

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA *
UNITED STATES COAST GUARD *

Docket No. 01-0542

Case No. PA01001470

vs.

NEAL E. PARKER *

DECISION AND ORDER

PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

APPEARANCES

FOR THE COAST GUARD

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I.
SUMMARY OF THE DECISION

This case involves a series of charges brought against the Captain of the schooner WENDAMEEN resulting from a confrontation initiated by an aggressive and harassing jet ski operator. The incident occurred while the crew of the WENDAMEEN, anchored in Pulpit Harbor, Maine was about to serve dinner to the seven passengers aboard. The reckless actions of the jet ski operator ultimately threatened the safety of the passengers and crew and the Captain used an antique replica, single shot, black powder pistol to signal his distress and to cause the jet ski operator to desist. The principal culprit in this incident is the jet ski operator.

With regard to the specific allegations of the complaint, the Coast Guard has failed to prove that Captain Parker assaulted the ski operator, Mr. Marves. Indeed, the evidence on this record shows that Mr. Marves may have assaulted the Captain and the others aboard the WENDAMEEN. Secondly, Captain Parker did not violate the Coast Guard stowage regulations governing black powder aboard the WENDAMEEN. Finally, the Coast Guard did prove by a preponderance of the evidence that Captain Parker violated other Coast Guard regulations requiring the Commandant's prior approval to carry black powder aboard the WENDAMEEN. This requirement was not widely known among the vessel owners in the schooner fleet in Maine or even to the Coast Guard inspectors at the time of the incident. Accordingly, the Respondent will be placed on probation for six months rather than have his license suspended outright.

II.

Preliminary Statement

On August 10, 2001 the Investigating Officer filed the Complaint in this case which contained in relevant part, the following factual allegations¹:

FACTUAL ALLEGATIONS – Misconduct

1. The Coast Guard alleges that on July 25, 2001 at Pulpit Harbor the Respondent:
2. wrongfully committed an assault on Marvin Reyes, by firing a black powder pistol during confrontation with Mr. Reyes.

FACTUAL ALLEGATIONS – Violation of Law or Regulation

The Coast Guard alleges that on July 25, 2001 at Pulpit Harbor the Respondent:

1. Violated Title 46 Code of Federal Regulations 147.40 by having a quantity of black powder, which is defined as an explosive in accordance with 49 Code of Federal Regulations 173.50, aboard the sailing vessel WENDAMEEN, a certificated sailing vessel without the authorization required by the referenced regulation.
2. Violated Title 46 Code of Federal Regulations 147.95 by not storing the black powder in an approved magazine in accordance with the referenced regulation.
3. This regulation was intended to promote marine safety or protect navigable waters.

The Proposed Order sought a Six Months Suspension of Respondent's Merchant Mariner's License No. 923467.

The Respondent's Answer was filed on August 21, 2001 and the Jurisdictional Allegations were Admitted. All Factual Allegations were Denied. The Answer also asserts:

"Respondent affirmatively alleges as a defense: All applicable COLREGS including but not limited to Rules 1, 2, 7, 8, 33, 36, and 37. Doctrines of waiver

¹ The Jurisdictional allegations were as follows:
The Coast Guard alleges that:

1. Respondent's address is as follows: [REDACTED], telephone ([REDACTED]) [REDACTED]
2. Respondent holds the following Coast Guard-issued credential(s): License Number 923467
3. Respondent acted under the authority of that license on July 25, 2001, by serving as Master aboard the vessel, WENDAMEEN O.N. D210173, as required by law or regulation.

and denimius. Self defense. Non applicability of sections cited. Respondent reserves the right to amend to add additional affirmative defenses.”

The case was assigned to this Judge on August 17, 2001 and was set for hearing at Portland, ME on November 7, 2001. (See Order dated August 28, 2001).

Witness and Exhibit Lists were timely served by both sides and the hearing commenced as scheduled. The Respondent and his counsel and the Investigating Officers were present. The Coast Guard’s case in chief consisted of 9 witnesses and 20 exhibits. The Respondent testified and sponsored 12 witnesses and 20 exhibits. A list of all witnesses and exhibits is set out on Appendix A.

At the conclusion of the two-day hearing, I took the case under advisement. Post hearing pleadings were scheduled upon receipt of the transcripts. The Coast Guard filed Proposed Findings of Fact and Conclusions of Law on January 9, 2002.² The Respondent’s counsel filed Proposed Findings of Fact and a Post Trial Brief on January 10, 2002. The Investigating Officer submitted the Coast Guard’s response (Response to Respondent’s Proposed Findings of Fact and Conclusions of Law) on January 25, 2002. Respondent’s counsel filed his response entitled Respondent Neal Parker’s Rebuttal on January 25, 2002. A correction to that pleading entitled Respondent’s Correction to Rebuttal Submission was filed five days later on January 30, 2002.

