

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD

v.

MERCHANT MARINER DOCUMENT

Issued to: RICHARD A. CHESBROUGH

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL  
NO. **2717**

**APPEARANCES**

For the Government:  
Ms. Lineka Quijano, Esq  
Suspension and Revocation National Center of Expertise  
LCDR Benjamin Robinson, USCG  
Coast Guard Marine Safety Unit Portland

Respondent *pro se*

Administrative Law Judge: George J. Jordan

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated July 26, 2016, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked the Merchant Mariner Credential of Mr. Richard Albert Chesbrough, the Respondent, upon finding proved two specifications of misconduct and one specification of conviction of an offense that would preclude issuance of a Coast Guard MMC.

The misconduct allegations found proved were those set forth in Allegation Number Two

(making a false statement in a casualty investigation) and Allegation Number Three (attempting to induce a witness to testify falsely in connection with a marine casualty) of the Complaint. Allegation Number Six of the Complaint (conviction of an offense that would prevent the issuance or renewal of a MMC) was also found proved.

### FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard.

The M/V WILLAMETTE QUEEN is a fiberglass-hulled sternwheeler constructed in 1990. [D&O at 3; Tr. Vol. I p. 22] WILLAMETTE QUEEN's length is 87 feet overall; its hull and engine comprise 65 feet of that distance while the sternwheel and its protective girder make up the remainder. [D&O at 3; Tr. Vol. I at 22, 30]. The vessel has a draft of three feet. [D&O at 3; Tr. Vol. I at 25]

WILLAMETTE QUEEN was owned at all relevant times by Respondent's wife, Barbara Chesbrough, under a corporate structure. [D&O at 3; Tr. Vol. II at 327, 336] Mrs. Chesbrough also owned Sternwheeler Excursions LLC, which operated the business side of the enterprise, including hiring and paying employees. [D&O at 3; Tr. Vol. II at 336] Sternwheeler Excursions LLC employed Respondent as Master of WILLAMETTE QUEEN. [*Id.*]

WILLAMETTE QUEEN was certificated to carry 101 passengers. [D&O at 3; Tr. Vol. I at 22] The vessel was used for lunch and dinner cruises and private events on the Willamette River and Willamette Slough. [D&O at 3; Tr. Vol. I at 22-23] The cruising route of the vessel was limited by the McLane's Island gravel bar to the north and the Traglio gravel bar to the south. [D&O at 3; Tr. Vol. I at 23-24] No charts or other navigational aids existed for the Willamette River between Newberg and Eugene. [D&O at 3; Tr. Vol. I at 25-26] Respondent used a depth sounder and, at nighttime, a spotlight to assist him in navigating the vessel. [D&O at 3; Tr. Vol. I at 26]

On November 16, 2012, Spirit Expeditions, a company owned by Mr. Dawane Harris, chartered WILLAMETTE QUEEN for a ghost tour. [D&O at 3; Tr. Vol. I at 27-28, 40, 65] Gregg Thompson was a passenger on board WILLAMETTE QUEEN during the ghost tour. [D&O at 4; Tr. Vol. I at 89] The first hour of the tour took place while the vessel was tied up to the pier. [D&O at 4; Tr. Vol. I at 26, 65] During this time, passengers boarded the vessel, had refreshments and listened to Mr. Harris's presentation about ghost hunting. [D&O at 4; Tr. Vol. I at 26-27]

For the second segment of the tour, Respondent took the vessel on a short trip up and down the Willamette Slough. [D&O at 4; Tr. Vol. I at 27, 42] During this time, the vessel stopped in an area where a Civil War skirmish had supposedly occurred and passengers were allowed to use ghost-hunting equipment. [D&O at 4; Tr. Vol. I at 27] At some point during the voyage, Respondent turned off the vessel's exterior lights and used only his spotlight so the passengers could use night-vision goggles and other equipment. [D&O at 4; Tr. Vol. I at 27, 67] There are many wooden pilings along the banks of the Willamette Slough, particularly in the area of the Civil War battlefield. [D&O at 4; Tr. Vol. I at 27-28] The pilings were originally used to moor riverboats and log rafts in the 1800s and early 1900s. [D&O at 4; Tr. Vol. I at 27-28]

