

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

UNITED STATES COAST GUARD

Complainant

vs.

JEFFREY NAGLER,

Respondent.

Docket Number 2017-0130
Enforcement Activity No. 5737356

DECISION AND ORDER

Issued: September 24, 2018

By Chief Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

**For the Coast Guard
CWO Michael E. Leathers
Andrew J. Norris, Esq.**

**For the Respondent
Joseph Giaramita, Jr., Esq.**

I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated this administrative action by filing a Complaint on May 8, 2017, seeking a five (5) month outright suspension of Jeffrey Nagler's (Respondent) Merchant Mariner Credential (MMC). The Coast Guard asserts Respondent violated a law or regulation, as described in 46 U.S.C. § 7703(1)(A) and defined in 46 C.F.R. § 5.33, when he operated the CAPTAIN MIDNIGHT without complying with 46 C.F.R. § 176.100(b). Specifically, the Complaint alleges Respondent violated 46 C.F.R. § 176.100(b) by operating the CAPTAIN MIDNIGHT with more than six (6) passengers, at least one (1) for hire, without undergoing the required hull dry-dock and internal vessel inspections.

Respondent's Answer admitted and denied jurisdictional allegations and denied factual allegations. After the Coast Guard filed a Motion to Compel, requesting Respondent to follow the instructions on the Answer form and specifically requesting Respondent to list the factual paragraphs he denies, Respondent filed an Amended Answer. In his Amended Answer Respondent admitted to the jurisdictional allegations and factual allegations 1 and 2, but denied factual allegations 4, 5, and 6. He neither admitted nor denied factual allegations 3 and 7, which are hereby deemed admitted in accordance with 33 C.F.R. § 20.308(c).

On July 31, 2017, the undersigned Administrative Law Judge (ALJ) convened a hearing in New York City in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, and Coast Guard regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5. Chief Warrant Officer (CWO) Michael Leathers and Andrew Norris, Esq., represented the Coast Guard, and Joseph Giaramita, Jr., Esq., appeared on Respondent's behalf. The Coast Guard presented three (3) witnesses and seven (7) exhibits, and Respondent called one (1) witness and offered no exhibits. See Attachment A.

Pursuant to the ALJ's instruction, the parties timely filed post-hearing briefs. The record is now closed and this case is ripe for decision. After considering the record as a whole, the undersigned ALJ finds the Coast Guard **PROVED** Respondent violated a law or regulation by operating the CAPTAIN MIDNIGHT with passengers aboard without being in full compliance with the terms of the vessel's certificate of inspection. For the reasons set forth below, including Respondent's prior record, Respondent's Merchant Mariner's Credential and all other credentials issued to him by the Coast Guard are suspended outright for a period of five (5) months. Respondent must surrender his Merchant Mariner's Credentials and all other credentials to the Coast Guard immediately. The period of suspension will not commence until Respondent surrenders all credentials and endorsements.

II. FINDINGS OF FACT

The following findings of fact are based on the record as a whole, including the hearing transcript and post-hearing briefs:

1. At all times relevant, and specifically on May 4, 2017, Respondent held Coast Guard issued Merchant Mariner's Credential number 000265609. (CG Ex. 4).
2. Respondent acted under the authority of Merchant Mariner's Credential number 000265609 on May 4, 2017, when he served as the Master of the CAPTAIN MIDNIGHT. (Tr. at 127-28; CG Ex. 1, 2, 3, and 4).
3. The CAPTAIN MIDNIGHT is an inspected and certificated small passenger vessel. (Tr. at 27; CG Ex. 5).
4. The Coast Guard issued the CAPTAIN MIDNIGHT a Certificate of Inspection (COI) on April 10, 2014, with an expiration date of April 10, 2019. (CG Ex. 5).
5. The CAPTAIN MIDNIGHT's COI required the vessel to undergo two (2) hull inspections (a dry-dock examination and an internal structure examination) by April 30, 2017.¹ (Tr. at 37; CG Ex. 5).
6. The Coast Guard contacted Respondent on several occasions to arrange the hull dry-dock and internal inspections prior to their due date. (Tr. 34-49).