In addition to those pleadings, the Respondent filed a Motion for Admission of Written Statements to the Record on February 4, 2002. That motion attached the two statements sought to be admitted. The first contains the signed statement of Mrs. Elizabeth C. Minot dated January 2, 2001. The second is a signed statement of Adam Campbell dated January 18, 2002. Neither individual appeared at the hearing. The Coast Guard filed a Response to Respondent’s Late

² An Errata to that pleading was filed the following day on January 10, 2002.

Submission of Witness Statements and objected to the admission of the statements into the record.

These statements will not be admitted on the record and will not be considered in the determination of this case. Neither witness appeared at the hearing and the late submission of statements will not be allowed. Otherwise, the Investigating Officer is entitled to the opportunity to cross examine and the record would have to be reopened and further hearing set. No reasons have been advanced by the Respondent for such reopening and why these potential witnesses could not have testified at the original hearing. Accordingly, these statements will be marked for identification as Respondent Exhibits V (Minot) and W (Campbell) but **NOT ADMITTED**.

III. FINDINGS OF FACT

1. Captain Neal Evan Parker is the holder of Coast Guard License Number 923467, which authorizes him to serve as Master of steam, motor or auxiliary sail vessels of not more than 100 gross tons upon near coastal waters. (*Tr. vol. 1: 4*).
2. Captain Parker has held a Coast Guard License for approximately 25 years and has no record of previous violations of Coast Guard laws and regulations. He also has a good reputation in the Maine maritime community. (*Tr. vol. 1: 138; Tr. vol. 2: 92*).
3. On July 25, 2001, Captain Parker was serving as Master aboard the schooner WENDAMEEN, when a jet skier by the name of Ryan Marves began performing high speed, unsafe, and harassing maneuvers around the schooner and failed to heed to the Captain's signals to slow down. As a result and in order to prevent an impending collision, the Captain fired an antique black powder pistol into the air while Mr. Marves was approximately 20 feet away from the schooner. (*Entire Transcript*).

4. The WENDAMEEN is a small passenger vessel, which is licensed to carry 14 passengers within a three-mile radius from shore. (*Tr. vol. 2: 104; Exhibit U*).
5. The vessel is a 67-foot long, 56-ton wooden schooner that was built in 1912 and bears official number D210173. (*Tr. vol. 2: 103-105, 117; Exhibit J1-7 and M*).
6. On July 25, 2001, Mr. Marves was the owner and operator of a 770 horsepower unregistered red jet ski known as the "Tiger Shark 770." (*Tr. vol. 2: 27; Exhibits A and B*).
7. At all relevant times on July 25, 2001, the weather was calm with a southwest wind of 12 knots and visibility of 3 to 5 miles. (*Tr. vol. 2: 142; Exhibit K*).
8. On the evening of July 25, 2001, the WENDAMEEN was carrying seven passengers who were sitting on the aft top deck awaiting dinner while moored in Pulpit Harbor, Maine. (*Tr. vol. 1: 147; Tr. vol. 2: 48, 87, 106, 108-110, 142; Exhibit K*).
9. The WENDAMEEN's aft top deck sits approximately three feet above the water. (*Tr. vol. 2: 117; Exhibit J1-7*).

MISCONDUCT--ASSAULT

10. Sometime between 5:00 and 6:00 p.m., while the WENDAMEEN was moored at Pulpit Harbor with the passengers and five crew members aboard, Mr. Marves operated his jet ski in close proximity to the schooner. (*Tr. vol. 1: 148-149, 165; vol. 2: 37, 48-49, 88, 90, 93, 106, 111-115, 160; Exhibit K*).
11. There was only approximately a 15 to 20 feet space between the WENDAMEEN and Mr. Marves' jet ski. (*Tr. vol. 2: 112-113*).

