



REDACTED
c/o REDACTED.
REDACTED
REDACTED

16731
31 MARCH 2008

RE: Case No. 1996239
REDACTED
REDACTED
\$3,250.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 1996239 which includes your appeal on behalf of REDACTED as owner/operator of the REDACTED. The appeal is from the action of the Hearing Officer in assessing a \$6,500.00 penalty for the following violations:

| <u>LAW/REGULATION</u> | <u>NATURE OF VIOLATION</u> | <u>ASSESSED PENALTY</u> |
|------------------------------|--|-------------------------|
| 33 U.S.C. § 1602 (Rule 5) | Failure to maintain proper look-out by sight/hearing as well as by all available means appropriate in the prevailing circumstances and conditions. | \$3,250.00 |
| 33 U.S.C. § 1602 (Rule 6) | Failure to proceed at a safe speed for prevailing conditions. | \$3,250.00 |

The violations were alleged to have occurred on September 25, 2002, when the REDACTED collided with the REDACTED (a 21-foot center console REDACTED) in the vicinity of the entrance to Point Judith, Rhode Island.

On appeal, you deny the violations occurred and contend that, in finding the violations proved, the Hearing Officer ignored much of the evidence presented at the hearing and made factual determinations that were inconsistent with the evidence of record. With respect to the alleged violation of Rule 5, failure to maintain a proper lookout, you contend that "[t]he written record...does not support...[the Hearing Officer's]...determination that REDACTED failed to maintain a proper lookout" and insist that the Hearing Officer's conclusion, in this regard, "ignores evidence presented before and at the time of the appeal hearing." In this regard, you specifically assert that "REDACTED...had no opportunity to see the Whaler" because his view was obstructed by another vessel, the REDACTED. In addition, you note that REDACTED's expert witness, a retired Coast Guard Officer, issued a report which emphatically stated that the record did not contain any credible evidence to indicate that your client failed to maintain a proper lookout. In addition, you assert that, in finding the violation proved—based on the fact

that other vessels transiting the area were able to see and avoid the REDACTED—the Hearing Officer improperly “superimposed” the line of sight of another vessel, the REDACTED. You further contend that the Hearing Officer erred by citing the “existence of a bow reel as a controlling factor in her finding as to the charge” and add, contrary to the Hearing Officer’s finding, that “[t]he reel does not obscure any area forward of the bow.” Finally, you contend that the Hearing Officer erred in finding that the record contained only circumstantial evidence regarding whether REDACTED maintained a proper lookout during the incident because REDACTED repeatedly addressed the issue during the instant proceedings. With regard to the alleged violation of Rule 6—failure to proceed at a safe speed—you contend that the Hearing Officer’s “determination that the REDACTED was not operating at a safe speed at the time of the collision is not consistent with her determination that this vessel was making way at seven-to-nine knots, and, again does not in any way address the expert opinions and findings” of REDACTED’s expert witness. In that vein, you contend that the Hearing Officer “superimpose[ed] the location and vantage point of the captains of the REDACTED and the REDACTED on REDACTED” and imply that she erred in finding that those vessels were operating at a safe speed that allowed them to avoid collision while “the evidence is that both of those vessels were operating at approximately the same speed as the REDACTED. You further assert that REDACTED showed that he was operating at the speed that was “customary in that area” and was prudent under the prevailing conditions. You conclude by stating that “[t]he REDACTED’s position relative to the REDACTED, the low profile of the Whaler, the ground swell, and all of the other factors cited above prevented REDACTED from seeing the Whaler and an horrific tragedy resulted” and add that “[t]he speed of the REDACTED had nothing to do with the collision.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I believe a brief recitation of the factual circumstances of the case is important in order to fully understand the nature of your appeal. Around midday on September 25, 2002, the REDACTED—the REDACTED—with two persons onboard, was either actively engaged in fishing or sitting idle in the vicinity of the east entrance to Point Judith, Rhode Island. Visibility was generally good and the seas ranged from 1-3 feet. The REDACTED was proceeding inbound to Point Judith and was immediately followed by the REDACTED and the REDACTED, respectively. At approximately 12:30, the REDACTED altered course to avoid collision with the REDACTED. The REDACTED did not alter course in time to avoid collision and hit the REDACTED just aft of amidships on the starboard side, causing it to capsize while both personnel were onboard. The captain of the REDACTED was recovered on scene and survived while the remaining crewmember remained missing and was recovered deceased seven days later. At the time of the collision, it appears that REDACTED was in the pilothouse and at the controls of the REDACTED and proceeding at a speed of approximately 7-9 knots.

