

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

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16780
October 22, 2002

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00001583
Unnamed (Black Zodiac)
[REDACTED]
\$250.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Alameda, California, has forwarded the file in Civil Penalty Case MV00001583, which includes your appeal on behalf of [REDACTED], operator of a black zodiac owned by the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$250.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(a)	Operating a vessel in a negligent manner that endangers life, limb or property of a person.	\$250.00

The violation was observed on May 15, 1999, during an organized protest of the [REDACTED] [REDACTED]'s hunt of gray whales near Neah Bay, Washington.

On appeal, you deny the violation and "request that these proceedings be dismissed and no civil penalty be assessed." You assert that "[i]t is clear from any objective review of the proceedings...that [REDACTED] never endangered the occupants of the whaling canoe, nor did she endanger the PWC operator, nor is the Coast Guard able to support the claim that the zodiac collided with the chase boat." To that end, you contend that, in reaching his decision, the Hearing Officer relied on "obviously prejudiced and unreliable testimony of a [REDACTED] whale hunter" and "inadequate photographic evidence and 'expert testimony'." You further assert that he "dismiss[ed]...the testimony by the owner [of the vessel] that the alleged collision damage was incurred prior to May 15, 1999" and ignored "testimony and videotape evidence that [the] alleged collision damage was caused by the USCG." To support your assertions, you note "similar cases brought by the Coast Guard against [REDACTED] whale hunt protestors from the period of 1998-99...result[ed] in dropped criminal charges and dismissal of civil

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violations.” You contend that such dropped and dismissed cases “demonstrate a pattern of intent to find violations where there were no violations to be found” and conclude that “[t]he fact that this civil case follows an attempt to lodge charges against [REDACTED] in a criminal proceedings, subsequently dropped, leads to the conclusion that your Agency has persevered with the civil case due to the lower standard of evidence involved.” You contend that the Coast Guard’s action in this case reflects a “clear pattern on the part of a federal agency making an effort to quash dissent, harass protestors, and otherwise cast a chilling effect on the exercise by US citizens of their rights as guaranteed under the First Amendment of the Constitution.” Your appeal is denied for the reasons described below.

Before I begin, I believe a brief recitation of the background and circumstances of the case is in order. In 1999, the [REDACTED] [REDACTED] announced its intent to resume hunting gray whales in the waters of Washington State, following a seventy-year hiatus. Numerous environmental groups, including the [REDACTED] ([REDACTED]), questioned the legality of the hunt and vowed to protect any endangered whales during the ensuing [REDACTED] hunts. Throughout the 1999 whaling season, relations between the conservationists and the [REDACTED] were tense and conflicts arose as both groups attempted to further their objectives.

On May 15, 1999, environmental groups, including [REDACTED], launched vessels into Neah Bay, Washington, to protest the [REDACTED]’s intended whale hunt that day. [REDACTED] was one of the individuals present. As the operator of a black zodiac in the area of the whale hunt, [REDACTED] attempted to disrupt the hunt to ensure that the [REDACTED] took no whales. The violation is the result of [REDACTED]’s operation of the vessel on that day. Specifically, the Coast Guard asserts that [REDACTED] was negligent in her operation of the zodiac when she 1) violated the rules of the road by so closely approaching the M/V [REDACTED], a support vessel operated by the [REDACTED], that a collision occurred with enough force to tear the number decals off the side of the vessel; 2) collided with a jet ski operated by [REDACTED], another protestor; and, 3) operated her vessel so close to the whaling canoe that its wake washed into the canoe, endangering the lives of the people on board.

