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. 2719
MERCHANT MARINER CREDENTIAL	:	
Issued to: NEIL ALAN VOELCKERS	:	

APPEARANCES

For the Government:
LCDR Graham Lanz, USCG
LT Dianna M. Robinson, USCG
CWO Israel R. Nieves, USCG
Coast Guard Sector Juneau

Ms. Lineka Quijano, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent:
Mr. Mark C. Manning, Esq.

Administrative Law Judge: Parlen L. McKenna

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 (D&O) dated August 29, 2016, an Administrative Law Judge (ALJ) of the United States Coast Guard suspended the Merchant Mariner Credential (MMC) of Mr. Neil Alan Voelckers, Respondent, for thirty days upon finding proved a single allegation of

misconduct. The allegation found proved alleges that on multiple occasions from May 2013 to September 2015, while holding an MMC endorsed for service as a Master of Steam, Motor or Auxiliary Sail Vessels of not more than 100 gross registered tons, Respondent served as Master of the 198-gross-ton SEA RANGER, including when the SEA RANGER was moored in the Bay of Pillars carrying passengers for hire, in violation of 46 C.F.R. § 15.905(b).

Respondent appeals.

FACTS

At all times relevant to these proceedings, Respondent was the holder of an MMC issued to him by the United States Coast Guard. [D&O at 3]

Between May 2013 and September 2015, Respondent held an MMC endorsed for service as Master of Steam, Motor, or Auxiliary Sail Vessels of Not More than 100 Gross Registered Tons Upon Inland Waters. [D&O at 3]

At the time of these proceedings, Respondent was the sole owner of Alaskan Experiences, LLC (hereinafter "Alaskan Experiences"), a sport fishing lodge business located in Southeast Alaska. [D&O at 3] Alaskan Experiences used three vessels in its business, the SEA RANGER, the MISS ASHLEY, and the MISS ALICIA. [D&O at 4]

The SEA RANGER, a U.S. Coast Guard-documented vessel bearing the Official Number 298185, was the principal physical asset of Alaskan Experiences. [D&O at 4] The vessel was 106 feet in registered length and 198 gross registered tons. It was self-propelled and was powered by two 6-cylinder Enterprise diesel-electric engines. [*Id.*]

The Certificate of Documentation for the SEA RANGER set forth that the vessel serves as an uninspected passenger vessel; it had endorsements for registry and coastwise, but not for recreational. [*Id.*] The vessel had been so certificated since Respondent purchased Alaskan Experiences, including the SEA RANGER; Respondent had never changed the vessel's status on its Certificate of Documentation. [*Id.*]

The SEA RANGER was a retired military vessel that had been reconditioned and modified to serve as a floating lodge. [D&O at 4] The vessel had six double staterooms and a dining salon. [*Id.*] It had 24-hour electricity, hot and cold running water, and maid service, among other conveniences. [*Id.*]

Alaskan Experiences' business season ran from approximately the second or third week in June to approximately the second or third week in August. [D&O at 5] To prepare for each business season, Respondent transited the SEA RANGER from where it wintered in Auke Bay, near Juneau, Alaska, to the Bay of Pillars, a navigable waterway of the United States. [D&O at 4] Since the SEA RANGER was acquired by Alaskan Experiences, the vessel had been exclusively used to house customers of Alaskan Experiences at a fixed moorage[1] in the Bay of Pillars. [D&O at 5] Customers stayed aboard the vessel as it was so situated for either four days/four nights, or five days/five nights. [*Id.*]

On multiple occasions between May 2013 and September 2015, Respondent served as Master of the SEA RANGER, meaning that he was the senior person in charge of the vessel and its business operations. [D&O at 5] Respondent also served as Master of the SEA RANGER while the vessel was moored in the Bay of Pillars with Alaskan Experiences customers aboard, who paid for, among other things, overnight accommodations. [*Id.*]

In May of 2013, the Coast Guard informed Respondent that the SEA RANGER was required to be under the direction and control of an individual with a 200 gross ton Master's Credential while it was operating with passengers-for-hire aboard. [D&O at 5] Respondent did not apply to upgrade his credential until December of 2015. [*Id.*]

PROCEDURAL HISTORY

On April 7, 2016, the Coast Guard filed its Complaint against Respondent's MMC.