¹ Here and after referred to as the hull dry-dock and internal inspections.

7. On April 17, 2017, Respondent requested a three-week extension on CAPTAIN MIDNIGHT's inspection deadlines citing financial hardship and lack of Coast Guard availability for topside inspection of the MIDNIGHT STAR, another vessel owned by Respondent. (CG Ex. 6).
8. The Coast Guard denied Respondent's request for an extension. (Tr. at 48).
9. Respondent failed to complete CAPTAIN MIDNIGHT's hull dry-dock and internal inspections before the April 30, 2017 deadline. (Tr. at 63 and 68).
10. On May 4, 2017, Respondent operated the CAPTAIN MIDNIGHT during a fishing trip with approximately eleven (11) passengers and two (2) mates onboard. (Tr. at 130; CG Ex. 1, 2, and 3).
11. The CAPTAIN MIDNIGHT had not completed its hull dry-dock and internal inspections prior to the May 4, 2017 fishing trip. (CG Ex. 1 and 3).

III. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Pursuant to 46 C.F.R. § 5.19, an ALJ is authorized to suspend or revoke a license or certificate for violations arising under 46 U.S.C. § 7703. The APA found at 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d).

A. Jurisdiction

Jurisdiction is a question of fact which the ALJ must determine before deciding the substantive issues of the case. See Appeal Decision 2620 (COX) (2001). When a mariner is engaged in the service of a vessel, the mariner is acting under the authority of the credential when a law or regulation requires holding such credential. 46 C.F.R. § 5.57(a). The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner, when acting under the authority of the credential, "violate[s] or fails to comply with this subtitle, a law or regulations prescribed under this subtitle, or any other law or regulation intended to

promote marine safety or to protect navigable waters.” See 46 U.S.C. § 7703(1)(A). When the Coast Guard brings an action based exclusively on 46 U.S.C. § 7703, with the basis for suspension or revocation being a violation of a law or regulation intended to promote safety at sea, the complaint must state the specific statute or regulation by title and section number along with the manner in which the mariner violated it. 46 C.F.R. § 5.33.

Here, the Coast Guard alleges the CAPTAIN MIDNIGHT was required to undergo required hull dry-dock and internal inspections no later than April 30, 2017, in accordance with 46 C.F.R. § 176.600(c)(1) and as documented on the vessel's COI. (CG Ex. 5). The Coast Guard further alleges Respondent violated 46 C.F.R. § 176.100(b) on May 4, 2017, by taking passengers on a fishing trip before it underwent the required inspections and failing to ensure the CAPTAIN MIDNIGHT was in full compliance with the terms of the vessel's COI.

Respondent holds an MMC and served as the master of the CAPTAIN MIDNIGHT on May 4, 2017. (Tr. at 127-28; CG Ex. 1, 2, 3, and 4). Respondent admitted to jurisdiction in his Amended Answer, and the Coast Guard followed the requirements of 46 U.S.C. § 7703(1)(A) when filing the Complaint against Respondent. Accordingly, the undersigned finds jurisdiction is proper in this case.

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. 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) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

C. Violation of Law or Regulation

This case is based exclusively on 46 U.S.C. § 7703; therefore, the Coast Guard must assert the specific regulation Respondent violated. See 46 C.F.R. § 5.33. The Coast Guard asserts Respondent violated 46 C.F.R. § 176.100(b) by operating the CAPTAIN MIDNIGHT on a fishing voyage with passengers without being in full compliance with the vessel's COI. The Coast Guard states CAPTAIN MIDNIGHT's COI requires hull dry-dock and internal inspections every two (2) years, and the vessel was due for these examinations by April 30, 2017. See 46 C.F.R. § 176.600(c)(1); CG Ex. 5. The Coast Guard argues the 46 C.F.R. § 176.100(b) violation comes not from the failure to have the required inspections done on time, but by having passengers aboard the CAPTAIN MIDNIGHT on May 4, 2017, prior to undergoing its required inspections.