A group of pilings may be referred to as a dolphin. [D&O at 4; Tr. Vol. I at 104] At the location near the Civil War battlefield, there is a distance of approximately eight to twelve feet between the pilings and shore. [D&O at 4; Tr. Vol. I at 33-34, 196] The grade of the bank in this area is very steep. [D&O at 4; Tr. Vol. I at 33] On the night in question, Respondent navigated the vessel as near to the pilings as he could so as to stay as close as possible to Minto Island. [D&O at 4; Tr. Vol. I at 27-28]

On the night in question, when Respondent attempted to turn the vessel around for the return trip, the vessel's stern struck something. [D&O at 4; Tr. Vol. I at 28] Mr. Harris and Mr. Thompson were standing near the vessel's stern at the time of this incident. [D&O at 4; Tr. Vol. I at 43-44, 89-90] They both felt a resultant sharp but slow stopping motion and observed churning mud coming from the vessel's paddlewheels. [D&O at 4; Tr. Vol. I at 44-45, 92-93, 102] Mr. Harris believed that the vessel had hit ground. [D&O at 4; Tr. Vol. I at 45] The nearest piling that Mr. Harris could see was 25 to 30 yards south of the vessel. [D&O at 4; Tr. Vol. I at 45-46]

Mr. Harris subsequently went to the pilot house and asked Respondent if the vessel had grounded. [D&O at 4; Tr. Vol. I at 46] Although Respondent acknowledged that something had happened, he did not necessarily agree that the vessel had grounded. [*Id.*] When Mr. Harris asked if they should report the incident, Respondent replied that he would take care of it. [*Id.*] Respondent never made a report of the incident and when the vessel was drydocked in May 2015, no damage was observed on the bottom of the boat. [D&O at 4; Tr. Vol. I at 36, 119] However, damage was found on a cowling, which was removed and rebuilt. [D&O at 5; Tr. Vol. I at 35-36, Vol. II at 357]

On January 29, 2013, CWO Travis Nolen, a Coast Guard Marine Inspector, conducted an inspection of WILLAMETTE QUEEN. [D&O at 5; CG Ex. 26 at 29-33] While CWO Nolen was attending the vessel on that date, Mr. Harris mentioned a grounding that had occurred in November 2012. (D&O at 5; Tr. Vol. I at 130-31, 186)

On February 4th, 2013, CWO Nolen informed CWO Nay, a Coast Guard Marine Investigator assigned to Marine Safety Unit Portland, of the conversation that he had had with Mr. Harris during the inspection of WILLAMETTE QUEEN. [D&O at 5; Tr. Vol. I at 115-116] Several days later, CWO Nolen informed CWO Nay that he had found another witness to the grounding, Mr. Gregg Thompson. D&O at 5; Tr. Vol. I at 116). After obtaining statements from Mr. Harris and Mr. Thompson, CWO Nay conducted a review of Coast Guard databases to see if any report of a casualty involving WILLAMETTE QUEEN was filed for a two-week period before and after November 15, 2012 (near the date of the alleged grounding). He did not find one. [D&O at 5; Tr. Vol. I at 119]

Thereafter, CWO Nay contacted Mrs. Chesbrough, stating that the Coast Guard had received a confidential report of a grounding. [D&O at 5; Tr. Vol. I. at 118] CWO Nay requested that Mr. and Mrs. Chesbrough come to MSU Portland so that a formal interview could be conducted. [*Id.*] The Chesbroughs did so on March 21, 2013. [*Id.*]