Before I address the violation in issue, I will address the standard of proof applicable to Coast Guard civil penalty procedures. As indicated in the correspondence contained within the case file, the procedures governing the informal adjudicative process used by the Coast Guard are set forth in 33 CFR Subpart 1.07. 33 CFR 1.07-65 states that any decision to assess a civil penalty must be based upon substantial evidence in the record. Conversely, if the Hearing Officer does not find substantial evidence to support the alleged violation, the case must be dismissed and returned to the appropriate District Commander. While the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*, does not specifically address the appropriate standard of proof in administrative adjudicative proceedings, both case law and administrative practice clearly show that the standard of proof in such proceedings is a preponderance of the evidence standard. Under this test, Coast Guard Hearing Officers must be convinced that the weight or majority of the evidence supports their conclusion. *See Steadman v. SEC*, 450 U.S. 91 (1981). For purposes of this review, I will provide a de novo review, meaning that I may substitute my judgment for that of the Hearing Officer. Therefore, for me to sustain the Hearing Officer’s decision, I, too,

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must believe that the weight or preponderance of the evidence supports my disposition of this case.

I will now address the violation. The only issue in this case is whether [REDACTED] negligently operated a zodiac during her protest of the [REDACTED] whale hunt. As used in 46 USC 2302, negligence is the failure to use that care which a reasonable and prudent person would exercise under similar circumstances. It is the operator's breach of that standard of reasonable care that results in the endangerment of life, limb, or property of a person and which constitutes a violation of 46 USC 2302. I will begin by addressing the Coast Guard's contention that [REDACTED] acted negligently in colliding with the M/V [REDACTED], the [REDACTED] chase boat.

Upon a thorough review of the record, I find that there is substantial evidence to support a conclusion that [REDACTED] acted negligently with respect to her collision with the M/V [REDACTED]. The statement of [REDACTED] indicates that "shortly after arriving on scene, the Zodiac made a high speed approach at the chase boat and struck the chase boat on its right side (left side of the zodiac)" with enough force to "tear the number decals off the side of the chase boat." [REDACTED] indicated that, following the collision, "the zodiac and the jetski then began working together to maneuver around the chase boat, trying to make him alter course." Indeed, in her own statement, [REDACTED] indicated that her "strategy on May 15 was to maneuver the zodiac back and forth between the chase boat and the whaling canoe in an effort to distract them from the whales." The record evidences that, although [REDACTED] admits intentionally attempting to disrupt the course of the M/V [REDACTED], she denies colliding with the vessel. While I find [REDACTED]'s statements sufficient to support a conclusion that [REDACTED] collided with the M/V [REDACTED], I note that [REDACTED]'s operation of the zodiac in the vicinity of the [REDACTED] chase boat is sufficient to support a conclusion of negligence, even absent the collision. The record clearly evidences that [REDACTED] made close approaches to the M/V [REDACTED] and that she maneuvered her zodiac around the vessel with the specific intent to interfere with its course and operation. Given the chaos present during the hunt and the obvious need for the M/V [REDACTED] to remain in close proximity to the whaling canoe, I find that [REDACTED] was negligent in closely approaching the M/V [REDACTED] and in operating the zodiac in an erratic manner near that vessel. In closely approaching the M/V [REDACTED], [REDACTED] failed to exercise the degree of care required of a reasonably prudent mariner and was, therefore, negligent.

Likewise, I find that there is sufficient evidence in the record to support a conclusion that [REDACTED] acted negligently in colliding with the jetski operated by [REDACTED]. The record contains clear evidence that [REDACTED] operated her zodiac in close proximity to the jet ski and that she did so in an erratic manner. It is beyond question that [REDACTED]'s zodiac is significantly larger than the jet ski operated by [REDACTED] and that a collision between the two could have resulted in drastic circumstances. Under the circumstances of this case, including the chaotic atmosphere present at the scene of the whale hunt, I do not believe that it was prudent for [REDACTED] to closely approach the jet ski. Doing so placed [REDACTED] in grave danger and could, ultimately, have lead to a more serious incident than is at issue in the present case.