[1] "The stern of the SEA RANGER is moored for the season to a multi-thousand pound, bronze navy-style anchor that remains in place. The SEA RANGER is anchored off its bow with its own anchor. This moorage is very protected and secure from adverse weather and sea conditions." [Memorandum of Agreed Facts dated 01 June 2016, admitted as Joint Exhibit No. 1 [Tr. at 5]]

On April 26, 2016, Respondent filed an Answer to the Complaint wherein he admitted to all jurisdictional allegations but denied all of the factual allegations supporting the Complaint. In his Answer, Respondent denied carrying passengers for hire aboard the SEA RANGER.

On May 18, 2016, Respondent filed a Motion to Dismiss the Complaint and a supporting Memorandum. Through this motion, Respondent asserted that dismissal of the matter was warranted because Respondent did not carry passengers for hire aboard the vessel at any of the relevant times. The Coast Guard opposed this motion.

The hearing convened on June 1, 2016. Once the hearing commenced, the parties engaged in oral argument on the Motion to Dismiss. The ALJ declined to rule on the motion during the hearing and informed the parties that the ruling would be included as part of his D&O in the matter.

At the hearing, the Coast Guard offered the testimony of three witnesses and entered four exhibits into the record. Respondent testified on his own behalf and entered four exhibits into the record.

Following the hearing, both parties filed post-hearing briefs; neither party submitted a reply brief. The ALJ subsequently issued his D&O on August 29, 2016.

Respondent timely filed a Notice of Appeal and an Appellate Brief. The Coast Guard filed a timely Reply Brief. This appeal is properly before me.

BASES OF APPEAL

Respondent appeals from the ALJ's D&O, which found proved the allegation of misconduct, and ordered the suspension of Respondent's Merchant Mariner Credential for thirty days outright. Respondent raises the following issues:

I. *The ALJ erred in finding that a vessel that serves as an immobile commercial fishing lodge carries passengers for hire even though it never gets underway and never leaves its mooring; and*

II. *The ALJ's decision that a one month suspension is warranted should be reversed.*

OPINION

I.

The ALJ erred in finding that a vessel that serves as an immobile commercial fishing lodge carries passengers for hire even though it never gets underway and never leaves its mooring

Respondent argues that the ALJ erred in finding the allegation of misconduct proved. Throughout these proceedings, Respondent has asserted that the SEA RANGER does not meet the statutory definition of an "uninspected passenger vessel." Specifically, Respondent contends:

> The ALJ's decision that SEA RANGER did carry passengers, even though it never transported the sport fishing customers that stayed aboard it, is without support in statute, regulation, case law or administrative decision. Indeed, it is contrary to the long-established meaning of "carry" in the passenger context to be "to transport."

[Respondent's Appeal Brief at 1]

As the ALJ noted, the facts of this case are generally not in dispute. [D&O at 7] The issue presented is "the use and interpretation of certain words in the statutory definition of uninspected passenger vessel." [*Id.*]

The misconduct allegation as charged in this case is predicated upon an alleged violation of 46 C.F.R. § 15.905(b), which provides:

> An individual holding a license or MMC endorsed as a master or pilot of an inspected self-propelled vessel is authorized to serve as master, as required by 46 CFR 15.805(a)(6), of an uninspected passenger vessel of at least 100 gross tons[2] within any restrictions, including gross tonnage and route, on the individual's license or MMC.

[2] On 24 December 2013, the regulation was changed so that "at least 100 gross tons" became "100 GRT or more".

One cannot violate this regulation as it is written. It does not require or prohibit anything. However, the regulation references 46 C.F.R. 15.805(a)(6), which provides, in pertinent part: "There must be an individual holding an appropriate license as or a valid MMC with endorsement as master in command of . . . [e]very uninspected passenger vessel of at least 100 gross tons[3]." It is clear from the record that the parties understood the misconduct alleged. The charged act of misconduct is considered to be predicated upon a violation of 46 C.F.R. 15.805(a)(6).