12. Mr. Marves was so close to the WENDAMEEN that he almost sprayed the passengers with water, as he performed various maneuvers on his jet ski. (*Tr. vol. 1: 164-165; Tr. vol. 2: 112-115*).
13. Previously, Captain Parker noticed Mr. Marves doing so called “donuts” and other maneuvers dangerously close to children swimming in the harbor on July 25, 2001. (*Tr. vol. 2: 111-112*).
14. Mr. Marves circled the WENDAMEEN, performed “donuts,” “wheelies” and other maneuvers on his jet ski, which was operated at speeds of approximately 30 knots. (*Tr. vol. 1: 148-149, 165; Tr. vol.2: 37, 48-49, 88, 90, 93, 111-115*).
15. Captain Parker motioned for Mr. Marves to slow down by using a universally recognized hand signal. (*Tr. vol.1: 152, 165; Tr. vol. 2: 37, 114*).
16. Although Mr. Marves saw Captain Parker’s hand signal, he continued to circle the WENDAMEEN and began shouting profanities at Captain Parker. (*Tr. vol. 1: 152; Tr. vol. 2: 38*).
17. Mr. Marves then left Pulpit Harbor; only to return shortly thereafter. (*Tr. vol. 2: 37, 114-115*).
18. Mr. Marves approached the WENDAMEEN head on at a speed of approximately 20 miles per hour and when the two vessels were about to collide, he made a sharp turn and, thus, avoided a collision. (*Tr. vol. 1: 148-149, 152-153; Tr. vol. 2: 117*).
19. Captain Parker and his passengers felt threatened by Mr. Marves’ actions and believed that harm was imminent. (*Tr. vol. 1: 152-153, 167-169, 172; Tr. vol. 2: 38-39, 49, 91*).
20. Captain Parker instructed deckhand Daniel Parker to get the single shot antique black powder pistol, which Captain Parker previously purchased and which was an antique

replica of a pistol made in the 1920s - 1930s. (*Tr. vol. 2: 37, 120-121; IO Exhibit 11A and B*).

21. While Mr. Marves was approximately 20 feet from the WENDAMEEN, Captain Parker fired a shot to signal to Mr. Marves to slow down. (*Tr. vol.1: 149, 166; Tr. vol. 2: 116, 117; Exhibit G*).
22. Captain Parker never aimed the pistol at Mr. Marves. (*Tr. vol. 1: 149, 166; Tr. vol. 2: 38, 45, 49, 116, 120; Exhibit G*).
23. When Captain Parker discharged the pistol into the air, Mr. Marves desisted and then Captain Parker contacted the Coast Guard at approximately 6:15 p.m. to report the incident. (*Tr. vol. 1: 57-60, 76; Tr. vol. 2:159*).
24. Because of the noise from his jet ski, Mr. Marves never heard Captain Parker fire the antique black powder pistol. (*Tr. vol. 1: 54*).
25. Mr. Marves only noticed that Captain Parker was holding an object, which he believed was a flare gun. It was not until one week before the November 7, 2001 hearing in this case, that Mr. Marves became aware that Captain Parker had fired a pistol on July 25, 2001. (*Tr. vol. 1: 48, 49, 68*).
26. Mr. Marves' testimony that he saw three puffs of smoke is not credible. Captain Parker was incapable of firing 3 shots in quick succession with the single shot antique black powder pistol. (*Tr. vol. 1: 22; Tr. vol. 2: 42, 123*).
27. After Captain Parker fired the pistol, Mr. Marves turned, stopped his jet ski and positioned himself ten feet from the WENDAMEEN's stern and made verbal threats of bodily harm to Captain Parker and his passengers. (*Tr. vol. 2: 90, 132*).

28. Mr. Marves' jet ski is gasoline powered and posed a significant risk of explosion if it had collided with the WENDAMEEN. Thus, a jet ski can be used as a dangerous weapon.
(Tr. vol.1: 131; Exhibit S).

SELF-DEFENSE

29. Captain Parker used a reasonable amount of force to cause Mr. Marves to desist from maneuvering his jet ski in an unsafe manner when the Captain fired the antique black powder pistol. *(Tr. vol. 1: 57-60).*

NAVIGATION RULES DEFENSE

30. Mr. Marves' close maneuvers put the anchored and sail powered WENDAMEEN in distress. *(Tr. vol.1: 148-149, 152-153; Tr. vol. 2: 112-114).*
31. Captain Parker used the antique black powder pistol as a signaling device pursuant to the International Rules, commonly known as and hereinafter referred to as the "COLREGS."
(Tr. vol. 2: 127-128).
32. Captain Parker used the antique black powder pistol as a means of averting immediate danger. *(Tr. vol. 1: 148-149, 152-153; Tr. vol.2: 117).*

VIOLATION OF LAW--STOWAGE

33. When Captain Parker fired the antique black powder pistol, the black powder was being used as a warning device. *(Tr. vol. 2: 127-128).*
34. The black powder was stored in a watertight container aboard the WENDAMEEN in accordance with applicable regulations. *(Exhibit E).*

