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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	ON APPEAL
	:	NO. 2707
MERCHANT MARINER LICENSE	:	
Issued to: RICHARD A. CHESBROUGH	:	

APPEARANCES

For the Government:
LT Kimberly D. Rule, USCG
CWO John Nay, USCG
Coast Guard Marine Safety Unit Portland

For the Respondent:
Mr. Richard Albert Chesbrough
Co-Representative: Mr. Scott Clifford
Vancouver, Washington

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 September 18, 2013, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard suspended the Merchant Mariner Credential of Mr. Richard Albert Chesbrough (hereinafter "Respondent") for two months upon finding proved one specification of *misconduct*.

The misconduct specification alleges that on May 9, 2012, 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 ft or more, as it did on the relevant date.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner License issued to him by the United States Coast Guard.[1] [D&O at 6]

The WILLAMETTE QUEEN is a small passenger vessel of 62 gross tons, 64.8 feet long. [D&O at 6] The WILLAMETTE QUEEN must abide by its Coast Guard-issued Certificate of Inspection (hereinafter "COI") whenever it operates with paying passengers aboard. [D&O at 6; Stipulation of Facts dated October 7, 2012 (hereinafter "Stipulation")] The Coast Guard issued the WILLAMETTE QUEEN a COI on October 29, 2007. [D&O at 6] One of the conditions listed on the WILLAMETTE QUEEN's COI provides: "When the river gauge at Salem reads 11 ft or more the vessel's operation is limited to the Willamette Slough located behind Minto Browns Island." [D&O at 6; Stipulation]

The Salem gauge is located at river mile 84.2, near Salem, Oregon. [D&O at 7; Transcript of December 4, 2012 proceedings (hereinafter "Tr. I") at 81] Gauge readings are recorded in feet; readings are updated hourly and made publicly available on the U.S. Geological Survey (hereinafter "USGS") website in 15-minute increments. [D&O at 7; Tr. I at 82-83, 88-89] During the period from April 5 through June 28, 2012, the gauge was calibrated and found to be giving appropriate readings. [D&O at 7; Tr. I at 91]

On May 9, 2012, Respondent was serving as the Master of the WILLAMETTE QUEEN.

[1] Respondent's Merchant Mariner License expired since the incident giving rise to this case occurred. The Coast Guard now issues consolidated Merchant Mariner Credentials rather than issuing separate Merchant Mariner Licenses, Certificates and Documents. Aligning with this change in issuance, Respondent was issued a Merchant Mariner Credential following the expiry of his Merchant Mariner License. This action is against his current Coast Guard-issued Merchant Mariner Credential. *See* D&O n. 3.

[D&O at 8; Transcript of February 26, 2013 proceedings (hereinafter "Tr. II) at 75; Stipulation] On May 9, 2012, the office manager for the WILLAMETTE QUEEN misinformed Respondent of the river levels, providing him with information showing the projected levels for the river for May 9 on May 7, 2012, rather than those projected on May 9, 2012. [D&O at 8; Tr. II at 40-41; Respondent's Ex. B] Respondent did not know the actual Willamette River level prior to getting underway on May 9, 2012. [D&O at 8; Tr. II at 77]

The vessel got underway at 1900 hours with 66 passengers for hire onboard. [D&O at 8; Tr. I at 40-41] At 1900 hours, when the voyage commenced, the Salem gauge read 11.25 feet; when the voyage ended at 2000 hours, the gauge read 11.24 feet. [D&O at 9; Tr. I at 83; CG Ex. 1, 9] Based on his assessment of the May 7 forecast predicting that the river level would be below 11 feet by 1700 hours, Respondent nonetheless entered the Willamette River during the voyage, a violation of the COI condition restricting vessel operation to the Willamette Slough when river levels were 11 feet or more. [D&O at 8-9; Tr. II at 40-42]

PROCEDURAL HISTORY

On June 27, 2012, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential. Respondent filed an Answer to the Complaint on July 17, 2012, wherein he admitted the jurisdictional allegations but denied some of the factual allegations and set out some affirmative defenses.

The hearing took place on December 4, 2012, and February 26, 2013, at Portland Oregon. The Coast Guard offered the testimony of one witness and entered thirteen exhibits into the record. Respondent testified on his own behalf, presented the testimony of two other witnesses, and entered nine exhibits into the record.

The ALJ issued his D&O on September 18, 2012. Respondent filed his Notice of Appeal on September 19, 2012 and his Appeal Brief on November 17, 2013, thus perfecting his appeal. The Coast Guard filed a Reply on December 24, 2013. This appeal is properly before me.

BASES OF APPEAL

Respondent appeals from the ALJ's D&O, which found one charge of *misconduct* proved. A thorough and careful review of Respondent's appellate filing reveals that he raises two issues:

I. Whether the ALJ was correct to find the misconduct charge proved even though the charge resulted from an arbitrarily placed COI restriction; and

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

OPINION

I.

Whether the ALJ was correct to find the misconduct charge proved even though the charge resulted from an arbitrarily placed COI restriction

On appeal, Respondent does not deny that he committed the act of misconduct charged in this case. He acknowledges, as the facts show, that he operated the WILLAMETTE QUEEN on May 9, 2012, on the Willamette River when the gauge at Salem read in excess of 11 feet, a violation of a restriction placed on the vessel's COI. Since Coast Guard case law precedent provides that a mariner who operates a vessel in violation of the conditions of its COI commits misconduct, the ALJ clearly did not err in finding the misconduct charge proved. *See, e.g.,* Appeal Decisions 2299 (BLACKWELL) (1983) and 715 (ROLL) (1953).