I will begin by addressing the alleged violation of 33 USC 1602 (Rule 5). A review of your appeal shows that, at many points, you address the issue of fault. While it is necessary to address issues of comparative fault in federal maritime tort cases, that need does not arise in Coast Guard civil penalty proceedings involving alleged violations of the COLREGS. Under 33 USC 1608(a), “[w]hoever operates a vessel” in violation of the COLREGS “shall be liable to a civil penalty.” As indicated in the correspondence contained within the case file, the procedures

governing the Coast Guard's civil penalty process are set forth in 33 CFR Part 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. 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). As such, regardless of whether other parties, like the operator of the REDACTED, were culpable for the collision, the key issue presented here is whether there is substantial evidence in the record to support a conclusion that your client committed the alleged violation.

33 USC 1602 (Rule 5) makes clear that “[e]very vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.” Addressing the violation, in her Final Letter of Decision, the Hearing Officer stated as follows:

Under the second charge, the Coast Guard alleges you failed to maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions. Again, absent any statement from you [regarding radar use, etc.] there is only circumstantial evidence regarding whether you maintained a proper lookout. Your crewmember was engaged in cleaning the vessel and icing down your catch. There is no suggestion that he was serving as lookout. You were therefore responsible for maintaining a proper lookout. There is evidence in the case file that another fishing vessel in the area observed the REDACTED from ½ to 1 mile away. There is also evidence in the case file that your vessel has a bow reel which increases the blind spot forward of your bow, and that you “never saw” the other vessel. I find the violation proved.

On appeal, you contend that the Hearing Officer erred in so finding. To that end, you assert that “REDACTED, in the raised pilothouse of the REDACTED, had no opportunity to see the Whaler once the stern of the REDACTED had cleared his line of sight,” that the Hearing Officer erred in disregarding or failing to accord proper evidentiary value to the report of REDACTED's expert witness and in finding that the OCEANA's bow reel increased the blind spot forward of the bow. You also contend that the Hearing Officer erred in finding that the record contained only circumstantial evidence as to whether REDACTED kept an adequate lookout at the time of the collision. In that regard, you state as follows:

At the appeal hearing,¹ REDACTED stated repeatedly and unequivocally that immediately prior to and at the time of the collision he was alone at the helm of the REDACTED. He stated that he was alert, attentive, not distracted, and at all

¹ Pursuant to the applicable procedural rules, at 33 CFR 1.07, there is no mechanism for an appellate hearing. As such, your comments undoubtedly address the informal hearing that was held prior to the Hearing Officer's final assessment in the case.

times on the lookout for other vessels and navigational hazards...Commander Thurber's failure to account for this testimony and her affirmative assertion that REDACTED had never addressed this critical issue is inexplicable. Respectfully, it alone raises a basis for the overturning of the finding that REDACTED had failed to maintain a proper lookout.

Your arguments regarding the Hearing Officer's characterization of REDACTED's testimony appear to be misplaced. As I noted above, in addition to requiring that a vessel maintain a proper look-out by sight and hearing, Rule 5 requires that a vessel use "all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision." A review of the record shows that one of the issues the Hearing Officer considered relevant in her determination was whether REDACTED used "all available means appropriate" in keeping a lookout. On that aspect of the issue, I find that the Hearing Officer's determination that the record contained only circumstantial evidence was not in error. Most notably, although the record shows that the REDACTED is equipped with a radar, the record shows that REDACTED did not state that he used the radar during his testimony.