VIOLATION OF LAW--MATERIALS REQUIRING COMMANDANT APPROVAL

35. The black powder is classified as Division 1.1D explosive as defined in 49 CFR §173.2
(a). *(IO Exhibit 16).*

36. Since the black powder is classified as a Division 1.1D explosive, it is not subject to reclassification under Division 4.1. (49 C.F.R. §173.2; *IO Exhibit 16*).
37. The Commandant's approval was required for Captain Parker to carry the black powder aboard the WENDAMEEN. (*Tr. vol. 2: 5-6, 56; IO Exhibit 15*).
38. Captain Parker failed to obtain the Commandant's approval to carry black powder aboard the WENDAMEEN. (*Tr. vol. 1: 242*).
39. The Coast Guard did not waive Commandant approval requirement.³
40. The stowage and Commandant approval requirements regarding black powder are important in ensuring marine safety. (*Tr. vol.2: 6-8*).

IV.
RULINGS ON PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Both sides filed pleadings setting out numerous proposed findings. Due to the number of rulings involved, the specific proposals and the rulings are set out in Appendix B.

V.
STATUTES AND REGULATIONS INVOLVED

1. The Administrative Procedure Act is incorporated by reference in 46 U.S.C. § 7702, which governs this proceeding and reads as follows:

§ 7702. Administrative Procedure

(a) Sections 551-559 of title 5 apply to each hearing under this chapter [46 U.S.C. §§ 7701 et. seq.] about suspending or revoking a license, certificate of registry, or merchant mariner's document.
2. The general procedures governing suspension and revocation or merchant mariners' licenses and documents are set out in 46 U.S.C. §§ 7701-7705 and provides in pertinent part:

³ However "[w]hether an alleged waiver is expressed or implied, it must be intentional. Mere negligence, oversight, or thoughtlessness does not create a waiver." 28 AM JUR 2d. Estoppel and Waiver §158, at 842-843 (1964).

§ 7703. Bases for suspension and revocation

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder

- (1) when acting under the authority of that license, certificate or document
 - (A) has violated or fails to comply with this subtitle [citation omitted], a regulation prescribed under this subtitle [citation omitted], or any other law or regulation intended to promote marine safety or to protect navigable waters; or
 - (B) has committed an act of incompetence, misconduct, or negligence;

46 U.S.C. §7703.

3. The charge of Misconduct is defined at 46 C.F.R. § 5.27 as follows:

§ 5.27 Misconduct.

Misconduct is human behavior, which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act, which is forbidden or a failure to do that, which is required.

4. The "COLREGS" demarcation lines are discussed in 33 C.F.R. §80.105 in pertinent part, as follows:

§ 80.105 Calais, ME to Cape Small, ME

The 72 COLREGS shall apply on the harbors, bays, and inlets on the east coast from International Bridge at Calais, ME to the southwestern most extremity of Bald Head at Cape Small.

5. The 1972 Convention on the International Regulations for Preventing Collisions at Sea formalized the 72 COLREGS, which became effective on July 15, 1977, and is located at 28 U.S.C. 3549 providing in pertinent part as follows:

RULE 1 Application

- (a) These Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.

(b) Nothing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbours, rivers, lakes or inland waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules.

(c) Nothing in these Rules shall interfere with the operation of any special rules made by the Government of any State with respect to additional station or signal lights or whistle signals for ships of war and vessels proceeding under convoy, or with respect to additional station or signal lights for fishing vessels engaged in fishing as a fleet. These additional station or signal lights or whistle signals shall, so far as possible, be such that they cannot be mistaken for any light or signal authorized elsewhere under these Rules.

RULE 2

Responsibility

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

RULE 7

Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

RULE 8

Action to avoid collision

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

RULE 34

Maneuvering and warning signals

d) When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. Such signal may be supplemented by a light signal of at least five short and rapid flashes.

RULE 36
Signals to attract attention

If necessary to attract the attention of another vessel any vessel may make light or sound signals that cannot be mistaken for any signal authorized elsewhere in these Rules, or may direct the beam of her searchlight in the direction of the danger, in such a way as not to embarrass any vessel.

RULE 37
Distress signals

When a vessel is in distress and requires assistance she shall use or exhibit the signals prescribed in Annex IV to these Regulations.

ANNEX IV
DISTRESS SIGNALS

1. The following signals, used or exhibited either together or separately, indicate distress and need of assistance:

- (a) a gun or other explosive signal fired at intervals of about a minute;

6. Firearm is defined in 26 U.S.C. §5845 as follows:

§ 5845. Definitions

For purposes of this chapter-----

- (a) **Firearm.**---The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, an other characteristics is primarily a collector's item and is not likely to be used as a weapon.