Title 46 C.F.R. § 176.100(b) states “[e]xcept as noted in § 176.114 of this part, each vessel inspected and certificated under the provisions of this subchapter must, when **any passengers** are aboard during the tenure of the certificate, be in full compliance with the terms of the certificate.”² (Emphasis added). “Passenger” is defined as “an individual carried on the vessel except” the owner, the master, or a member of the crew. See 46 U.S.C. § 2101(21)(A) and 46 C.F.R. Chapter I, Subchapter T. As shown below, the parties have differing interpretations of the term “passenger,” as used in 46 C.F.R. § 176.100(b).

² Title 46 C.F.R. § 176.114 is titled “Alternative requirements for a vessel operating as other than a small passenger vessel” and states in paragraph (a) “[w]hen authorized by the cognizant OCMI by an endorsement of the vessel's Certificate of Inspection, a small passenger vessel carrying six or less passengers, or operating as a commercial fishing or other uninspected vessel....” That section is not applicable to this case because CAPTAIN MIDNIGHT's Certificate of Inspection contained no such endorsement.

1. Coast Guard's Argument

The Coast Guard makes two (2) arguments in its post-hearing brief. First, if the CAPTAIN MIDNIGHT is not in full compliance with its COI then it may not carry **any passengers**. The Coast Guard argues there is no limit or requirement as to the number of passengers required by 46 C.F.R. § 176.100(b), and that merely one (1) passenger aboard is enough. In support of this argument the Coast Guard states that if the regulation intended the number of passengers to be limited it would have so stated as it has done in other sections of the regulations. See e.g., 46 C.F.R. § 175.110(a). Second, and in the alternative, even if 46 C.F.R. § 176.100(b) did not intend it to mean **any passengers**, Respondent still carried at least one (1) passenger for hire on May 4, 2017. The Coast Guard supports this argument with three (3) Coast Guard officers' statements showing that approximately ten (10) to fifteen (15) passengers exited the CAPTAIN MIDNIGHT with one (1) female passenger stating she and her male companion paid for the trip. (CG Ex. 1, 2, and 3; Tr. at 65, 66).

2. Respondent's Argument

Respondent argues the Coast Guard has not met its burden of proof because it failed to show by a preponderance of the evidence that any of the passengers aboard the CAPTAIN MIDNIGHT were paying passengers. In support of this argument, Respondent claims the Coast Guard interviewed only five (5) passengers and did not get the passengers' name, or photograph them. Respondent's argument is not persuasive. There is no requirement that any of the passengers must be for hire under 46 C.F.R. § 176.100(b).

D. Respondent Violated 46 C.F.R. § 176.100(b)

To prove a violation of 46 C.F.R. § 176.100(b), the Coast Guard must show the vessel was inspected and certificated; and, during the tenure of the certificate, the vessel had "any passengers" onboard when it was not in full compliance with the terms of the certificate. The evidence shows the Coast Guard proved each of these elements.

The CAPTAIN MIDNIGHT is an inspected and certificated small passenger vessel with a COI valid until April 10, 2019. (CG. Ex. 5). Therefore, CAPTAIN MIDNIGHT is the type of vessel contemplated in section 176.100(b).

The undersigned next turns to this section's application to passengers. Title 46 C.F.R. § 176.100 (b) specifically states "when any passengers are aboard." It is undisputed that the CAPTAIN MIDNIGHT carried passengers on the May 4, 2017 fishing trip. Respondent stated there were thirteen (13) people aboard, two (2) being crew members. The Coast Guard inspectors observed ten (10) to fifteen (15) passengers disembark the CAPTAIN MIDNIGHT, and at least one (1) woman stated she and her male companion paid for the trip. Regardless of whether the passengers paid, the evidence shows the CAPTAIN MIDNIGHT carried passengers on the May 4, 2017 fishing trip.

