandant rejected this argument, holding that to be a passenger for hire only requires that "consideration" be paid, and it does not matter to whom the consideration is paid. Appeal Decision 2505 (TAYLOR) at 3.

2. Analysis of Section 175.110(a)(2) for Application of Subchapter T

Turning to 46 C.F.R. § 175.110(a)(2), to fit within this subpart, the ALLORA had to be operated under a charter with the crew provided or specified by the owner and carry more than six passengers on board. The Coast Guard did not present any direct evidence of the details of Respondent's agreement to operate the vessel on June 16, 2018. The Coast Guard called Marine Investigator Timothy Drury, who testified regarding an investigation of the ALLORA's owners beginning in 2017. Investigator Drury testified that the owner of the vessel provided a list of available crew members that favored selection of Respondent and another mariner since they were less expensive. [Tr. at 68]. A copy of an email exchange related to a previous voyage that took place on July 6, 2017 is contained in CG Ex 2. [CG Ex. 2 at 55-58, 64]. This document is what Investigator Drury referred to when he testified "[t]he crew list that we were provided was, I guess for lack of a better word, was very one-sided." [Tr. at 68]. The email exchange shows that any choice of crew by the prospective charterer was analogous to a Hobson's choice. The

charter required the use of credentialed mariners and the vessel owner or representative presented a list of available mariners to the charterer that was highly suggestive of Captain Schwieman and another captain. There was no indication that the charterer was free to select their own captain or crew not on the suggested list. However, the Coast Guard presented no evidence that this "one-sided" selection method was utilized for the June 16, 2018 voyage. There is no document in evidence showing what Respondent was paid or by whom for the voyage on June 16, 2018. Respondent testified that he typically made an agreement and exchanged payment with the "renter" of the vessel for the particular voyage. [Tr. at 205-207]. Therefore, the Coast Guard's evidence is not sufficient to prove the ALLORA was operated by charter with a crew provided on June 16, 2018 within the meaning of 46 C.F.R. § 175.110(a)(2).

3. Bareboat Charter Analysis

The Coast Guard focused much of its case on proving the June 16, 2018 charter was not a valid bareboat charter. Success on that point does not satisfy the Coast Guard's burden of proof in this case. As stated above, the applicable regulation (46 C.F.R. § 175.110) does not include a discussion of bareboat charters. However, Respondent's assertion that he operated the vessel under a bareboat charter may be considered as a potential defense to the charged violation, because a bareboat charter under certain circumstances would fall outside of the ambit of 46 C.F.R. § 175.110(a). For a voyage to constitute a valid "bareboat" or "demise" charter, the "owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof" to the charterer. Appeal Decision 2490 (PALMER) (1989) (citing Guzman v. Pichirilo, 369 U.S. 698, 699 (1962); U.S. v. Shea, 152 U.S. 178 (1894)). In a valid bareboat/demise charter, the person chartering the vessel would have discretion to navigate the vessel in whatever manner she sees fit, without regard to rules put in place by the vessel's owner. In Palmer, the Commandant upheld the ALJ's finding that a valid bareboat charter did not exist,

because, among other things, the owner of the boat retained authority to cancel the voyage for bad weather. PALMER at 5. Also, in a valid bareboat charter, the owner would not provide the crew to the charterer. If Respondent was able to demonstrate the charter for the ALLORA on June 16, 2018 was a bareboat charter with 12 or fewer passengers, it would be operating as a recreational vessel outside of the reach of 46 C.F.R. § 176.100(a) and the requirements of Subchapter T.

Respondent argued numerous times during the hearing that the ALLORA was an exceptionally safe vessel and he believed he had complied with all of the safety standards and manufacturer's recommendations for the vessel. [Tr. at 56-57, 82, 122-124, 127-128, 206-207]. LT Woods testified that if the ALLORA voyage on June 16, 2018 fell within the definition of a bareboat charter, it would not have to meet commercial standards of safety and would, to her knowledge, be considered a safe vessel for a recreational voyage. [Tr. at 131].