7. Violation of law or regulation is defined at 46 C.F.R. § 5.33 as follows:

§ 5.33 Violation of law or regulation.

Where the proceeding is based exclusively on part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

8. Authorization for particular materials is discussed in pertinent part in the following regulations of 46 C.F.R. Parts A and B:

§ 147.1 Purpose and applicability

(b) This part applies to all vessels listed in 46 U.S.C. 3301 as subject to inspection under part B of U.S.C. Subtitle II.

§ 147.3 Definitions

As used in this part:

Hazardous material means *hazardous material* as the term is defined in 49 CFR 171.8.⁴

Hazardous ships' stores means ships' stores that are hazardous materials.

§ 147.40 Materials requiring Commandant (G-MSO) approval.

(a) Commandant (G-MSO) approval is required before the following hazardous materials may be on board a vessel as ships' stores:

* * *

(2) Explosives of Divisions 1.1 or 1.2

* * *

(4) Forbidden materials listed in 49 C.F.R. 172.101.

(b) Request for approval must be submitted to the Commandant (G-MSO), identify the material, and explain the need for its use.

§147.95 Explosives

(a) Explosives—general. Except as provided for elsewhere in this subchapter, explosives, as defined in 49 C.F.R. 173.50, which are hazardous ship stores must be stowed in a magazine which is constructed and located in accordance with 49 CFR 172.122 through 176.138.

(b) Small arms ammunition.

(c) Ships' signals and emergency equipment.

⁴ Hazardous material means a substance or material, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated. The term includes hazardous substances, hazardous wastes, marine pollutants, and elevated temperature materials as defined in this section, materials designated as hazardous under the provisions of Sect. 172.101 of this subchapter, and materials that meet the defining criteria for hazard classes and divisions in part 173 of this subchapter. 49 CFR 171.8

- (1) Explosive ship signals and emergency equipment, including pyrotechnic distress signals and line throwing equipment, must be stowed in watertight containers or wood lined magazine chests.
- (2) All pyrotechnic distress signals, rockets, and line throwing guns must be stowed in accordance with the requirements of 49 C.F.R. 176.140 through 49 C.F.R. 176.146.

9. Forbidden materials listed in 49 C.F.R. 172.101 is attached in Appendix B.
10. Small passenger vessels are subject to inspection pursuant to 46 U.S.C. §3301(8), which reads as follows:

§ 3301. Vessels subject to inspection

- (8) small passenger vessels.

11. The definition of small passenger vessel is discussed in 46 U.S.C. §2101(35) in pertinent part:

§ 2101. General definitions

In this subtitle-----

- (35) "small passenger vessel" means a vessel of less than 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14010 of this title-----

- (A) carrying more than 6 passengers, including at least on passenger for hire;
- (B) that is chartered with the crew provided or specified by the owner or the owner's representative and carrying more than 6 passengers;

12. Shippers requirements for certain materials is discussed in 49 CFR §173.50 in pertinent part as follows:

§ 173.50 Class 1 Definitions

Explosives in Class 1 are divided into six divisions as follows:

- (1) Division 1.1 consists of explosives that have a mass explosion hazard. A mass explosion is one which affects almost the entire load instantaneously.

13. Classifications of a material having more than one hazard are discussed in pertinent part in 49 C.F.R. § 173.2a as follows:

§173.2a Classification of a material having more than one hazard.

(c) The following materials are not subject to the provisions of paragraph (a) of this section because of their unique properties:

(1) A Class 1 (explosive) material that meets any other hazard class or division as defined in this part shall be assigned a division in Class 1.

14. The applicable procedural regulations governing this matter are codified at 33 C.F.R. Part 20.

**VI.
OPINION**

A. General

This matter is within the jurisdiction of the Coast Guard pursuant to 46 U.S.C. § 7703, which authorizes the Coast Guard to suspend or revoke a license or Merchant Mariner's document for Misconduct or Violation of Law or Regulation. In these proceedings, the Coast Guard has the burden of proving the allegations in the complaint by a preponderance of the evidence. 33 C.F.R. §§20.701 and 20.702; Appeal Decisions 2468 (LEWIN), 2477 (TOMBARI). See also Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). This proceeding was conducted under the provisions of 33 C.F.R. Part 20 and the Administrative Procedure Act, as amended and codified in 5 U.S.C. § 551 *et seq.*

In a complaint dated August 9, 2001, the Coast Guard charged Captain Parker with Misconduct resulting from the alleged assault of Mr. Marves. Also, Respondent was charged with two counts of Violation of Law or Regulation. The first alleges that Parker violated stowage laws by improperly storing black powder on the WENDAMEEN. The second count

alleges that the Respondent failed to obtain the required approval from the Commandant for the black powder. Each of the Coast Guard's allegations will be discussed in turn.