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Although [REDACTED] contends that a collision did not occur between the zodiac and the jet ski, there is sufficient evidence in the record to allow me to conclude otherwise. The statement of [REDACTED] indicates that, from a distance of approximately fifty feet, he observed the collision between the zodiac and the jetski. [REDACTED] described the collision as follows:

The jetski was running on the left side of the chase boat on a parallel course. The Zodiac then came across the bow of the chase boat from the right side and made a wide circle so that it was proceeding directly toward the chase boat. The Zodiac then collided with the jetski, with the bow and the right side of the Zodiac going up and over front of the jetski...the collision was violent enough to force the front of the jetski underwater as the Zodiac drove over it. The jetski went dead in the water after the collision and the Zodiac continued after the chase boat.

In addition to [REDACTED]'s statement, there is other evidence in the record sufficient to allow me to conclude that the collision occurred. Upon a thorough examination of the two vessels, Detective [REDACTED], a Reconstructionist for the State of Washington, conclusively determined, based upon paint transfers and physical observation, that the two vessels collided. Specifically, Detective [REDACTED]'s statement indicated that "there was obvious paint transfer on both of them [the jetski and the zodiac] and damage that was consistent of a collision." Detective [REDACTED] further determined that "[t]here was black paint transfer that was consistent from the black RHI" on the jetski and "[o]n the RHI there was purple paint transfer also consistent to the Jet ski." Furthermore, Detective [REDACTED] found that "cuts on the front of the Jet ski...[were]...consistent with that of the propeller from the RHI cutting into the Jet ski" and that "[t]he broker stabilizer fin on the RHI's motor also supports that the RHI collided and rode up over the nacelle of the Jet ski." I note that Detective [REDACTED]'s conclusions are supported by the photographic evidence contained in the record. In addition to showing the cuts on the front of the jetski, the photos clearly indicate significant damage to the zodiac's propeller and significant scarring on the zodiac's hull. The fact that propeller marks appear on the nacelle of the jet ski indicates just how close [REDACTED] came to actually causing severe injuries to [REDACTED].

Contrary to the evidence discussed above, [REDACTED] and [REDACTED] contend that the collision witnessed by [REDACTED] did not occur. [REDACTED] asserted that she has "no independent recollection" of the incident, while [REDACTED] mentioned that the "paths" of the zodiac and the jetski "momentarily converged, resulting in the PWC and zodiac coming slightly in contact with one another." [REDACTED] further noted that the vessels "were not going very fast and the impact of the two vessels was so slight...[that she was]...not even sure if [REDACTED] was aware of what happened." With specific reference to the vessel's damage, [REDACTED] asserted that, following the Coast Guard's termination of her operation of the zodiac, as the Coast Guard lifted the vessel onto the cutter, "[t]he rough, rolling water caused the zodiac to slam against the side of the cutter, thereby damaging the zodiac's fin and propeller." I am not persuaded by these assertions. The record is replete with evidence indicating that the women were operating in consort with the unified goal of obstructing the whale hunt. Consequently, I do not believe that they would have made assertions contrary to each other. Furthermore, I note that although [REDACTED] contends that the zodiac was damaged by the Coast Guard, she has provided no evidence to support this assertion. Given the number of

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people present at the scene, including various protest groups and the media, I do not believe that such an occurrence would have gone unnoticed. Therefore, I find that there is sufficient evidence in the record to allow me to conclude that [REDACTED] negligently operated her vessel when it collided with the jet ski operated by [REDACTED].