The evidence in the record does not support a finding that the charter agreement entered into between Offshore, LLC and Molly Nichols was a valid bareboat/demise charter because it did not relinquish all control of the vessel to the charterer. The charter agreement required passengers to wear life jackets while using certain equipment, prohibited glass bottles aboard the vessel, and allowed the owner to cancel the voyage due to inclement weather. [CG Ex. 3 at 52-55; Tr. at 50, 110-111]. Additionally, as noted above, there is some evidence that Offshore, LLC's practice may not have left the charterer free to select her own crew. A review of the charter and the applicable law leads to the conclusion that the agreement in question was not sufficient to constitute a bareboat/demise charter. See Appeal Decision 2490 (PALMER) (1989); Appeal Decision 2496 (MCGRATH) (1990). However, the lack of a bareboat charter

alone does not prove the ALLORA was subject to Title 46 C.F.R. Subchapter T for the voyage of June 16, 2018.

E. Respondent's Knowledge of the Requirement for a Certificate of Inspection to Operate the ALLORA to Carry Passengers

The Coast Guard spent a significant amount of time at the hearing attempting to impute Respondent with knowledge of the Navigation and Inspection Circular (NVIC) No. 7-94 and the Coast Guard's Marine Safety Manual. As discussed above, I find that the Coast Guard should have provided those materials in discovery to a *pro se* mariner and I declined to grant official notice of these internal Coast Guard guidance documents. Additionally, they are not factual materials such as a chart or a notice to mariners. The Coast Guard's Marine Safety Manual and NVICs are guidance relating to the application of law and unnecessary for the Court to apply the applicable law and regulations in this matter. Knowledge of these Coast Guard internal guidance materials is not required to prove a violation of the regulations.

The Coast Guard also presented evidence of civil enforcement actions brought against Offshore, LLC for prior invalid bareboat charter voyages as evidence to demonstrate "in aggravation" that Respondent should have been aware that he was operating the vessel in violation of 46 C.F.R. § 176.100(a). As discussed in the Sanction section below, prior actions against Offshore LLC, the ALLORA's owner, to which Respondent was not a party, cannot be considered as evidence of knowledge by Respondent. Additionally, the allegations regarding prior operations of the vessel ALLORA are not charged and under the Coast Guard's own procedural regulations cannot be considered as aggravation evidence. 33 C.F.R. § 20.1315. Respondent made the inverse argument and contended that because he was not aware of any issue that the charter was not a valid bareboat charter agreement, he should not be found in violation of the regulation. [Tr. at 81, 247-249].

The caselaw makes clear that specific knowledge or willful misconduct is not an element of proving a violation of 46 C.F.R. § 176.100(a). Appeal Decision 2490 (PALMER) at 4 ("It should be noted that "knowledge" is technically not a prima facie element in this case…"); Appeal Decision 2496 (MCGRATH) at 3 ("In the case herein, "knowledge" is not a prima facie element…specific intent is not a prerequisite element of a charge of misconduct or a violation of law or regulation…"). While Respondent is not an attorney and should not be expected to parse legal language as rigorously as an attorney would, he is bound to follow the law and regulations pertaining to safety at sea, including the requirements applying to whatever vessel he agrees to operate for hire. As an experienced licensed mariner he is required to comply with vessel safety regulations. Although Respondent asserts indirectly a reasonable mistake defense in regard to the nature of the charter agreement, specific knowledge is not required to prove the charged violation. Essentially, ignorance of the law is not a defense.

Additionally, even if it were considered local industry practice for a master to assume validity of a charter agreement labeled as a "bareboat charter," industry standards cannot be used to circumvent the law and regulations that promote safety at sea. See 46 U.S.C. §§ 7701-7704; 46 C.F.R. § 5.5; cf. The T. J. Hooper, 60 F.2d 737, 1932 A.M.C. 1169 (2d Cir. 1932). The undersigned ALJ finds that upon accepting employment to operate the ALLORA, Respondent was obligated to comply with all laws and regulations pertaining to the operation of the vessel.

As discussed above, the operation of the ALLORA on June 16, 2018 included carrying at least one passenger for hire. Under 46 C.F.R. § 175.110(a)(1), operation of the vessel ALLORA on June 16, 2018 required compliance with 46 C.F.R. Subchapter T. To comply with the Subchapter T regulations, the ALLORA was required to have a COI as a small passenger vessel and it is undisputed that there was no such COI for ALLORA. Therefore, based on the evidence

in the record as a whole, I find Charge 1 - Violation of Law of Regulation (46 C.F.R. § 176.100(a)) **PROVEN**.