B. Misconduct

(1) Assault

Misconduct is defined as human behavior that violates a formal duly established rule. 46 C.F.R. § 5.27. It is well settled that assault is a form of misconduct. Appeal Decision 2561 (CARTER); 2198 (HOWELL); 1218 (NOMIKOS); Ladner v. United States, 358 U.S. 169, 177 (1958), Guarro v. United States, 237 F.2d 578, 580 (D.C. Cir. 1956). Assault is a willful attempt or threat to inflict injury upon the person of another, when coupled with the apparent ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. *Id.* An assault may be committed without actually touching, or striking, or doing bodily harm to a person. State v. Murphy, 500 P.2d 1276, 1284 (Wash. Ct. App. 1972); BLACK'S LAW DICTIONARY, 114 (6th ed. 1990); Appeal Decision 2561 (CARTER); 2198 (HOWELL); 1218 (NOMIKOS).

In the instant case, the Coast Guard failed to prove that Captain Parker assaulted Mr. Marves. The Coast Guard's assault allegation heavily rests on Mr. Marves' testimony, which is not credible. Moreover, Captain Parker has established that the black powder antique replica pistol was fired in self-defense and as a navigational signal to alert Mr. Marves of impending collision.

(a) Willful Attempt or Threat

The first element of assault is that there must be a willful attempt or threat to inflict bodily injury on a person. Appeal Decision 2561 (CARTER); 2198 (HOWELL); 1218 (NOMIKOS). Mr. Marves' testimony failed to establish that Captain Parker willfully attempted

or threatened him with bodily harm. Mr. Marves testified that Captain Parker pointed and fired a pistol at him while standing on the top deck of the WENDAMEEN. (*Tr. vol. 1:22*). Yet Mr. Marves also testified that he saw the profile of the gun, when Captain Parker discharged it. (*Tr. vol. 1:22, 68-69*). Mr. Marves also testified that he saw three puffs of smoke when Captain Parker discharged the antique black powder pistol. (*Tr. vol.1:22*). However, the facts show that there was only one puff of smoke since the antique black powder pistol is a single shot pistol. (*Tr. vol. 2:121-123*). Also, based on the configuration of the schooner and the fact that dinghies or life boats are located on either side in the middle of the top deck, it would have been virtually impossible for Mr. Marves to see Captain Parker admidships or aft midships from 20 feet away. (*Tr. vol. 2:120; Exhibit J1-7*).

The evidence in this case shows that Captain Parker's intention in discharging the pistol was to cause Mr. Marves to desist from operating his jet ski in a threatening manner and to avoid an impending collision. (*Tr. vol. 2:114-119, 132-133*). Captain Parker testified that only a percussion cap was in the pistol and he did not have a projectile in it, which lends further support to a finding that Captain Parker did not willfully attempt or threaten Mr. Marves with bodily harm. (*Tr. vol. 2:122*).

(b) Apparent Ability

The second element of assault is that there must be an apparent ability to inflict bodily harm. Appeal Decision 2561 (CARTER); 2198 (HOWELL); 1218 (NOMIKOS). An objective standard is used in determining whether there was an apparent ability to inflict bodily harm. The inquiry is whether a reasonable person would think that there is an apparent ability to inflict harm. Bauer v. Sampson, 261 F.3d. 775 (9th Cir. 2001). The circumstances in this case fail to establish that the Respondent had an apparent ability to inflict injury on Mr. Marves.

Mr. Marves testified that he saw Captain Parker's pistol as an object, which he assumed was a flare gun. (*Tr. vol. 1:68*). Even given that Mr. Marves thought that the antique black powder pistol was a flare gun, a reasonable person would see that Captain Parker could not readily move the sail powered and moored WENDAMEEN, while Marves' could leave the so-called "threatening" situation on his very fast jet ski. (*Tr. vol.2:36, 48-49, 87, 108-110, 142; Exhibit D*). Thus, Mr. Marves was unreasonable in determining that Captain Parker had an apparent ability to harm him.

Mr. Marves also testified that he thought Captain Parker fired a flare gun at him. (*Tr.vol.1:48-49*). Given that Mr. Marves was 15-20 feet away from the sail-powered and moored WENDAMEEN and given that Mr. Marves was on a fast-moving jet ski, he was unreasonable in determining that Captain Parker had an apparent ability to harm him. (*Tr. vol.2:36, 48-49, 87, 108-110, 117,142; Exhibit D*).