Finally, I will address the Coast Guard's contention that [REDACTED] was negligent in passing the [REDACTED] whaling canoe so closely that her vessel's wake washed into the canoe. You contend that [REDACTED] did not endanger the lives of the eight people aboard the whaling canoe. To that end, you point to the video tape recording enclosed with the record and assert that the tape shows a "lack of any evidence of unsafe or negligent operation on the part of [REDACTED]." Throughout this case, [REDACTED] consistently asserted that she neither flooded the [REDACTED] canoe nor acted in a manner that threatened the [REDACTED] whaling party. In her written statement, [REDACTED] asserted that the video, "show[s] that the zodiac was moving very slowly...[and that]...it...was at a considerable distance from the canoe until it was pushed towards the right, towards the canoe, by the chase boat." [REDACTED] further asserted that "[a]s the paths of the three vessels [the canoe, the [REDACTED] support vessel and the zodiac] started to converge...[she]...sped up slightly to get out of the way." [REDACTED] concluded that "the videotape shows only that [REDACTED] slowly and carefully motored the zodiac out from between the chase boat and the whaling canoe." However, the Coast Guard paints a decidedly different picture of the incident. The record contains the statements of several Coast Guardsmen present during the incidents in issue. Although there are slight variations in the statements, they all note that the black zodiac was initially observed operating 5 to 10 yards from the canoe and that a Coast Guard "safe boat" stopped the zodiac and instructed [REDACTED] that she should remain a safe distance from the canoe, a fact confirmed by [REDACTED]'s written statement, wherein she notes: "[a]t one point, a Coast Guard boat approached me and requested that I stay a safe distance from the whaling canoe." The Coast Guard statements further indicate that, shortly after [REDACTED] was warned to remain a safe distance from the canoe, she passed close to, and then in front of the whaling canoe, causing her wake to wash into the canoe. Although [REDACTED] contends that the incident occurred as she attempted to avoid a collision with the [REDACTED] support vessel, the Coast Guard statements make no such assertion.

As I have already stated, negligence is the failure to use that care which a reasonable and prudent person would exercise under similar circumstances. Therefore, the key issue in this case is whether [REDACTED], in passing the [REDACTED] vessel, used that degree of care that would have been exercised by a reasonable and prudent person. Under the facts of this case, I do not believe that she did. I have carefully reviewed the video enclosed with the case file. Although the video's quality is low, it nonetheless clearly shows the incidents of May 15, 1999. Indeed, the video clearly indicates that [REDACTED] operated her vessel in close proximity to the [REDACTED] whaling canoe. At 1:32:21, [REDACTED] is clearly seen passing the whaling canoe so close that her vessel's wake flowed into the canoe. Although I acknowledge that, until the pivotal moment, [REDACTED] operated her vessel at a relatively slow speed, and while I note that the [REDACTED] vessel was also close to [REDACTED]'s vessel, I do not believe that fact excuses her actions in this instance.

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The video clearly indicates the degree of chaos present during the whale hunt. An inordinate number of vessels were present on the scene and the wakes that they collectively created lead to the seas becoming increasingly “choppy” as the hunt progressed. [REDACTED]’s written statement indicates that her “strategy on May 15 was to maneuver the zodiac back and forth between the chase boat and the whaling canoe in an effort to distract them from the whales.” With respect to the incident in issue, [REDACTED] noted that “[u]pon seeing the whaling canoe move towards a surfacing whale, I slowly motored the zodiac between the canoe and the chase boat and sped up only to get out of the way as the paths of these three vessels started to converge.” From these statements, alone, it is clear that [REDACTED] did not operate her vessel with the degree of care and skill required of a reasonable operator. [REDACTED] set out to prevent the [REDACTED] from taking a whale by “distract[ing] them.” To that end, she purposely operated her vessel in close proximity to both the [REDACTED] canoe and its support vessel, thereby increasing the likelihood that a dangerous situation would arise. The fact that the Coast Guard warned [REDACTED] to stay a safe distance from the whaling canoe only exacerbates this situation. [REDACTED] was, undoubtedly, aware of the dangers of the situation, yet she ignored the Coast Guard warning and continued to closely follow the whaling canoe. Even if I were to ignore the dangerous condition created by the wake of [REDACTED]’s vessel, I would, nonetheless, conclude that her actions in purposely maneuvering her vessel between the whaling canoe and its support vessel were negligent. Therefore, I find that the Hearing officer was correct to conclude that [REDACTED] negligently operated her vessel on May 15, 1999.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violations occurred and that [REDACTED] is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$250.00 penalty assessed, rather than the \$500.00 preliminarily assessed or \$1,100.00 maximum permitted by statute appropriate in light of the seriousness of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$250.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 3 % accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost

RE: CIVIL PENALTY

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of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//S//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center