Finally, the undersigned turns to whether Respondent's vessel was in full compliance with the terms of its COI. The COI shows Respondent should have completed the examinations by April 30, 2017. Respondent admits he had not achieved the examinations as of May 4, 2017, when the vessel got underway. However, Respondent argues he did not carry any passengers for hire, and therefore, he did not violate 46 C.F.R. § 176.100(b). Respondent's argument misreads the applicable regulations.

The Coast Guard asserts that the act of carrying any passengers aboard the CAPTAIN MIDNIGHT violates Section 176.100(b) if the vessel is not in full compliance with the terms of its COI. Respondent argues there needs to be more than six (6) passengers aboard the vessel, with at least one (1) for hire to violate this section, yet § 176.100 (b) states "any passengers" onboard and nothing about "more than six passengers." There is no ambiguity in this regulation. It is clear on its face and does not mention a specified number of passengers must be aboard to invoke compliance with this section. Under 46 C.F.R. §

176.100(b), a vessel must comply with all the terms of its COI if there is at least one (1) passenger aboard the vessel.

Respondent's argument that the "any passengers" requirement in section 176.100(b) means more than six (6) passengers, at least one (1) for hire, is misguided. Title 46 C.F.R. Chapter 1, Subchapter T governs small passenger vessels under 100 gross tons. It includes vessels of less than 100 gross tons carrying 150 or less passengers, or has overnight accommodations for 49 or less passengers, and carries more than six (6) passengers, including at least one (1) for hire. 46 C.F.R. § 175.110 (a)(1). The CAPTAIN MIDNIGHT's COI shows it is a passenger vessel under 100 gross tons, thus making it an inspected small passenger vessel for purposes of Subchapter T. (CG Ex. 5). Nothing in 46 C.F.R. § 176.100(b) refers to a passenger limit for that section to apply. Accordingly, I do not find Respondent's argument persuasive. The language in the regulation is clear; it states "any passengers," not paying passengers or passengers for hire.

Even assuming Respondent's interpretation of the regulation is correct, the preponderant evidence shows Respondent operated the CAPTAIN MIDNIGHT with more than six (6) passengers, at least one (1) for hire. (Tr. at 65, 66). However, I find the violation of 46 C.F.R. § 176.100(b) occurred by operating the CAPTAIN MIDNIGHT with only one (1) passenger, regardless of whether that passenger was for hire.

Finally, it is undisputed that the CAPTAIN MIDNIGHT did not have the required hull dry-dock and internal inspections by the due date of April 30, 2017. Therefore, the vessel was not in full compliance with the terms of its COI. Accordingly, the undersigned finds the Coast Guard proved Respondent operated the CAPTAIN MIDNIGHT on May 4, 2017, after the hull dry-dock and internal inspections were due, with passengers onboard. The operation of the CAPTAIN MIDNIGHT with passengers onboard while the CAPTAIN MIDNIGHT was not in full compliance with the terms of its COI is a violation of 46 C.F.R. § 176.100(b). Accordingly,

I find the Coast Guard **PROVED**, by a preponderance of reliable and credible evidence, Respondent violated a law or regulation by operating the CAPTAIN MIDNIGHT with a passenger aboard without being in full compliance with the terms of the vessel's certificate of inspection.

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 undersigned ALJ in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent's failure to complete the CAPTAIN MIDNIGHT's required hull dry-dock and internal inspections by April 30, 2017 violated the terms of the COI.
3. Respondent violated 46 C.F.R. § 176.100(b) when he operated the CAPTAIN MIDNIGHT on May 4, 2017 with passengers aboard, without being in full compliance with the terms of the CAPTAIN MIDNIGHT's COI.
4. Violation of 46 C.F.R. § 176.100(b) is a "violation of a law or regulation" as described in 46 U.S.C. § 7703(1)(A) and as defined in 46 C.F.R. § 5.33.

V. SANCTION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. 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 and Appeal Decision 2294 (TITTONIS) (1983). Once the ALJ finds the alleged violations proved, the next step is to determine the sanction based on the concerns of safety at sea and pursuant to the applicable regulations. Under 46 C.F.R. § 5.569, it is the responsibility of the ALJ to select an appropriate order imposing sanction. That section lists the following factors which may affect the sanction order:

1. Remedial actions which have been undertaken independently by the respondent;
2. Prior record of the 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.