Prior to their arrival, Mr. Hank Sullivan, a marine inspector at MSU Portland, notified CWO Nay that Mr. Harris had just called. [D&O at 5; Tr. Vol. I at 120] Mr. Harris had informed Mr. Sullivan that Respondent had tried to contact him. [D&O at 5; Tr. Vol. I at 120]

CWO Nay called Mr. Harris. During their conversation, Mr. Harris stated that Respondent called him to ask for a passenger manifest; said he was going to tell the Coast Guard the vessel struck a piling; and asked Mr. Harris to back him up. [D&O at 5; Tr. Vol. I at 120] Thereafter, CWO Nay, CWO Nolen, and another investigating officer conducted a forty-five-minute recorded interview with Mr. and Mrs. Chesbrough wherein they described the ghost-hunting cruise and the route that their vessel had taken on the relevant evening. [D&O at 5; Tr. Vol. I at 235-291]

During the interview, Respondent stated that, at the time of the incident, it was “pitch black, can’t see a damn thing.” [D&O at 6; Tr. Vol. I at 248]. He also told the investigators that WILLAMETTE QUEEN was standing still and as he attempted to execute a turn using his bow thruster, he hit a dolphin. [D&O at 6; Tr. Vol. I at 126, 244, 248] Using a photograph, Respondent specifically identified the dolphin he had hit. [D&O at 6; Tr. Vol. I at 248]

Throughout the interview, Respondent maintained that the water was seven to eight feet deep in this area. [D&O at 6; Tr. Vol. I at 274]

After the interview, CWO Nay received a call from Mr. Harris, who said he just received a voicemail from Mr. Chesbrough, asking him to call back and to corroborate his story about the piling. [D&O at 6; Tr. Vol. I at 121-22] Thereafter, CWO Nay informed LCDR Anthony Hillenbrand, the senior investigating officer at MSU Portland, that he believed Mr. and Mr. Chesbrough had lied throughout the interview and provided false information. [D&O at 6; Tr. Vol. I at 122]

Because such events could amount to a criminal violation, LCDR Hillenbrand and his superior decided to turn the investigation over to the criminal investigators at the Coast Guard

Investigative Service, and the marine investigators suspended their investigation. [D&O at 6; Tr. Vol. I at 122, 127]

Concerning CWO Nay's call from Mr. Harris after the interview, Mr. Harris had received a voicemail from Respondent asking him to call back as soon as he could. [D&O at 6; Tr. Vol. I at 55; CG Ex. 14) Respondent's message said he was just leaving his Coast Guard interview and that he wanted to let Mr. Harris know what he had said "just so that we don't trip each other up here." [D&O at 6; Tr. Vol. I at 55; CG Ex. 14) Respondent also left a second voicemail message for Mr. Harris. [D&O at 6; Tr. Vol. I at 56-57; CG Ex. 13) Respondent asked Mr. Harris to call back prior to getting in touch with the Coast Guard Investigator so he could "tell you what—what came—what we did yesterday so that our stories somewhat match." [D&O at 6; Tr. Vol. I at 56-57; CG Ex. 13]

Mr. Harris consented to allow CGIS special agents to listen to and record a telephone call between him and Respondent. [D&O at 6; Tr. Vol. I at 57, 147] On Friday, March 22, 2013, CGIS Special Agents Austin and Lukowiak initiated that call. [D&O at 6; Tr. Vol. I at 154; CG Ex. 12] Respondent answered and identified himself. [D&O at 6; Tr. Vol. I at 154-76; CG Ex. 12) During the call, Respondent and Mr. Harris discussed their conflicting versions of events. [*Id.*] Respondent told Mr. Harris that "because it was so dark, I couldn't see anything from the pilot house, for sure." [D&O at 6; Tr. Vol. I at 171; CG Ex. 12] Respondent later said, "Let's keep our stories consistent on that. And, you know, I sure the hell don't need another grounding incident against my record, you know." [*Id.*] Mr. Harris asked Respondent what exactly Respondent wanted him to say when he spoke to the Coast Guard. [D&O at 6; Tr. Vol. I at 172; CG Ex. 12] Respondent replied, "Well, basically that—I mean you can either say, 'I didn't see anything,' which is what I think you just said, you know. You know, you felt something, and you don't know what it was, but you definitely felt something." [D&O at 7; Tr. Vol. I at 172; CG Ex. 12]