(c) Reasonable Expectation of Immediate Bodily Harm

The third element of assault is there must be a reasonable expectation of immediate bodily harm is an element of assault. Appeal Decision 2561 (CARTER); 2198 (HOWELL); 1218 (NOMIKOS). Here, the Coast Guard failed to establish that Mr. Marves had a reasonable expectation of immediate bodily harm from Captain Parker. As a matter of fact, the evidence shows that Mr. Marves did not fear immediate bodily harm from Captain Parker. Mr. Marves mistakenly believed that he was approximately 90 feet away from Captain Parker when the pistol was discharged. (*Tr. vol. 1:49-50*). Mr. Marves did not even hear the pistol being discharged. (*Tr. vol. 1:54*). All Mr. Marves observed was that Captain Parker was holding an object, which he assumed was a flare gun. (*Tr. vol. 1: 68*). It was not until one week before the November 7, 2001 hearing in this matter that Mr. Marves became aware that Captain Parker had discharged a

pistol. (*Tr. vol. 1: 48-49,68*). Given the facts that Mr. Marves did not hear the pistol being discharged and he did not even know that Captain Parker had a pistol, Mr. Marves could not have reasonably feared immediate bodily harm.

Mr. Marves' actions following the alleged assault lend further support to a finding that he did not possess a reasonable expectation of immediate bodily harm from Captain Parker. The facts show that after Captain Parker fired the pistol, Mr. Marves turned and stopped his jet ski and positioned himself 10 feet from the WENDAMEEN's stern and verbally threatened to inflict bodily harm on Captain Parker and his passengers. (*Tr. vol. 2:89-90, 132*). These actions fail to show that Mr. Marves expected immediate bodily harm or even had reason to expect immediate bodily harm from Captain Parker.

(2) Self-Defense

Assuming, arguendo, that Mr. Marves was assaulted by Captain Parker, self-defense justifies an assault in these cases so long as it is defensive and not retaliatory. Appeal Decision 2391 (STUMES). Self-defense is only that amount of force sufficient to cause the assailant to desist. *Id.* See also Appeal Decision 2163(WITTCH); 1803 (PABON); 1975 (GRADDICK); 2193 (WATSON); 2290 (DUGGINS). The evidence establishes that Captain Parker acted in self-defense.

In the instant case, Mr. Marves operated his gasoline powered and potentially dangerous jet ski at a speed of about 35 miles per hour in Pulpit Harbor. (*Tr. vol. 1: 148-149, 160-165; Tr. vol. 2: 48-49, 88, 90, 93,111-115*).⁵ Mr. Marves began doing "donuts," wheelies and other high-

⁵ Based on accident data compiled by the U.S. Coast Guard, jet skies are disproportionately involved in 30 percent of all boating accidents and nearly 40 percent of all boating injuries. Although 40 mph might not appear fast, at this speed a jet ski will travel almost 60 feet per second. According to the National Transportation Safety Board (NTSB), while most conventional boating deaths result from drowning. The leading cause of death in jet ski accidents is blunt-force trauma. The top four cause of jet ski accidents are:

1. careless/reckless operation
2. operator/inexperience

speed maneuvers in close proximity to the WENDAMEEN. (*Tr. vol. 1:48-50, 148-149,160-165; Tr. vol. 2: 88, 90, 93, 111-115*). Mr. Marves was so close to the WENDAMEEN that he almost sprayed the passengers with water, as he performed his jet ski maneuvers. (*Tr. vol. 1:164-165; Tr. vol. 2:112-115*). When Captain Parker motioned for Mr. Marves to slow down, Mr. Marves ignored Captain Parker. (*Tr. vol.1:152, 165; Tr. vol. 2:37, 114*). Instead, Mr. Marves continued to circle the WENDAMEEN and began shouting profanities at Captain Parker. (*Tr. vol. 1:152*). Then, Mr. Marves left Pulpit Harbor only to quickly return. (*Tr. vol.2:37, 114-115*).

Upon return, Mr. Marves' maneuvers became more intimidating. Mr. Marves approached the WENDAMEEN head on, turning away from the WENDAMEEN just in time to avoid a collision. (*Tr. vol. 1: 148-149, 152-153; Tr. vol. 2: 113*). These maneuvers made Captain Parker and his passengers feel threatened that harm was imminent. (*Tr. vol.1:152-153,167-169, 172; Tr. vol. 2: 38-39, 49, 90*).