46 C.F.R. § 5.569(b)

A. Remedial Actions Undertaken Independently by the Respondent

Concerning factor number one (1), the hearing's administrative record does not reflect Respondent undertook any remedial actions independently.

B. Respondent's Prior Record

Next I will address factor number two (2), Respondent's prior record. On March 20, 2008, he entered into a Settlement Agreement with the following provisions: three (3) months outright suspension followed by eighteen (18) months' probation, and forty (40) hours participation in conservation awareness/education with "Riverkeeper" or "Baykeeper" or other reputable conservation organizations in the New York area. The suspension period was also conditioned upon committing no further acts of Misconduct, Negligence, or Violations of Law. (CG Ex. 7 at 25). Respondent successfully completed all of its terms by October 2010.

The factual circumstances surrounding this Settlement Agreement arose from similar charges, Respondent carrying passengers on a vessel that was taking on water. The Coast Guard received an anonymous tip from a passenger claiming to have overheard crew members discussing a broken valve in the engine room allowing water to ingress through the hull and the bilge pumps were pumping oil overboard. Specifically, the vessel's bilge pump switch was arranged to remain in the "on position" and its Marine Sanitation Device's (MSD) overboard set in the "open position," unlocked. Finally, the passenger overheard the valve would not be repaired until Monday even though there were more fishing trips scheduled.

Upon arrival on scene, Coast Guard personnel discovered the vessel was loading passengers onboard while there was a continuous discharge of oily water into Sheepshead Bay from the bilge pump. Coast Guard personnel found eleven (11) deficiencies, including those with the Main Diesel Engine (MSD), and fourteen (14) additional deficiencies when the vessel was required to go to a dry-dock. (CG Ex. 7 at 8, 17).

Finally, the hearing record contains no evidence of violations from the time of the Consent Order Approving Settlement Agreement issued on April 15, 2008, and the date of this violation, May 4, 2017.

C. Evidence of Mitigation or Aggravation

1. Mitigation

Respondent's brief is silent as to whether any factors should be taken into consideration to mitigate the sanction. However, during the hearing and listed in Respondent's post-hearing brief as a proposed finding of fact, Respondent argues he requested an extension on the CAPTAIN MIDNIGHT's COI because he had to reschedule the inspection of the MIDNIGHT STAR due to a snowstorm. Although, it is correct Respondent asked for an extension, the circumstances of that request fall short of evidence in mitigation and when further examined are actually facts in aggravation.

2. Aggravation

Finally, we turn to evidence in aggravation. In this case, the Coast Guard, specifically Commander Heather Mattern (CDR Mattern), Chief of Inspections at Sector New York, went above and beyond the normal course of dealings to provide Respondent with options that would keep his business going. (Tr. at 38, 39). One such instance occurred after Respondent emailed CDR Mattern on April 17, 2017, requesting an extension on the CAPTAIN MIDNIGHT's COI while he awaited topside inspection for another one of his vessels, the MIDNIGHT STAR. (CG Ex. 6). Respondent attached the letter to the email supporting this request. *Id.* The letter explained he needed a three (3) week extension "due to financial hardship." *Id.* Respondent also claimed a major snowstorm caused the inspection of the MIDNIGHT STAR to be postponed and that the shipyard was not available until March 30th for a dry-dock inspection. *Id.* Finally, the letter goes on to state he called back for the topside inspection and the first available date was May 5th. *Id.* The costs of waiting for the inspections was approximately \$100 a day and

Respondent needed a vessel in service to generate income because all of his other vessels were out of service. (CG Ex. 6; Tr. at 140). Immediately CDR Mattern called Respondent advising him that the Marine Safety Manual provides “financial hardship shall not be a reason to grant a dry-dock extension.” (Tr. at 46).