At all times relevant to these proceedings, Respondent's MMC was endorsed for service as Master of vessels of not more than 100 gross tons. Since the SEA RANGER is 198 gross tons, if the vessel were deemed to be an "uninspected passenger vessel," Respondent's MMC, as then endorsed, would be insufficient to enable him to serve as that vessel's Master.

The regulations in 46 C.F.R. Part 15 do not define the term "uninspected passenger vessel." The definition of that term is found in 46 U.S.C. § 2101(42). In pertinent part, the statute defines the term to mean "an uninspected vessel--- (A) of at least 100 gross tons . . . --- (i) **carrying** not more than 12 passengers, including at least one passenger for hire." (emphasis added) 46 U.S.C. § 2101(21) provides a long definition of the word "passenger," which can be summarized for the purposes of this case as anyone carried on a vessel except for the owner or owner's representative or the captain or the crew. 46 U.S.C. § 2101(21a) establishes that a "passenger for hire" is "a passenger for whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel."

On appeal, Respondent asserts:

> These statutory and regulatory sections establish that Voelckers could only have been found to have operated SEA RANGER as an "uninspected passenger vessel" with inadequate licensure if, on any day between May 2013 and September 2015, he was in command of SEA RANGER when it was carrying at least one passenger for hire.

[3] On 24 December 2013, the regulation was changed so that "gross tons" became "GRT".

[Respondent's Appeal Brief at 4] Respondent further contends: "Surely no one working in any field of marine commerce could understand 'carrying' or 'carriage' as anything other than the transportation of individuals or cargo by water." [*Id.*] Thus, Respondent argues, because the meaning of these terms is "unambiguous" in the marine context as referring to transportation, i.e. movement, and because the SEA RANGER was moored, serving as an immobile fishing lodge at the relevant times, it was not an "uninspected passenger vessel" under the applicable definitions.

Respondent's argument is novel. Respondent does not deny that the SEA RANGER is a vessel, nor does he deny that, at the relevant times, the vessel had paying customers aboard. Rather, Respondent asserts that, because the vessel was moored and immobile, it could not be viewed as *carrying* passengers, either for hire or otherwise, because it was not transporting them from one place to another.

Respondent cites numerous cases to support his argument that "carrying" and "carriage" are unambiguous terms that are commonly understood in the maritime sense as meaning transport of goods or people from one place to another. *See* Respondent's Appeal Brief at 5-6, 8. None of these cases addresses the question of whether movement is required before a person can be considered a passenger. Rather, they reflect the fact that for centuries, the only reason a non-crewmember would embark on a commercial vessel was for transportation from one place to another. In the modern world, however, people pay for all kinds of entertainment, to include embarking on a vessel purely for the sake of being on a vessel, whether it moves or not, or because it offers services they desire irrespective of whether it is a vessel.

In these proceedings, a vessel may be in operation or navigation even when it is moored at a wharf. *Appeal Decision 2497 (GUIZZOTTI)* (1990) at 6 (citing *United States v. Monstad*, 134 F.2d 986, 988 (9th Cir. 1943)). Further:

> There is no jurisdictional prerequisite that a vessel be underway before the Coast Guard can act against licensed personnel who are both on board and have affirmative duties to perform that are within the scope of their licenses. . . . In addition, a licensed operator cannot disregard his duties to passengers simply because the vessel is idle at the pier. "A carrier is bound to exercise the highest degree of care and diligence in providing for the safety of its passengers." ANTILLES, 1975 A.M.C. 1159, 1163, 392 F. Supp. 973 (D.P.R. 1975).

Id. at 6-7. Respondent attempts to distinguish *Guizzotti* in that the case turned on the meaning of "operation," not "carry," and the passenger vessel status of the vessel in that case was not in question. His arguments (including this one), if accepted, would undermine the Coast Guard's mission to ensure the safety and security of this nation's vessels and waterways.

