

The misconduct specification alleges that on April 12, 2011, Respondent, while acting under the authority of his Coast Guard-issued mariner license, committed misconduct by navigating the vessel WILLAMETTE QUEEN from the Willamette Slough into the Willamette

River in violation of the vessel's Certificate of Inspection, which limited operation of the vessel to the Willamette Slough when the river gauge at Salem reads 11 feet or more, as it did on the relevant date. The negligence specification alleges the same facts and further alleges that Respondent acted negligently by failing to check the river gauge at Salem to ascertain the river's stage, by operating the vessel outside the conditions of its Certificate of Inspection, and by grounding the vessel at Mile 85 on the Willamette River.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner License issued to him by the United States Coast Guard. [D&O at 8; Transcript (hereinafter "Tr.") at 34]

The WILLAMETTE QUEEN is a small passenger vessel of 62 gross tons and 64.8 feet in length that operates on the Willamette River in Oregon. [D&O at 8; Coast Guard Exhibits (hereinafter "CG Ex.") 2 and 15] As a small passenger vessel, the WILLAMETTE QUEEN is subject to Coast Guard inspection and must operate within the routes permitted on its Coast Guard-issued Certificate of Inspection (hereinafter "COI"). *See* 46 U.S.C. § 3301; 46 U.S.C. § 3313.

After a grounding of the vessel on November 8, 2009, the Coast Guard amended the WILLAMETTE QUEEN's COI to add the following operating condition: "When the river gauge at Salem reads 11 ft or more, the vessels operation is limited to the Willamette Slough located behind Minto Browns Island." [D&O at 9; Tr. at 38, 40, 45-46, 52, 114, 153; CG Ex. 2] The rationale for the condition was that the vessel is underpowered for the current when the river is high, thus making operation at higher levels hazardous. [D&O at 9; Tr. at 39, 143, 146; CG Ex. 1]

The Willamette river gauge at Salem is located at river mile 84.16. Its purpose is to determine the stage of the river, allowing the flow of the river to be calculated. [D&O at 10; Tr. at 62] The gauge at Salem is accurate to 0.02 feet and is calibrated every 6-8 weeks. [D&O at 10; Tr. at 64-65] The gauge was accurate on April 12, 2011.¹ [Tr. at 78]

¹ The D&O mistakenly says that the gauge was accurate on April 12, 2012. This mistake in the date occurs at a few other places in the D&O; this is clearly erroneous but inconsequential.

Although the vessel's owner, CBVB Associates, Inc., formally challenged the amendment to the COI (limiting operation based on the gauge at Salem), the amendment remained in effect. [D&O at 10; Tr. at 134-35; CG Ex. 2]

Respondent was hired as the master of the WILLAMETTE QUEEN in 1998 and has been serving in that capacity, under the authority of his Coast Guard-issued Merchant Mariner License, ever since. [D&O at 8; Tr. at 112-13]

On the evening of April 12, 2011, the WILLAMETTE QUEEN was scheduled to transport passengers on a dinner cruise. [D&O at 10; Tr. at 138-39] Respondent was serving as master of the WILLAMETTE QUEEN during the cruise. [D&O at 8; Tr. at 102, 107, 124, 152-53]

Prior to his operation of the vessel on April 12, 2011, Respondent checked the current issue of the Statesman Journal, a newspaper, which reported that the river stage was at 12.1 feet. [D&O at 10; Tr. at 116, 153-54; CG Ex. 9; Respondent's Ex. J] This was from the previous day's readings. The Statesman Journal reported that the river had dropped .067 feet in the prior 24-hour period. [D&O at 10; CG Ex. 9; Respondent's Ex. J]

Hourly updates from the Willamette River gauge at Salem are available on the internet, although Respondent did not view the internet site prior to his operation of the vessel in the Willamette River on April 12, 2011. [D&O at 10, 12; Tr. at 67, 116, 120, 154] The internet site showed that the river height was 12.02 feet at 1800 hours on April 12, 2011 and 11.94 feet at 1900 hours.² [CG Ex. 8]

When the vessel's route is restricted to the Willamette Slough due to a high river level, Respondent typically makes two passes of the slough during an evening cruise. [D&O at 11; Tr. at 138]

The cruise commenced between 1815 and 1830 hours, when the vessel departed its dock. [D&O at 11; Tr. at 99, 136; CG Ex. 12] There were at least eight paying passengers aboard the

² See n. 1.

