



August 3, 2023

Phillip Stanford  
[REDACTED]

RE: In the matter of: *C/P Constellation* / Phillip Stanford  
Incident Number: 2300387  
Appeal of Written Warning

Dear Mr. Stanford,

This appeal concerns a written warning (“Written Warning”) issued on March 9, 2023, by the National Oceanic and Atmospheric Administration’s (“NOAA’s”) Office of Law Enforcement (“OLE”) against Phillip Stanford (“Respondent”), the Factory Foreman aboard the *C/P Constellation* between October 23, 2022, and December 1, 2022. The Written Warning states that Respondent violated 50 C.F.R. § 679.7(g)(5), which provides that it is unlawful for any person to harass an observer.<sup>1</sup> On April 18, 2023, Respondent submitted a timely appeal of the Written Warning via mail to the Section Chief of the Enforcement Section of NOAA’s Office of General Counsel.<sup>2</sup>

For the reasons discussed below, I affirm the Written Warning.

## **I. Legal Background**

Pursuant to the implementing regulations of the Magnuson-Stevens Fishery Conservation and Management Act, as amended (“the Act”), 16 U.S.C. § 1801 *et seq.*, “[a] written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for violation of” the Act.<sup>3</sup> The regulations specific to the North Pacific Observer Program of the Alaskan fisheries and relevant to this Written Warning state that it is a violation of the Act to “[h]arass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer’s work performance, or otherwise creates an intimidating, hostile, or offensive environment.”<sup>4</sup> The regulations further state that “[i]n determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context

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<sup>1</sup> The Magnuson-Stevens Fishery Conservation and Management Act, as amended (“the Act”), 16 U.S.C. § 1801 *et seq.*, defines “observer” as “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under” the Act. 16 U.S.C. § 1802(31).

<sup>2</sup> The Written Warning incorrectly advised Respondent that an appeal of the Written Warning must be sent to the Section Chief of the Enforcement Section of NOAA’s Office of General Counsel. Pursuant to the newly-revised regulations covering written warning appeals, such an appeal must be sent to the NOAA Deputy General Counsel. 15 C.F.R. § 904.403(b). Accordingly, the NOAA Deputy General Counsel has adjudicated this appeal.

<sup>3</sup> 15 C.F.R. § 904.400.

<sup>4</sup> 50 C.F.R. § 679.7(g)(5).



in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.”<sup>5</sup>

The regulations governing an appeal of a written warning are set forth in 15 C.F.R. § 904.403. Pursuant to 15 C.F.R. § 904.403(b), a respondent to a written warning may seek review of a written warning issued by an authorized officer by submitting a written appeal to the NOAA Deputy General Counsel within sixty days from the date of receipt of the written warning. An appeal from a written warning must present the facts and circumstances that explain or deny the violation described in the written warning.<sup>6</sup> On appeal, the NOAA Deputy General Counsel has discretion to affirm, vacate, or modify the written warning.<sup>7</sup> The NOAA Deputy General Counsel’s determination constitutes final agency action for purposes of judicial review.<sup>8</sup>

## II. Factual Background<sup>9</sup>

Between October 23, 2022, and December 1, 2022, Jessica Zemp (“Zemp”) and Jessica Smith (“Smith”) were employed by Alaskan Observers, Inc., to serve as groundfish observers on the *C/P Constellation* for the National Marine Fisheries Service.<sup>10</sup> While aboard the *C/P Constellation*, one of the individuals on the vessel placed an anonymous sticky note in the pocket of Zemp’s sweatshirt that read, “Hey Beautiful. My handwriting sucks but I wish you can [sic] read it because I want to hold you tight.”<sup>11</sup>

The note was shown to Respondent, among others, and Respondent subsequently led a meeting with the crew to discuss the note.<sup>12</sup> The Case File contains witness testimony stating that after this meeting, the crew made “continuous jokes about the situation” and that Respondent, specifically, “maybe a handful of times . . . liked to hold himself whenever he saw” Zemp, and “repeat the things written on the note.”<sup>13</sup> Witness testimony expressed that this conduct had the effect of undermining the observers, and disrupting their work aboard the *C/P Constellation*.<sup>14</sup>

In an interview OLE conducted with Respondent on February 24, 2023, Respondent confirmed that he led the meeting with the crew to discuss the note, and asked the crewmen to leave the observers alone. Respondent stated he had normal interactions with the observers and denied holding himself.<sup>15</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> 15 C.F.R. § 904.403(b)(1).

<sup>7</sup> *Id.* § 904.403(c).

<sup>8</sup> *Id.*

<sup>9</sup> The facts of this appeal decision were developed from Respondent’s appeal letter dated April 18, 2023 (“Resp. Appeal Letter”) and OLE’s case file for Incident # 2300387 (“Case File”), which included the March 9, 2023, Written Warning Notification, affidavits from observers Jessica Zemp and Jessica Smith (“Zemp Aff.” and “Smith Aff.,” respectively), Investigative Reports (“IRs”) and Supplemental Investigative Reports (“SIRs”) from Special Agent Marsden (“SA Marsden”), and Crew Lists.