The legislative history of Subtitle II of Title 46, United States Code, is clear that Congress intended for vessel operation to be construed to include "all operations of a vessel when it is at the pier, idle in the water, at anchor, or being propelled through the water." H.R. Rep. No. 98-338 at 121 (1983), reprinted in 1983 U.S.C.C.A.N. 924, 933. That construction supports the statutory scheme intended to provide comprehensive safety regulation of vessels and people on the nation's waterways and the high seas. Likewise, the meaning of "carry" must support the same legislative purpose: safety of vessels and waterways.

The ALJ accepted that this case hinges on the definitions of the terms "carry" and "carriage" and, before accepting the broader definitions of the terms favored by the Coast Guard, embarked upon a careful analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Respondent argues that to do so was error:

> Understanding the simple words "carry," "carriage," and "carried" in statutory definitions bears no relation to the regulatory scheme at issue in Chevron. The definitions of these words are not to be settled by an administrative agency upon resolution of "conflicting policies." "Stationary source" [the term at issue in *Chevron*] has no common meaning; "carry," "carriage" and "carried" are simple, unambiguous words, whose meanings Voelckers showed in his briefing are well-established in the maritime context. This Court "must give effect to the unambiguously expressed intent of Congress."

[Respondent's Appeal Brief at 6-7]

When a statute administered by an agency is silent or ambiguous concerning an issue, that agency's statutory construction is reviewed by a court by asking whether the agency's construction is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. In contrast to this case, the court in *Chevron* was considering an agency regulation, Here, the agency construction of the terms "carry" and "carriage" is not contained in a regulation or other

formal document, but was presented to the ALJ in the proceeding below: "We believe the meaning is clear on its face that carry simply means to have aboard or be laden with." [Tr. at 23] *Chevron* recognizes a "principle of deference to administrative interpretations," *id.* at 844, but it may be that the Coast Guard's position in this case does not deserve *Chevron* deference. Nevertheless, a *Chevron* analysis is a useful approach when the Coast Guard's interpretation of a marine safety statute is in question in these proceedings. *See Appeal Decision 2678 (SAVOIE)* (2008). And Respondent's argument that a *Chevron* analysis should not be undertaken in this case because the words "carry," "carriage" and "carried" are unambiguous is unpersuasive. In any event, the ALJ's analysis and conclusion as to the meanings of the terms "carry" and "carriage" is sound.

In seeking the meanings of the terms "carry" and "carriage," the ALJ conducted a thorough analysis of case law and legislative history. The ALJ reviewed the Supreme Court's discussion of the term "carry" in the context of "carrying" a firearm, where the Supreme Court said, "[O]ur definition does not equate 'carry' and 'transport.'" *Muscarello v. United States*, 524 U.S. 125, 134 (1998). [D&O at 13-14] In addition, the ALJ carefully reviewed the legislative history of Subtitle II of Title 46, United States Code.

> Clearly, the general Congressional intent was to enact a regulatory scheme that would protect life, property, and safety at sea. Throughout the definitions in 46 U.S.C., Congress used the word "carrying" when referring to three particular things: passengers, oil, and hazardous materials. It would run counter to Congressional intent to enact "safety laws" if those laws concerning passengers, oil and hazardous materials applied to vessels moving with the cargo aboard but not moored vessels with the same cargo aboard. Congress used the terms "transport" and "transportation" when defining "ferry" which necessarily involves movement of passengers. Clearly, Congress could have used "transporting" or "moving" when defining uninspected passenger vessel; however, it did not. An empty vessel, whether at sea or tied to a dock may be subject to some safety controls or rules, but as soon as oil or hazardous materials or paying passengers are on board, the need for additional safety measures necessarily increases. This is true whether the vessel is moving or stationary. To find otherwise would contradict the over arching purpose of protecting life and safety at sea.
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> Moreover, if the SEA RANGER is not defined as an uninspected passenger vessel because it is not "carrying" passengers, the regulatory impact would be incongruent with protecting life and safety at sea. If Respondent's