Thereafter, CGIS agents interviewed Respondent. [D&O at 7; Tr. Vol. I at 152] Respondent initially stated that the vessel had struck a dolphin. [D&O at 7; Tr. Vol. I at 152] He later changed his story to say he was actually unsure if it was a piling and it could have been



something else. [*Id.*] Also, during the interview, Respondent specifically denied that he ever called Mr. Harris or suggested that they get their stories straight. [D&O at 7; Tr. Vol. I at 153, 156]

In February 2013, U.S. Environmental Protection Agency (EPA) Special Agents received information that Respondent was discharging wastewater into the Willamette River. [D&O at 7; Tr. Vol. I at 206; CG Ex. 27] As a result, EPA agents conducted an investigation. [D&O at 7; CG Ex. 27] The agents observed discharges from a pipe at the stern of WILLAMETTE QUEEN into the Willamette River. [D&O at 7; Tr. Vol. I at 207; CG Ex. 27] The EPA agents recommended bringing charges against Respondent, and the Oregon Department of Justice did so. [D&O at 7; Tr. Vol. I at 124; CG Ex. 27]

On May 7, 2015, Respondent pled guilty to two counts of violating O.R.S. § 468.943, Unlawful Water Pollution in the Second Degree, Misdemeanor Class A, in the Marion County Circuit Court, Marion County, Oregon. [D&O at 7; CG Ex. 8] Respondent was placed on bench probation for 18 months; was required to perform 80 hours of community service; and paid a criminal fine of \$2,000.00 for each count. [D&O at 7; CG Ex. 8]

James Crouse, Chief of the Safety and Suitability Evaluation Branch at the Coast Guard's National Maritime Center, advised the Coast Guard Investigating Office responsible for initiation of the instant proceeding that a conviction for two counts of improper handling of marine pollutants or hazardous materials would prevent the issuance of an MMC. [D&O at 7; Tr. Vol. II at 302-303] At the hearing, however, Mr. Crouse clarified that the conviction would only prevent the issuance of an officer endorsement and not the underlying MMC. [D&O at 7; Tr. Vol. II at 316]

### **PROCEDURAL HISTORY**

On May 12, 2015, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential. Respondent filed a timely Answer. The ALJ held the hearing on November 3-4, 2015, at Portland, Oregon. At the beginning of the hearing, the ALJ permitted the Coast Guard to withdraw Allegations Four and Five, both of which alleged a violation of law or

regulation. The parties thereafter offered evidence and argument pertaining to the remaining four allegations.

The ALJ issued his D&O in the matter on July 26, 2016. Respondent timely filed a Notice of Appeal and an Appellate Brief. The Coast Guard filed a timely reply. This appeal is properly before me.

### **BASES OF APPEAL**

Coast Guard regulations require that an individual appealing an ALJ's decision submit both a Notice of Appeal and an Appellate Brief. 33 C.F.R. §§ 20.1001, 20.1003. In addition, the regulations specify issues that may properly be appealed: whether findings of fact are supported by substantial evidence; whether conclusions of law accord with applicable law, precedent, and public policy; whether the ALJ abused his discretion; or whether the ALJ's denial of a motion for disqualification was proper. 33 C.F.R. § 20.1001(b).