On appeal, you further imply that the Hearing Officer failed to accord the evidence that you presented with regard to the violation proper evidentiary weight. In Coast Guard civil penalty actions, the Hearing Officer is the finder of fact and is responsible for making credibility determinations with regard to the evidence presented. The Hearing Officer's decisions, in that regard, will only be disturbed if they are arbitrary or capricious. The record shows that, in her Final Letter of Decision, the Hearing Officer found that other vessels transiting in the relevant area were able to see the REDACTED. Indeed, the case file contains evidence to show that the captain of the REDACTED spotted the REDACTED approximately ½ to 1 mile before it came upon it and was able to successfully maneuver around the stationary vessel. The record also shows that visibility was good at the time of the incident, and that it is not uncommon for several small vessels to be operating in the area where the collision occurred. In addition, the record shows that REDACTED did not see the REDACTED at any time prior to the collision. Moreover although the record shows that the REDACTED was equipped with a radar at the time of the incident, the record does not contain any evidence to support a conclusion that your client was, in fact, actively monitoring the radar prior to the collision. Regardless of whether the radar would have "picked up" the REDACTED, the fact that you have not shown that REDACTED was using the radar at the time of the incident shows that he was not using "all available means" to avoid collision at the time of the incident. Given all of these factors, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and I will not disturb the penalty assessed by the Hearing Officer for the violation.

I will now address the remaining violation. 33 USC 1602 (Rule 6) states that "[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions." Rule 6 further states that in determining a safe speed, "[t]he state of visibility," "traffic density," "maneuverability of the vessel," "state of wind, sea and current," and vessel's draught are among the factors which should be considered. Finally Rule 6 makes clear that vessels that are equipped with operational radar should consider "[t]he characteristics, efficiency

and limitation of the radar equipment,” “constraints imposed by the radar range scale in use,” “[t]he effect on radar detection of the sea state, weather and other sources of interference,” “[t]he possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range,” “[t]he number, location and movement of vessels detected by radar,” and “[t]he more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.”

On appeal, you contend that “Commander Thurber’s determination that the REDACTED was not operating at a safe speed at the time of the collision is not consistent with her determination that this vessel was making way at seven-to-nine knots, and, again, does not in any way address the expert opinions and findings of Captain Wood.” You further assert that because the Hearing Officer determined that other vessels transiting in the area—the REDACTED and the REDACTED—were transiting at a safe speed and the REDACTED was transiting at roughly the same speed as those vessels, the Hearing Officer erred in finding the violation proved. You further note that “REDACTED affirmatively stated at the hearing that he was traveling at the same speed as was customary in that area, at that time, under existing conditions” and add that all captains transiting the area at the time of the incident “believed that their speed was safe and prudent under the circumstances as required by the COLREGS.” In addition, you contend that “[t]he REDACTED’s position relative to the F/V MABEL SUE, the low profile of the Whaler, the ground swell, and all of the other factors...prevented REDACTED from seeing the whaler and an horrific tragedy resulted.” You add that “[t]he speed of the REDACTED had nothing to do with this collision.” Finally, you contend that the Hearing Officer’s conclusion that the vessel was traveling at an unsafe speed improperly “presumes that REDACTED saw the Whaler and speed prevented him from avoiding the collision,” a conclusion that you contend “belies Commander Thurber’s own finding that REDACTED never saw the Whaler.” After a thorough review of the record, I find your assertions, in this regard, to be persuasive.

In her Final Letter of Decision, the Hearing Officer addressed the violation as follows:

I find the testimony of your eyewitness more credible. He gauged the approximate speed of your vessel just prior to the collision based on his years of experience on board and also by the sound of the engine. He stated that OCEANA’s maximum speed was about 15 knots and that she was “absolutely not making 15 knots,” but more on the order of “7-9 knots.” His statement is consistent with the Interview notes of September 25, 2002, during which he stated OCEANA was making “seven or eight knots.”