> vessel were determined to not fall within the statutory definition of an uninspected passenger vessel, then none of the regulations mandating the minimum safety requirements would apply.[3] . . .
>
> These regulations are in place to ensure that certain minimum safety requirements are met for any vessel before passengers put their lives and safety into the hands of the owners and operators of the vessel. While there may be more risks if the vessel is involved in transporting passengers, there is still risk associated with being on board a vessel and the clear intent of the regulatory scheme is to ensure the safety of those on board. It is in this context that Congress provided that an uninspected passenger vessel is one that is "carrying" at least one passenger for hire.
>
> As such, Congress' intent is clear that the purpose of the statute and regulatory scheme is to protect life and safety at sea. Limiting the definition of "carrying" to only include vessels that are moving with passengers aboard is inconsistent with Congress' clear intent. Therefore, "carrying" must include situations where a vessel is moored, docked, or otherwise not moving while passengers for hire are embarked.
>
> [3] Although Respondent describes the use of the SEA RANGER as a "floating lodge," there is no evidence in the record that the SEA RANGER is regulated under other federal or state safety laws as a hotel, motel, lodge or other entity in the business of providing overnight accommodations to paying customers.

[D&O at 14-17] (citations omitted) This thoughtful analysis is fully consistent with Congressional intent and is adopted herein. Respondent's argument that because the SEA RANGER was not "carrying passengers" at the relevant times, it could not be considered an "uninspected passenger vessel" is rejected. The SEA RANGER was indeed carrying passengers and it was an uninspected passenger vessel at the relevant times.

Accordingly, the record supports the ALJ's conclusion that Respondent committed an act of misconduct in that he served as Master of the SEA RANGER while the vessel was carrying passengers for hire, without an MMC endorsed for the size of the vessel.

II.

The ALJ's decision that a one month suspension is warranted should be reversed

Respondent asserts that the ALJ assessed a thirty-day suspension because "witnesses testified that Voelckers was told he needed a 200 Ton license to carry passengers for hire." [Respondent's Appeal Brief at 9] Respondent avers that he "never disputed that he understood

that he needed that license to carry passengers, but he understood that hosting customers on SEA RANGER as lodge was not carrying passengers for hire," but "[t]he Coast Guard never advised him at any time that his operation at the Bay of Pillars constituted carriage for licensing purposes." [*Id.*] Respondent argues that "he had no reason to know a 200 Ton license was needed for his operation. Accordingly, no sanction beyond an adverse decision in this matter is warranted." [*Id.* at 10]

"In these proceedings, the ALJ has wide discretion to choose the appropriate sanction based on the individual facts of each case." *Appeal Decision 2707 (CHESBROUGH)* (2015) at 6 (quoting *Appeal Decision 2695 (AILSWORTH)* (2011) at 16).

Respondent's argument centers on his belief that the ALJ assessed the thirty-day sanction at issue here solely upon consideration of the Coast Guard's assertion that Respondent was told that he would need to upgrade his credential if he were to carry passengers aboard the SEA RANGER, even though he was not told that, from the Coast Guard point of view, he was in fact carrying passengers. This is not entirely the case.

First, the ALJ considered the recommended sanction for a misconduct charge predicated upon a violation of law or regulation as set forth in 46 C.F.R. § 5.569(a): "the recommended penalty for misconduct based on failure to comply with U.S. law or regulation is between one (1) and three (3) months." [D&O at 20]

The ALJ noted that Respondent himself testified the Coast Guard had told him in 2013 that he needed to get a 200- ton upgrade. [D&O at 20] Even so, the ALJ expressly found as follows in mitigation:

> In this case, while Respondent did commit misconduct by serving as Master aboard the SEA RANGER without the proper license, he did so under the mistaken belief that he was not "carrying" passengers. Indeed, because of the nature of Respondent's operation, it was not unreasonable for him to think that he was not doing anything wrong.

[D&O at 20-21] Thus, the sanction assessed by the ALJ appropriately considered the mitigating factors. There is no reason to disturb it.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The Order imposed by the ALJ, suspending Respondent's Merchant Mariner Credential for thirty days, was consistent with applicable law and precedent, and was not an abuse of discretion.

ORDER

The ALJ's Decision and Order dated August 29, 2016, is AFFIRMED.

ADM, USCG

Signed at Washington, D.C., this 13 day of AUGUST, 2018.