In this case, although Respondent filed a Notice of Appeal and an Appellate Brief, the latter arguably does not conform to the requirements set forth in the regulations; it does not explicitly set out any basis of appeal in accordance with 33 C.F.R. § 20.1003(a)(1). In its Reply Brief, the Coast Guard urges me to discount Respondent's Appeal due to this failing. I decline to do so. Coast Guard case law precedent does not support such a crabbed approach to the filings of *pro se* respondents. *Appeal Decision 2697 (GREEN)* (2011) explains:

The federal courts grant wide latitude in construing the pleadings and papers of *pro se* litigants. *SEC v. Elliott*, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing *Maldonado v. Garza*, 579 F.2d 338, 340 (5th Cir. 1978)). See also *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (Allegations set forth in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers). More generally, "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

*Id.* at 5.

Given that Respondent appears *pro se*, I will consider his brief notwithstanding its imperfection. It appears that Respondent raises the following issues:



- I. *Whether the ALJ's findings with respect to Allegation Number Two are supported by substantial evidence;*
- II. *Whether the ALJ's findings with respect to Allegation Number Three are supported by substantial evidence;*
- III. *Whether the ALJ's findings with respect to Allegation Number Six, Conviction of an offense that would prevent the issuance or renewal of a MMC, are proper; and*
- IV. *Whether the sanction is appropriate.*

### OPINION

#### I.

*Whether the ALJ's findings with respect to Allegation Number Two are supported by substantial evidence*

Allegation Number Two alleges, in pertinent part, that Respondent committed misconduct by violating 18 U.S.C. § 1001(a)(2) in that:

On March 21, 2013, Respondent willfully and knowingly made false, fictitious, and fraudulent statements to U.S. Coast Guard Investigating Officers, *stating the WILLAMETTE QUEEN, struck a dolphin piling and did not run aground on November 16, 2012.*

[emphasis added] On appeal, Respondent asserts that he did not make a false statement to Coast Guard investigators as he maintained that a grounding did not occur, pointing out, "The record DOES NOT establish that a grounding occurred and thus this grounding was found NOT PROVEN." [Respondent's Appeal Brief at 1]

Indeed, the ALJ found "no credible evidence" in the record to support a conclusion that a grounding had occurred. [D&O at 21] Accordingly, he found Allegation Number One of the Complaint Not Proved and dismissed the charge. [*Id.*] With respect to Allegation Number Two, at issue here, the ALJ found, in relevant part, as follows:

. . . [Respondent] continually identified a specific group of pilings as the object the vessel struck . . . . However, the evidence firmly establishes that he could not see the pilings in question, both because it was dark and because his vantage point

would not have given him a clear view. Therefore, Respondent had reason to know or should have known that the statement he gave was false. Even if he had a good-faith belief he hit that specific piling, he could not have been certain about it and should have disclosed that to the Coast Guard. Instead, he positively identified the piling and gave unqualified statements about what happened that night.

[D&O at 25-26]

It is well settled in these proceedings that the decision of the ALJ will only be reversed if it is arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g., Appeal Decision 2699 (MAXWELL) (2012) at 4.*

In the D&O, the ALJ determined that the record did not establish that a grounding had occurred, but that the vessel had allided with a fixed object, perhaps a piling. [D&O at 18-21] Hence he dismissed Allegation Number One. But in finding Allegation Number Two proved, the ALJ stated that even if Respondent “had a good-faith belief he hit that specific piling, he could not have been certain about it and should have disclosed that to the Coast Guard.” Assuming that assertion states an offense, it is not an offense that Respondent was charged with. Nor was he charged with incorrectly identifying the piling he hit. Stated simply, Respondent is charged with committing misconduct by falsely stating that the vessel struck a piling and did not run aground. Having found that a grounding was not established, the ALJ was clearly erroneous in finding Allegation Number Two proved.