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 Coast Guard and the ALJ, in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

2. Title 46 of the Code of Federal Regulations, Subchapter T (Small Passenger Vessels (Under 100 Gross Tons)), requires vessels under 100 gross tons carrying more than six passengers, at least one for hire, to have on board a valid U.S. Coast Guard Certificate of Inspection (COI) when operating as a small passenger vessel. 46 C.F.R. § 175.110; 46 C.F.R. § 176.100.

3. Molly Nichols paid Offshore, LLC $1,200 in consideration for a June 16, 2018 charter of the ALLORA.

4. Passengers aboard the ALLORA contributed consideration for the voyage and therefore ALLORA was operated with at least one "passenger for hire" in accordance with 46 U.S.C. § 2101(30).

5. On June 16, 2018, the ALLORA was operated as a small passenger vessel within the meaning of 46 C.F.R. § 175.110(a)(1) and was subject to 46 C.F.R. Subchapter T requirements, including the requirement to have a U.S. Coast Guard COI.

6. On June 16, 2018 Respondent operated the ALLORA without a valid U.S. Coast Guard COI and therefore the charge of violation of a regulation, 46 C.F.R. § 176.100(a), is **PROVEN**.

V. SANCTION

In this case, the Coast Guard seeks six months' outright suspension based on the charged offense and surrounding circumstances. The evidence presented to prove the charge is also relevant to determining a sanction pursuant to 46 C.F.R. § 5.569. The parties may also present matters that support either aggravation or mitigation. Title 33 C.F.R. Part 20, Subpart M (Supplementary Evidentiary Rules) provides guidance on what may properly be presented as evidence in aggravation or mitigation.

In its Post-Hearing Brief, the Coast Guard argues that Respondent's prior operation of the vessel ALLORA in 2017 should be considered "aggravation." The Coast Guard's argument is rejected. The Coast Guard did not bring any administrative action against Respondent in connection with the alleged prior incidents. The Coast Guard has not provided any due process to Respondent in regard to those alleged incidents. These matters may be considered as background information regarding the operation of the vessel ALLORA but uncharged misconduct cannot be considered as prior violations and these matters clearly are not within the scope of matters to be considered in aggravation under 33 C.F.R. Part 20, Subpart M. Specifically 33 C.F.R. § 20.1315 describes what may be considered in aggravation in suspension and revocation proceedings:

> (a) The prior disciplinary record of the respondent comprises the following items less than 10 years old:
>
> (1) Any written warning issued by the Coast Guard and not contested by the respondent.
>
> (2) Final agency action by the Coast Guard on any S&R proceeding in which a sanction or consent order was entered.
>
> (3) Any agreement for voluntary surrender entered into by the respondent.
>
> (4) Any final judgment of conviction in Federal or State courts.
>
> (5) Final agency action by the Coast Guard resulting in the imposition against the respondent of any civil penalty or warning in a proceeding administered by the Coast Guard under this title.
>
> (6) Any official commendatory information concerning the respondent of which the Coast Guard representative is aware. The Coast Guard representative may offer evidence and argument in aggravation of any charge proved. The respondent may offer evidence of, and argument on, prior maritime service, including both the record introduced by the Coast Guard representative and any commendatory evidence

The Coast Guard is bound by its own regulations and the allegations referenced by the Coast Guard as "aggravation" are not within the limits of this section. The Coast Guard has taken significant civil penalty action against the owner of the vessel who is responsible for drafting the charter agreements for its vessels. [CG Ex. 3]. Respondent is not the owner of the vessel ALLORA and proceedings against the owner of the vessel cannot be considered as prior disciplinary record for Respondent.

These proceedings are remedial, not penal in nature, and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5; Appeal Decision 2294 (TITTONIS) (1983). If a charge is proven, sanctions are to be determined based on the concern of safety at sea and pursuant to the regulations. Respondent has no previous infractions over long service as a mariner. His argument regarding lack of knowledge of bareboat charters does not excuse a lack of compliance with the regulations that are focused on vessel safety and the protection of passengers. However, the undersigned ALJ finds Respondent's prior record as a safe mariner to be appropriate as a matter in mitigation.