Although CDR Mattern was unable to give Respondent a dry-dock extension for financial hardship, she continued to work with Respondent to try and get him on the water as soon as possible. She explained to him that “the way he presented this information was in direct conflict of what is given in Coast Guard policy coming from Coast Guard Headquarters on when we can and cannot issue dry-dock extensions.” (Tr. at 46, 47). Because Respondent informed her the dry-dock was unavailable due to the snowstorm, she advised him that if he provided information from the boat yard stating it was shut down it could strengthen his request for an extension for legitimate purposes. (Tr. at 47). CDR Mattern provided Respondent with an opportunity to present additional information which would have allowed her to fully consider his request with all relevant information. Id. Because Respondent never provided CDR Mattern with the requested information the Coast Guard did not grant him a dry-dock examination extension. (Tr. at 47-48).

This letter Respondent sent to CDR Mattern requesting the dry-dock extension for the MIDNIGHT STAR is also evidence in aggravation because it fails to address why the CAPTAIN MIDNIGHT was not scheduled for its hull dry-dock and internal inspections prior their due date. It only shows Respondent was having trouble getting the MIDNIGHT STAR inspected and that he needed to have the CAPTAIN MIDNIGHT sailing to generate income if the Coast Guard did not move up the MIDNIGHT STAR’s inspection date. Respondent furthers this notion when he testified that he needed a vessel in service to generate income because his other boats were out of service. (Tr. at 140).

Further evidence in aggravation are the false statements Respondent made to the Coast Guard. Senior Investigating Officer LCDR Eric Ramirez interviewed Respondent on May 4, 2017 when the CAPTAIN MIDNIGHT returned to port. LCDR Ramirez specifically questioned Respondent about the dry-dock inspection due date of April 30, 2017. Respondent replied that he “got an extension to May 17th and I’m allowed to do this.” (Tr. at 68). However, CDR Mattern and another officer advised Respondent multiple times he could not operate the CAPTAIN MIDNIGHT after April 30, 2017. LCDR Ramirez also asked Respondent if the passengers were paying customers and Respondent replied the passengers were his friends. However, when members of the investigations team arrived on scene May 4, 2017, they asked the disembarking passengers if they were paying customers and at least one said yes. (Tr. at 65, 66). LCDR Ramirez reminded Respondent he was talking to a law enforcement officer who had spoken with the passengers beforehand, and Respondent finally agreed they were paying customers. (Tr. at 68, 71).

Accordingly, I find Respondent gave false statements to the Coast Guard on two (2) separate occasions during the on scene investigation and immediately after passengers disembarked the CAPTAIN MIDNIGHT. Respondent told LCDR Ramirez he had an extension on his Certificate of Inspection, a statement he knew was false. He also told LCDR Ramirez the passengers aboard CAPTAIN MIDNIGHT were his friends and not paying customers, another statement he knew was false.

D. Appropriate Order

Under 46 C.F.R. § 5.567(a), the ALJ may order admonition, suspension with or without probation, or revocation. In light of the foregoing evidence, a period of outright suspension for a specified period after surrender would best “help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 C.F.R. § 5.5. To that end, it is necessary to look to the regulations for guidance on an appropriate time of suspension.

Title 46 C.F.R. Table 5.569 lists a Suggested Range of an Appropriate Order. The Table is “for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered . . . [and] should not affect the fair and impartial adjudication of each case on its individual facts and merits. The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation.” (Emphasis added). 46 C.F.R. § 5.569(d). The ALJ is not bound by 46 C.F.R. § 5.569 or the average order table. See Appeal Decision 2578 (CALLAHAN) (1996) and Appeal Decision 2475 (BOURDO) (1988). Mitigation or aggravation 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).

Table 5.569 lists “Violation of Regulation” as a separate topic which lists “Refusal to take chemical drug test” and “Refusal to take required alcohol test” as a specific violation, each with recommended order ranges from twelve (12) to twenty four (24) months. However, those examples are not appropriate guidance for this case. But, under “Type of offense,” the Table lists “Misconduct” as the first category. Title 46 C.F.R. § 5.27 defines Misconduct as:

. . . human behavior which violates some formal, duly established rule. Such rules are 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.