## II.

### *Whether the ALJ’s findings with respect to Allegation Number Three are supported by substantial evidence*

Allegation Number Three alleges that Respondent committed misconduct by attempting to induce his employee to falsely report to the Coast Guard what had happened. On appeal, Respondent insists that he was not trying to influence his employee to say anything that was untrue, but rather, was trying to educate him, as was his duty as an experienced Captain. Respondent avers, “There was nothing wrong or illegal with my having a conversation with my employee,” and contends that the record supports this assertion, citing the testimony of Coast Guard Special Agent Dan Austin. [Respondent’s Appeal Brief at 2]

I do not agree with Respondent that Agent Austin's testimony shows that he did not commit misconduct in his conversation with his employee. That argument misconstrues the testimony of Agent Austin. During cross-examination at the hearing, the following exchange occurred between Respondent and Agent Austin:

Q. [By Respondent] All right. Is there anything wrong with the – an employer calling his employee, thinking that he was obviously going to be a – if ever it came to it, to be a witness on his side from talking to him prior to – prior to him talking to you, to the Coast Guard? Is there anything criminal in doing that?

A. [By Agent Austin] Is there anything criminal in your calling your employee?

Q. Right.

A. Prior to his interview with the Coast Guard?

Q. Yes, not knowing that he was the one and nobody ever telling me that he was the one that actually was making the accusation about the grounding?

A. Well, I'm going to answer your question. Your specific question to me is is there anything wrong with you contacting an employee prior to his Coast Guard interview. No, there is nothing wrong with that.

[Tr. Vol. I at 159-160] Agent Austin did not testify that Respondent had not committed misconduct in this case. Rather, Agent Austin was accepting the general premise that it would not be misconduct, in itself, for an employer to contact an employee prior to an interview with the Coast Guard.

In these proceedings, the findings of the ALJ must be supported by reliable, probative, and substantial evidence. *See, e.g., Appeal Decision 2655 (KILGROE) (2006) at 7.*

With respect to Allegation Number Three, the ALJ found as follows:

The evidence clearly shows that Respondent wanted to speak to Mr. Harris in advance of Mr. Harris's interview with Coast Guard investigators. While Respondent never outright stated that he wanted Mr. Harris to lie to the investigators, he did specifically suggest that Mr. Harris say he hadn't seen

anything and did not know what caused the jolt he had felt. He also specifically told Mr. Harris not to tell the Coast Guard that he suspected a grounding.

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

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

[D&O at 29-30]

Respondent's second basis of appeal is rejected. The ALJ's determinations with respect to Allegation Number Three are supported by substantial evidence.

### III.

*Whether the ALJ's findings with respect to Allegation Number Six, Conviction of an offense that would prevent the issuance or renewal of a MMC, are proper*

The record shows that on May 7, 2015, Respondent was convicted of two counts of violating Oregon Revised Statute 468.943, Unlawful Water Pollution in the Second Degree, a Misdemeanor Class A. [D&O at 30] The ALJ determined that conviction of these offenses constituted a "criminal conviction" under 46 C.F.R. § 10.211. [D&O at 32-34] He further found that "offenses listed in table 1 of 46 C.F.R. § 10.211 are convictions that would preclude the issuance or renewal of MMCs." [D&O at 39] He further found that the particular offense of which Respondent was convicted (in two counts) constitutes a serious offense, thus falling within the intent of 46 U.S.C. § 7703(2), which authorizes Allegation Number Six. Furthermore, an authoritative witness from the National Maritime Center testified that conviction of these offenses

would preclude issuance of the officer endorsement on Respondent's MMC. [D&O at 7] I agree that Respondent's conviction of a water pollution offense amounts to a conviction of a criminal offense that would preclude issuance or renewal of a MMC.

On appeal, Respondent acknowledges that he pleaded guilty to the water pollution offenses but argues, despite having so pleaded, that such charges should have been brought against the vessel owner, rather than himself. Respondent further claims that any errant conduct was immediately corrected. Finally, Respondent calls attention to the fact that state prosecutors "offered to make the charge go away" if he surrendered his MMC (citing Tr. Vol II at 410-11), and contends that "it was obvious the Coast Guard was behind this all along." [Respondent's Appeal Brief at 2]

First, despite Respondent's protestations to the contrary, Respondent is a proper party to be charged with a violation of Oregon Revised Statute § 468.943. Under that statute, "any person commits the offense of unlawful water pollution in the second degree if the person with criminal negligence violates ORS chapter 468B or any rule, standard, license, permit or order adopted or issued under ORS chapter 468B." The term "Person" "includes individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the federal government and any agencies thereof." Oregon Revised Statute § 468.005(5). Thus, the law does not limit liability to vessel owners and there is no defect in the finding of Proved of Allegation Number Six on this account.