Despite the clear evidence of misconduct contained in the record, Respondent contends that the ALJ should not have found the violation proved because the COI restriction, *itself*, was arbitrarily placed by the Coast Guard, is unsupported by any facts, is unlike any COI restriction placed on any other vessel by the Coast Guard, and is likely to be removed soon.

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

> The question of whether the 11-foot restriction on the COI is arbitrary and/or unfair is not properly before me. Under Coast Guard regulations, "[a]ny person directly affected by a decision or action taken under this subchapter [subchapter T], by or on behalf of the Coast Guard, may appeal therefrom in accordance with [46 C.F.R.] § 175.560. The procedures for requesting an amended COI are at 46 C.F.R. § 176.120, and a 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 18]

A review of the applicable regulations shows that appeals taken under 46 C.F.R. § 175.560 are conducted in accordance with 46 C.F.R. § 1.03. This process 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. As the ALJ properly concluded, suspension and revocation proceedings, such as this one, are not the appropriate forum in which to question the conditions of a vessel's COI. Just as the issue was not properly before the ALJ, it is not properly raised here. Irrespective of whether the restriction on the vessel's COI may, could, or should be removed, the fact remains that the COI restriction was properly in place at the relevant time and Respondent was required to ensure compliance with any and all terms of the vessel's COI. Because the record shows that Respondent failed to do so, the ALJ neither erred nor abused his discretion in finding the misconduct charge proved.

Respondent refers to statements of a Coast Guard inspector who, he claims, originated the COI restriction, to argue that the restriction was not intended to be strictly construed. That Coast Guard inspector was not a witness in this proceeding and any statements he made are not a part of this record. Accordingly, they will not be considered. Even if they were considered, the intentions of a former official do not bind his superiors' and successors' prosecutorial decisions. The Coast Guard is entitled to enforce the clear language of the COI.

Respondent also argues that, according to a witness, "there can be inaccuracies on both streamflow and gage height because one feeds into the other," and therefore the restriction cannot be enforced within 5%. This argument mischaracterizes the witness's testimony. The COI restriction refers to the gauge reading; how the predicted gauge reading relates to other stream variables is irrelevant to the question of whether the COI restriction is being complied with.

II.

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

The bulk of Respondent's appeal is argument in mitigation, meant to support elimination of the two-month suspension assessed by the ALJ. Respondent urges mitigation because: (1) he did not intend to knowingly violate the COI restriction "even by an inch or two" [Appeal Brief at 1]; (2) the ALJ found that Respondent's operation of the vessel in violation of the COI on the relevant day amounted to nothing more than a "trivial infraction" that did not place any passengers, crew or other vessels on the river in any degree of danger [*Id.* at 3]; and (3) "The approval of a temporary credential by Judge Jordan further indicates that he does not feel that Respondent's continued employment as master does not [sic] pose any danger to passenger safety." [*Id.*]

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.*

The record shows that the ALJ carefully considered all aggravating and mitigating evidence in assessing the two-month sanction at issue. Although the ALJ found the misconduct allegation proved, he did not find the aggravating factors articulated by the Coast Guard sufficient to warrant a sanction beyond that articulated in the "Suggested Range of an Appropriate Order" Table, at 46 C.F.R. § 5.569. However, given what the ALJ deemed the "single aggravating circumstance" (Respondent's operation of the WILLAMETTE QUEEN beyond the conditions of its COI based upon reliance on outdated and inaccurate information) and Respondent's prior history, the ALJ found it appropriate to assess a sanction beyond the one-month minimum set out in the Table. [D&O at 26-27] In so doing, the ALJ did, as Respondent asserts, note that the river level was "only slightly above the limit" and that there was no evidence presented to indicate that passengers were actually endangered by Respondent's operation of the vessel. [D&O at 26] The ALJ's thorough and thoughtful discussion of these factors demonstrates that his decision to suspend Respondent's license for two months was not an abuse of discretion.

Respondent also complains that the Coast Guard's action in this case was motivated by

"pure vindictiveness to unfairly restrict our ability to operate and thus cause severe financial losses to our small business and not because of passenger safety concerns." [Appeal brief at 3] This complaint is utterly unsubstantiated by the record of the proceedings and need not be addressed.

Respondent's assertion that a suspension is inappropriate because the ALJ obviously did not find Respondent's continued service as a master inconsistent with safety at sea, as he issued a Temporary Mariner Credential to Respondent, is wholly unpersuasive.

Coast Guard Suspension and Revocation actions are "remedial and not penal in nature. These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. An order of suspension levies accountability on a mariner and deters that mariner and others from similar conduct, without permanently removing that mariner from service at sea. By contrast, an order of revocation permanently removes a mariner from service at sea in addition to its accountability and deterrence effects, presumably because the conduct found proved is at least potentially inconsistent with safety at sea.

Under the regulations, mariners whose credentials have been suspended or revoked may seek issuance of temporary mariner credentials, except for an offense in a category for which revocation is mandatory or presumptively appropriate. *See* 46 C.F.R. § 5.707. Respondent did so in this case, and was granted a temporary credential. "A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea." 46 C.F.R. § 5.707(c). The issuance of a temporary credential is not, as Respondent suggests, inconsistent with suspension of a mariner's Coast Guard-issued Mariner Credential, which contemplates that the mariner will again serve at sea after the suspension period.

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 abuse his discretion on sanction. There is no reason to disturb the ALJ's Order.

ORDER

The ALJ's Decision and Order dated September 18, 2013, is AFFIRMED.

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

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