<sup>10</sup> Smith Aff., Attach. 1-1; Zemp Aff., Attach. 2-1.

<sup>11</sup> Note, Attach. 7-2.

<sup>12</sup> SA Marsden SIR (Feb. 28, 2023), Attach. 4-2; SA Marsden SIR (Feb. 28, 2023), Attach. 6-2

<sup>13</sup> Smith Aff., Attach. 1-1; Zemp Aff., Attach. 2-1; SA Marsden SIR (Feb. 28, 2023), Attach. 6-2.

<sup>14</sup> Smith Aff., Attach. 1-1; SA Marsden SIR (Feb. 28, 2023), Attach. 6-3.

<sup>15</sup> SA Marsden SIR (Feb. 28, 2023), Attachs. 4-1, 4-2.

On March 9, 2023, OLE issued the Written Warning to Respondent for violating 50 C.F.R. § 679.7(g)(5), which was served on that same date. The Written Warning stated that Respondent “perpetuat[ed] . . . the harassment/offensive environment where [Respondent] was specifically identified as ‘holding yourself’ and making comments using similar language found on the note to the observer after the fact.”<sup>16</sup>

Respondent submitted a timely appeal on April 18, 2023. In his appeal, Respondent argues that the Written Warning should be vacated because “[m]y name was the only name [Zemp] ‘remembered or recalled’”; “I was the person who called my crew together to discuss the matter and remind them it was inappropriate and will NOT be stand [sic] for”; and “I was not the person whom [sic] did what is noted, I am the ‘name’ she recalls.”<sup>17</sup> As support for his appeal, Respondent submitted a photocopy of a text message exchange he had with “my co-worker on the boat the plaintiff is currently on.”<sup>18</sup>

In the text message exchange, the “co-worker,” who is identified in the text messages as Tyler Gates (“Gates”), wrote that, “home girl just pulled me aside and asked me to APOLOGIZE TO YOU FOR HER . . . she said she hates the cops and it got out of hand and she didn’t mean for it to go down like that.”<sup>19</sup> Respondent replied, “WOOOOOOOOWWWWWW” and “F\*\*K HER.”<sup>20</sup> Gates continued,

Oh also bro earlier today she gave me ‘her side of the story’ She said that she never told OEL [sic] that you were the one who wrote the note, she said the only reason you’re [sic] name got mentioned is because she was saying that inappropriate jokes were being made and OEL [sic] asked her who participated and that and she said she remembered you laughing at one and yours was the only name she remembered anyway.<sup>21</sup>

### **III. Discussion**

The contents of Respondent’s appeal letter and its attachment do not support modifying or vacating the Written Warning. Respondent argues that Zemp’s alleged recollection of his name, and only his name, is somehow, in and of itself, an indication of his innocence. Absent additional support, this argument is not persuasive. First, it is clear from the Case File that Zemp did remember the name of at least one other crewmember and the captain, but did not identify them as participating in the harassing behavior.<sup>22</sup> Second, even if multiple crewmembers participated in Zemp’s harassment, and Respondent was the only one of her harassers whose name Zemp remembered, the Written Warning would still be appropriate. Third, Gates’ texted account of his later conversation with Zemp, which provides the purported underpinning for Respondent’s argument, is in tension with OLE’s witness interviews. But, even crediting Gates’

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<sup>16</sup> Written Warning Notification, Attach. 8-2.

<sup>17</sup> Resp. Appeal Letter.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at Attach. p. 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at Attach. p. 2.

<sup>22</sup> SA Marsden SIR (Feb. 28, 2023), Attach. 6-2.

account as true, it would not exonerate Respondent, because even in Gates' account, Respondent is implicated in the harassing and inappropriate jokes made at Zemp's expense.

Respondent's other argument – that he led the crew meeting to discuss the inappropriateness of the note left in Zemp's sweatshirt – is similarly unpersuasive. That Respondent led a crew meeting to discuss the note is undisputed. It is Respondent's conduct after the meeting that prompted the Written Warning. By leading a meeting about the note, Respondent did not foreclose the possibility that he would later harass an observer using references to the note.

In consideration of the totality of the circumstances, including the nature of the conduct and the context in which it occurred, as well as the unpersuasive nature of Respondent's arguments, I affirm the Written Warning. The information provided in the Case File supports the conclusion that Respondent harassed an observer under the definition of "harass" contained in 50 C.F.R. § 679.7(g)(5). Respondent's conduct undermined and disrupted Zemp's work, which had the effect of interfering with an observer's work performance.

#### **IV. Conclusion**

For the reasons set forth above, I deny Respondent's request to vacate the Written Warning and, instead, affirm the Written Warning.

Sincerely,

**GUSTAFSON.KRISTE**  
**N.LYN.1521761314**  
Kristen Gustafson  
Deputy General Counsel  
NOAA Office of General Counsel

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