Although none of the listed violations within the sanction guidance are an exact match, the closest comparable guidance for the violation in this matter from the suggested range of sanctions contained in 46 C.F.R. § 5.569 (Table 5.569) would be one to three months' suspension for misconduct by failure to comply with U.S. law or regulation. It is within the duties of the ALJ to determine an appropriate sanction. See 46 C.F.R. § 5.569; see also Appeal Decision 2569 (TAYLOR) (1995); Appeal Decision 2680 (MCCARTY) (2006). The undersigned is not bound by 46 C.F.R. § 5.569. See Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Consideration of mitigating or aggravating factors and evidence may justify a lower or higher sanction than

the range suggested in the suggested range of an appropriate order table. See 46 C.F.R. § 5.569(d). Considering all of the facts in the record as a whole, including all of the testimony and exhibits admitted at the hearing, the arguments presented by the parties, and Respondent's previous good record, I find the appropriate sanction in this matter is for Respondent's MMC to be **SUSPENDED FOR ONE (1) MONTH ON SIX (6) MONTHS' PROBATION**.

VI. ORDER

IT IS HEREBY ORDERED, Respondent's Merchant Mariner Credential #000362483 is hereby **suspended for one (1) month on six (6) months' probation**. 46 C.F.R. § 5.567(c)(3). If another suspension and revocation charge as described in 46 C.F.R. §§ 5.27 – 5.35 is found proved against Respondent during the period of probation, the Coast Guard may request that the probationary suspension be enforced. At the successful completion of the six-month probation period, the suspension shall be remitted.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001 – 20.1004. (See **Attachment B**).

_____/s/_____
Michael J. Devine
Administrative Law Judge
U.S. Coast Guard

Date: September 13, 2019

ATTACHMENT A

Coast Guard's Witnesses

1. Special Agent Anthony Lewandowski
2. Marine Investigator Timothy Drury
3. LT Katherine Woods
4. ME3 Jacob Ruhe
5. Illinois DNR Officer Suzanne Klemme

Coast Guard's Exhibits

CG Exhibit 1: Copy of Respondent's Merchant Mariner Credential (MMC) (1 page)

CG Exhibit 2: Coast Guard Investigative Service Action Report of ALLORA (Report # ACT-2017-06-001399) (68 pages)

CG Exhibit 3: Coast Guard Civil Penalty Enforcement Summary against owner of ALLORA (Activity No. 5752999) and enclosures (108 pages)

CG Exhibit 4: Coast Guard Hearing Officer Civil Penalty Preliminary and Final Assessment Letters against the owner of ALLORA (13 pages)

CG Exhibit 5: Coast Guard Vessel Critical Profile of ALLORA (Primary VIN 920812) (4 pages)

CG Exhibit 6: Illinois Registration for ALLORA (State No. IL1490RC) (1 page)

Respondent's Witness

1. Daniel W. Schwieman

Respondent's Exhibits

Resp. Exhibit A: Article on Uninspected Passenger Vessel and Bareboat Charter Workshop hosted by Coast Guard Marine Safety Unit Chicago and Chicago Harbor Safety Committee at Chicago Yacht Club (2 pages)

Resp. Exhibit B: Two (2) articles on tour boat incidents on Chicago River (3 pages)

Resp. Exhibit C: Article on illegal charters operating in Chicago area (2 pages)

Official Notice Requested

1. NVIC 7-94 (rejected)
2. Excerpt of Marine Safety Manual, Vol. II pp. B4-8 through B4-10 (rejected)
3. 46 U.S.C. § 8902 (official notice taken)
4. 46 C.F.R. § 15.515 (official notice taken)
5. 46 C.F.R. § 175.100 (official notice taken)
6. 46 C.F.R. § 175.110 (official notice taken)
7. 46 C.F.R. § 176.100 (official notice taken)
8. 46 C.F.R. § 176.103 (official notice taken)

ALJ Exhibits

I. NVIC 7-94 (not admitted)
II. Excerpt of Marine Safety Manual, Vol. II pgs B4-8 through B4-10 (not admitted)

ATTACHMENT B

Notice of Appeal Rights

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.