WILLAMETTE QUEEN for the cruise. [D&O at 11; Tr. at 99] During the cruise, the vessel proceeded up the Willamette Slough for approximately one mile, then turned back to make another pass. [D&O at 11; Tr. at 137]

At the entrance to the Willamette Slough, there is a gravel bar at Pringle Creek. [D&O at 11; Tr. at 58] As the WILLAMETTE QUEEN made its second pass at Pringle Creek, gravel could be felt hitting the bottom of the vessel. [D&O at 11; Tr. at 106, 117, 111, 125, 137] At this time, Respondent was unable to obtain a reading from the vessel's depth meter. [D&O at 11; Tr. at 124-25, 137]

Respondent and the vessel's owner believed that the pilings at the Wallace Marine Boat Ramp only showed when the river level fell to eleven or eleven and a half feet. [Tr. at 118] Because Respondent could see the pilings at the Wallace Marine Boat Ramp during the cruise, he believed that the river level was below eleven feet. [D&O at 11; Tr. at 67, 163]

Irrespective of the initial readings indicating that such operation would be prohibited by the vessel's COI and without checking the Salem gauge, based on visual cues and the sound and feel of gravel hitting the bottom of the vessel, after consultation with the vessel's owner, Respondent, at approximately 1915 hours (believing that the river must have dropped below 11 feet), maneuvered the vessel from the Willamette Slough into the Willamette River. [D&O at 11-12, Tr. at 118, 121-22, 139-40, 147]

The portion of the Willamette River traversed by Respondent is not charted, has no aids to navigation and, from mile 84.5 to mile 86, is shallow. [D&O at 12; Tr. at 31-32, 92, 94, 144, 149, 157] A large rock/gravel bar, known as the Traglio Bar, extends off the river's east bank at approximately mile 85. [D&O at 12; R Ex. C-E] The Traglio Bar has grown over time and, in particular, shifted and changed shape during the winter of 2010-2011. [D&O at 12; Tr. at 23-24, 26-27, 30, 82, 86, 91-92] Respondent was aware of the Traglio Bar and its tendency to shoal and change shape over time. [D&O at 11; Tr. at 141, 148-49, 154]

Prior to the evening of April 12, 2011, Respondent had not piloted the WILLAMETTE

QUEEN outside the Willamette Slough for several months; he had not surveyed the river to determine whether there were any changes to the Traglio Bar or if any hazards had developed since the previous year.³ [Tr. at 133]

Respondent customarily relied on a landscape feature ashore to determine where his turnaround should be on the Willamette River. [D&O at 12; Tr. at 140-41, 145] Respondent used this marker, at approximately 2000 hours, in an attempt to turn the vessel around for the return trip. [D&O at 12; Tr. at 110, 141] During the turnaround, the vessel grounded on the Traglio Bar at approximately mile 85 on the Willamette River. [D&O at 13; Tr. at 101, 110, 118; CG Ex. 12] Darkness had fallen. [D&O at 12; Tr. at 110]

PROCEDURAL HISTORY

On May 17, 2011, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credentials. On the following day, May 18, 2011, the Coast Guard amended the Complaint. On June 6, 2011, Respondent filed an Answer to the Complaint wherein he admitted all jurisdictional allegations but admitted in part and denied in part factual allegations supporting the Complaint's misconduct and negligence allegations.

The hearing was held on September 20, 2011, at Portland, Oregon. At the hearing, the Coast Guard presented the testimony of four witnesses and offered nineteen exhibits, seventeen of which were admitted into evidence. Respondent testified on his own behalf and presented the testimony of four other witnesses; he offered 29 exhibits, of which ten were admitted into evidence. The hearing record was held open to allow for the additional admission of one exhibit, a Coast Guard Report of the grounding of the vessel. The record was closed on December 28, 2011.

The ALJ issued his D&O on July 25, 2012. Respondent filed his Notice of Appeal and Appeal Brief on August 6, 2012, thus perfecting his appeal. The Coast Guard filed a Reply on September 11, 2012. This appeal is properly before me.

³ See n. 1.

BASES OF APPEAL

Respondent appeals from the ALJ's D&O, which found one charge of *misconduct* and one charge of *negligence* proved. In his appellate filing, Respondent raises two issues:

- I. *Whether the ALJ erred by failing to consider the propriety of the restrictions placed on the WILLAMETTE QUEEN's COI in finding the allegations proved; and*
- II. *Whether the ALJ abused his discretion in assessing a two-month outright suspension.*

OPINION**I.**

Whether the ALJ erred by failing to consider the propriety of the restrictions placed on the WILLAMETTE QUEEN's COI in finding the allegations proved.

On appeal, Respondent asserts that the ALJ erred by failing to consider the propriety of the operational restriction placed on the WILLAMETTE QUEEN via the 2009 amendment to its COI (restriction to the Willamette Slough when the river gauge at Salem reads 11 feet or more) in his D&O. Respondent contends that the Coast Guard arbitrarily imposed the 2009 COI restriction without testing the vessel's capabilities and that the restriction places the vessel in danger by forcing it to operate in an unsafe manner.