Although the Coast Guard charged Respondent with “Violation of Law or Regulation,” his conduct violated “[a] formal, duly established rule . . . [such as] statutes, regulations . . . It is an act which is forbidden or a failure to do that which is required.” He failed to do that which was required by failing to have the CAPTAIN MIDNIGHT’S dry-dock and hull inspections completed by April 30, 2017. Respondent then carried “any passengers” on May 4, 2017, after the hull dry-dock and internal inspection dates passed without undergoing the required vessel inspections. Therefore, “Misconduct” as listed in the Table is an appropriate characterization of

Respondent's conduct to use as a framework in determining an appropriate order of sanction for violation of law or regulation.

Under "Misconduct", the Table lists several "Types of offenses" that closely match the facts in this case. The first is "Failure to comply with U.S. law or regulation" which lists a one (1) to three (3) month suspension for each allegation proved. The second is "Improper performance of duties relating to vessel safety" which lists a two (2) to five (5) month suspension for each allegation proved; and, the third is "Failure to perform duties related to vessel safety" which lists a three (3) to six (6) month suspension for each allegation proved.

The Coast Guard argues the violation of 46 C.F.R. § 176.100(b) comes not from the failure to have the required inspections on time, but by having passengers aboard the CAPTAIN MIDNIGHT prior to undergoing its required inspections. Therefore, "[f]ailure to perform duties related to vessel safety," which lists a three (3) to six (6) month suspension for each allegation proved, appears to most accurately depict Respondent's conduct because Respondent had a duty to complete the required hull dry-dock and internal inspections prior to carrying passengers aboard the CAPTAIN MIDNIGHT.

The Coast Guard seeks a five (5) month outright suspension based on the charged offense and surrounding circumstances. This is an upward departure from the top range of three (3) months suspension recommended by "Misconduct's" "Failure to comply with U.S. law or regulation" but is well within the framework range of three (3) to six (6) months suspension recommended by "Misconduct's" "Failure to perform duties related to vessel safety."

The aggravating factors the Coast Guard presented in support of a five (5) month suspension were Respondent's procrastination when it came to scheduling and rescheduling vessel inspections, previous violations, and false statements. Details of Respondent's "procrastination" are described in the above explanation of the events surrounding his request for

an extension on his COI. "Previous violations" are detailed above and reveal a tendency of failing to maintain his vessel(s) in a seaworthy manner.

Respondent's violations show a pattern of irresponsible behavior and poor judgment. The current violation, aggravated by his false statements that he had an extension on his COI and that the passengers were his friends and therefore not paying customers, show a disregard for the safety of his passengers and a failure to comprehend the seriousness of carrying passengers on a vessel that is overdue for hull inspections. Whether a passenger is a family member, friend, or paying passenger the vessel still needs to be in compliance with its COI. A family member or friend should not be afforded less safety protection than a paying passenger. The failure to comply with hull inspections is a serious violation because the purpose of a hull inspection is to ensure the vessel is sea worthy. In the interest of safety at sea and in light of the fact that Respondent has a previous violation of a similar nature, the undersigned finds a five (5) month outright suspension appropriate.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Credential and all other credentials the Coast Guard issued to Jeffrey Nagler, are **SUSPENDED OUTRIGHT FOR A PERIOD OF FIVE (5) MONTHS**.

IT IS FURTHER ORDERED that Respondent immediately surrender his Merchant Mariner Credential and any other Coast Guard issued credentials to the Coast Guard at Commanding Officer, U.S. Coast Guard Sector New York, 212 Coast Guard Drive, Staten Island, New York 10305. The period of suspension commences when Respondent deposits his credentials with the Coast Guard. If Respondent knowingly continues to use his credentials during a period of outright suspension, he may be subject to criminal prosecution.

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

See Attachment B.



Walter J Brudzinski
Chief Administrative Law Judge
United States Coast Guard

Date: September 24, 2018