Respondent's averment that the pollution offense was quickly corrected is of no moment. Respondent pleaded guilty to two Oregon water pollution offenses and, upon his pleas, he was convicted of those offenses. An attack on the Oregon charges in this forum will not be entertained.

Finally, Respondent's complaint that the Coast Guard was "behind" the Oregon charges is unavailing. It is neither uncommon nor improper for State and federal agencies to work together toward common enforcement goals. Any offer made to Respondent by the State is irrelevant.



There is nothing improper in the ALJ's findings with respect to Allegation Number Six.

V.

*Whether the sanction is appropriate.*

With regard to sanction, Respondent "recognizes that he does have some minor past violations that in their totality might warrant a suspension BUT they do not warrant a revocation." [Respondent's Appeal Brief at 3] To support this argument, Respondent cites 46 C.F.R. § 5.61 and argues that because none of the offenses found proved are among those identified as offenses for which revocation may be sought, revocation is improper here. Respondent also argues that he "had a long career (34 years) with no injuries to any passenger or crew member and no major casualties of any sort" to show that revocation is inappropriate. [*Id.*]

Because one of the ALJ's findings is being set aside, I determine the sanction *de novo*. I consider the totality of the circumstances of the case, including any remedial actions taken by Respondent, his prior record, and any aggravating and mitigating factors, to determine the sanction. 46 C.F.R. § 5.569(b). Where multiple offenses have been found proved, revocation may be appropriate even if none of the individual offenses would have warranted it. *Appeal Decision 2711 (TROSCLAIR)* (2015) at 15. Further, as the ALJ noted, 46 C.F.R. § 5.61(b) allows for revocation of a credential or endorsement "when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline."

Notwithstanding *de novo* consideration, it is appropriate to consider the aggravating factors discussed by the ALJ in the D&O, even as they may be partially offset by the dismissal of Allegation Number Two. The ALJ noted that Respondent was on probation when the conduct at issue occurred and that Respondent's prior record included the imposition of two suspensions and a civil penalty. [D&O at 44] The ALJ also expressed that he was "very concerned with Respondent's attitude towards regulation. Here, he only had to tell the truth during the Coast Guard investigation . . . Instead, he concocted a story and attempted to induce a witness to support

that story.” [D&O at 44-45] I am dismissing the Allegation that he “concocted a story,” but the facts underlying that Allegation, and more so the Allegation that he attempted to induce a witness to make a false report, indeed demonstrate a problematic attitude toward the Coast Guard’s regulatory authority and regulatory function. See *Appeal Decision 2654 (HOWELL)* (2005), where the respondent’s cavalier attitude toward safety as found by the ALJ was held to support an order of revocation [*id.* at 16]; and *Appeal Decision 2593 (MOWBRAY)* (1997), where the ALJ’s conclusion that the respondent “has not and will not abide by the fundamental rules of good seamanship and the requirements of Federal law and regulation” [*id.* at 8] was likewise held to support an order of revocation.

The totality of the circumstances of this case supports a conclusion that revocation is the appropriate sanction.

### CONCLUSION

The ALJ’s finding that Allegation Number Two was proved is set aside and the Allegation is dismissed. The remainder of the ALJ’s findings and decision were lawful, based on correct interpretation of the law, and supported by substantial evidence. Revocation is the appropriate sanction in this case.

### ORDER

The ALJ’s Order of Revocation dated July 26, 2016, is AFFIRMED.

  
VICE COMMANDANT

Signed at Washington, D.C., this 27<sup>th</sup> day of DECEMBER, 2017.