The ALJ specifically addressed the COI amendment during discussion of the misconduct charge:

Respondent has also raised the argument that the conditions of the amended COI are arbitrary and unfairly restrict his ability to operate. This issue is not properly before me, and I have not given it weight in reaching my decision. Pursuant to 46 C.F.R. § 175.560, "[a]ny person directly affected by a decision or action taken under this subchapter, by or on behalf of the Coast Guard, may appeal therefrom in accordance with § 1.03..." Further, a request for an amended Certificate of Inspection may be made pursuant to 46 C.F.R. § 176.120. The vessel's owner did not timely challenge the amendments to the COI or request an amendment, thus the vessel is bound by the existing conditions until such time as the COI is amended again or a new COI is issued.

(citations omitted) [D&O at 21] Respondent now contends that the ALJ erred by failing to consider the propriety of the 2009 amendment to the WILLAMETTE QUEEN's COI. I do not

agree.

The WILLAMETTE QUEEN is a small passenger vessel that must, pursuant to 46 U.S.C. § 3313(a), be operated in compliance with the terms of its COI. In the case at hand, the ALJ found that Respondent committed misconduct by operating the vessel beyond the terms of its COI and that Respondent was negligent in grounding the vessel. Respondent does not focus on these findings; rather, he rejects the imposition of the operational condition on the vessel's COI—that it is restricted to the Willamette Slough when the river gauge at Salem reads 11 feet or more. The ALJ was correct to conclude that the propriety of that condition is not properly addressed via a suspension and revocation proceeding.

Small passenger vessels, such as the WILLAMETTE QUEEN, are subject to Coast Guard inspection and certification pursuant to 46 U.S.C. § 3301. The Coast Guard has implemented regulations to provide for inspection and certification of such vessels in 46 C.F.R. Subchapter T. The regulations provide: "Any person directly affected by a decision or action taken under this subchapter by or on behalf of the Coast Guard, may appeal therefrom in accordance with §1.03 in subchapter A of this chapter." 46 C.F.R. § 175.560.

The appeal process set out in 46 C.F.R. § 1.03 is distinct from suspension and revocation proceedings and involves review by the Coast Guard personnel best suited to make determinations as to specific vessel operating requirements. Through the § 1.03 appeal process, after first requesting reconsideration by the cognizant Officer in Charge, Marine Inspection (hereinafter "OCMI"), adversely affected parties must, within 30 days of the OCMI's determination on reconsideration, appeal in writing to the District Commander of the Coast Guard district in which the OCMI is located. 46 C.F.R. § 1.03-20. Subsequent appeal may be made to the Commandant, who takes final agency action on the matter. 46 C.F.R. § 1.03-25. The regulations, however, specify that the action taken remains in effect unless it is stayed pending determination on the appeal. 46 C.F.R. § 1.03-15(f).

Here, the vessel's owner did not appeal the action, that is, the amendment to the COI. Therefore, whether Respondent agreed with the operational limitation set out in the vessel's COI

or not, he was bound to comply with that requirement unless and until the requirement was changed. A suspension and revocation proceeding is not the appropriate forum in which to question the conditions of a vessel's COI. The ALJ was correct to conclude that this issue was not properly before him.

II.

Whether the ALJ abused his discretion in assessing a two-month outright suspension.

Respondent asserts that the ALJ abused his discretion in assessing a sanction beyond probation in this case. He argues that any sanction beyond probation is unfair and causes severe financial hardship to the vessel owner and its operations. Respondent's argument is not persuasive.

The ALJ has wide discretion to choose the appropriate sanction based on the individual facts of each case. Appeal Decision 2695 (AILSWORTH) (2011), slip op. at 16 (citing 2654 (HOWELL) (2005)). "The ALJ may consider the sanction recommended by [46 C.F.R. Table 5.569], but Respondent's remedial actions, his prior record, and other aggravating and mitigating factors may justify a tougher or more lenient order." *Id.*

In this case, after noting that the Coast Guard had not introduced any evidence, beyond that supporting the misconduct and negligence charges, to support the aggravated sanction it sought (12 months outright suspension), the ALJ assessed a lesser sanction than the maximum sanction suggested by 46 C.F.R. Table 5.569. [D&O at 34-35] In mitigation, the ALJ considered the fact that Respondent had held a Merchant Mariner License for over thirty years without being subject to any other negative Coast Guard enforcement action, that no one was injured during the grounding of the vessel, that the vessel did not suffer any damage during the incident, and that Respondent and the vessel owner amended their operating activities following the incident to use real-time readings of the Salem gauge when planning vessel operations. [D&O at 35] In assessing the sanction, the ALJ also considered the impact that a long-term suspension would have on the livelihood of Respondent and others employed by the WILLAMETTE QUEEN. [D&O at 37] The ALJ's thorough and thoughtful discussion of these factors demonstrates that his decision to suspend Respondent's license for two months outright was not an abuse of discretion.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The ALJ did not err in declining to consider the propriety of the operational conditions set out on the WILLAMETTE QUEEN's COI, and he did not abuse his discretion on sanction. There is no reason to disturb the ALJ's Order.

ORDER

The ALJ's Decision and Order dated July 25, 2012 is AFFIRMED.



Peter V. Neffenger
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 23rd day of January, 2015.