Both on appeal and throughout the course of these proceedings, you have asserted that because you client was traveling at the same speed as other vessels in the area and because his view of the REDACTED was essentially blocked by the MABEL SUSAN, the collision was not caused by speed, but rather unfortunate unavoidable accidents. Given the evidence contained in the case file, including the Hearing Officer’s determination that the OCEANA was traveling 7-9 knots, the customary speed for the area, I do not find that the record contains substantial evidence to support the Hearing Officer’s conclusion that the violation occurred. Indeed, irrespective of her finding that the OCEANA was traveling at the same speed as other vessels in the area, the Hearing Officer concluded as follows with regard to the violation:

Just because it is likely you were proceeding at the slower rate, does not necessarily mean that speed was a “safe speed.” The COLREGS state “In determining a safe speed the following factors shall be taken into account: the state of visibility; the traffic density including concentrations of fishing vessel[s] or any other vessels; the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions...the state of wind, sea, and current, and the proximity of navigational hazards; the draft in relation to the available depth of water.”

Visibility the day of the casualty was very good, *traffic density* was high, and *prevailing conditions* were good. According to the Interview of the MABEL SUSAN, he “observed several small boats, including a REDACTED that appeared to be drifting, engaged in fishing near the entrance. He said he had been able to see them easily from ½ mile to a mile away.” He also stated, “...it was normal to see small boats in the vicinity of the entrance to Pt. Judith engaged in fishing.” He also stated, “There was a three to four foot ground swell and no wind.”

Other factors that would have affected “safe speed” were: your vessel had a bow reel that increases blind spot forward of your bow; and, at some point prior to the collision MABEL SUSAN may have been between you and the Whaler; MABEL SUSAN avoided the Whaler.

You did not proceed at a safe speed so that you could take proper and effective action to avoid collision and be stopped within the distance appropriate to the prevailing circumstances and conditions. I find this violation proved.

A careful review of the Hearing Officer’s decision, in this regard, shows that although she accepted your assertion that the OCEANA was traveling at a speed of 7-9 knots, the same speed as other vessels transiting the area such as the MABEL SUSAN, she nonetheless found the violation proved because the OCEANA was involved in the collision. After a thorough review of the record, I believe the Hearing Officer’s decision, in this regard, was in error. As I have already stated, the record contains substantial evidence to support a conclusion that a violation of Rule 5—failure to maintain a proper lookout—occurred. With that finding in mind, I note that I do not agree with the Hearing Officer that the record contains substantial evidence to support a conclusion that the collision occurred due to the OCEANA’s speed. The evidence shows that the OCEANA was about 100 yards behind the MABEL SUSAN. That being the case, once the MABEL SUSAN cleared the REDACTED, the OCEANA had sufficient time to either stop or take evasive action to avoid a collision with the vessel. The record also shows that the weather and visibility at the time of the incident were good and that the MABEL SUSAN had no difficulty in seeing and successfully avoiding the REDACTED at least ½ mile away. Given the fact that the record contains such evidence, I do not find that the OCEANA was traveling at an unsafe speed at the time of the collision. Instead, the record supports a conclusion that the collision occurred solely because the REDACTED failed to maintain a proper lookout on the relevant day. As such, I will dismiss the penalty assessed for the alleged violation of Rule 6.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation of Rule 5 occurred and that Capt. Pesante is the responsible party. For the reasons noted above, I do not find that the record contains substantial evidence to support the Hearing Officer's conclusion that the violation of Rule 6 occurred and I will dismiss the penalty assessed for that violation. The decision of the Hearing Officer with respect to the alleged violation of Rule 5 was neither arbitrary nor capricious and is hereby affirmed. I find a total penalty of \$3,250.00 rather than the \$6,500.00 penalty assessed by the Hearing Officer or \$13,000.00 maximum penalty permitted by statute to be appropriate in light of the circumstances surrounding this case.

Payment of **\$3,250.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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 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.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

Sincerely,

//s//

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

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center