In order to warn Mr. Marves of the imminent collision and to cause him to slow down, Captain Parker fired the antique black powder pistol that was aboard the WENDAMEEN while Mr. Marves was approximately 20 feet away. (*Tr. vol. 1:166; Tr. vol. 2:116,117*). Captain Parker did not aim the pistol at Mr. Marves. (*Tr. vol. 2:38, 45, 49, 116, 120, 162; Exhibit G*). When Captain Parker discharged the pistol into the air, Mr. Marves desisted and then Captain Parker contacted the Coast Guard at approximately 6:15 p.m. to report the incident. (*Tr. vol. 1: 60, 76; Tr. vol. 2:159*). Based on the facts of this case, I find that Captain Parker used a sufficient amount of force to cause Mr. Marves to desist from assaulting him and the WENDAMEEN and thus acted in self-defense.

-
3. operator inattention, and
 4. excessive speed.

These factors cause 78 percent of all jet ski accidents. UNITED STATES COAST GUARD, UNITED STATES DEPARTMENT OF TRANSPORTATION, BOATING STATISTICS---- 1999. (See Respondent Exhibit S, p. 1).

(3) Discharge of a Pistol as a Warning Device

Since the events in this matter occurred in Pulpit Harbor, ME, the COLREGS apply. 33 C.F.R. § 80.105; 28 U.S.C. § 3459. The COLREGS apply to vessels, such as the WENDAMEEN, which is a small passenger vessel, and Mr. Marves' jet ski, which is personal watercraft vessel. 28 U.S.C. § 3459; 46 U.S.C. § 2101; 1 U.S.C. § 3; Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11th Cir. 1990); Complaint of Dillahey, 733 F.Supp. 874 (D. NJ 1990); In re Royal Carribean Cruises, Ltd., 55 F. Supp.2d. 1367 (S.D.Fla. 1999). The applicable rules in this case are located in Rule 2, 7, 8, 34 and 37 of the COLREGS. 28 U.S.C. § 3459.

Rule 2 of the COLREGS requires a mariner to exercise due regard with respect to all dangers of navigation and collision and to any special circumstances. *Id.* Rule 2 also requires a mariner to exercise precaution, which may be required by the ordinary practice of seamen, or by the special circumstances of the case. *Id.* With respect to navigation, Rule 7 requires a vessel operator to assume that a risk of collision exists if there is any doubt that collision exists and Rule 8 requires a vessel operator take prompt and sufficient action to avoid a collision. *Id.*

In order to avoid or otherwise warn of collision, mariners may use various signals. Under Rule 34, a vessel master may blast its whistle or flash his light five times when he fails to understand the intention of another vessel. *Id.* In addition, Rule 36 allows a seaman to use a light or sound signal to attract attention. *Id.* A pistol is classified as a warning device under the Sounds and Light section of the COLREGS. *Id.* (Annex IV). Rule 37 specifically allows a vessel to use a gun or explosive, such as a pistol, to warn another vessel of the risk of collision when said vessel is in distress. 28 U.S.C. § 3459.

Here, Captain Parker gave due regard to Mr. Marves' dangerous maneuvers around the WENDAMEEN. (*Tr. vol. 2:110-117*). Captain Parker observed Mr. Marves doing donuts and

other maneuvers around children swimming in the Pulpit Harbor earlier that evening. (*Tr.vol.2: 111-112*). Captain Parker invoked his 25 years of experience as a sea captain to determine that a risk of collision existed as required by Rule 7 of the COLREGS. 28 U.S.C. § 3459; (*Tr. vol. 2:101, 117*). By operating his jet ski at speeds between 25 to 35 miles per hour within 15 to 20 feet of the WENDAMEEN, Mr. Marves placed the moored and sail-powered vessel in distress. (*Tr. vol. 2:112-115*). Since Mr. Marves' jet ski was being operated in dangerously close proximity to the moored WENDAMEEN and Pulpit Harbor was crowded, Captain Parker could not maneuver the vessel and avoid an imminent collision. Doing so would have required Captain Parker to draw up the anchor to unmoor the WENDAMEEN and operate and steer the sail powered vessel, which would have resulted in an unreasonable delay. Thus, I find that Captain Parker acted prudently in using and discharging the pistol as a warning device of the risk of collision in accordance with Rule 37 of the COLREGS.

C. Violation of Law

(1) Stowage Laws

Since the WENDAMEEN is a vessel that weighs less than 100 gross tons and carries more than 6 passengers and is chartered with a crew, the WENDAMEEN is a small passenger vessel subject to Coast Guard inspection laws and regulations. 46 U.S.C. § 2101(35); 46 U.S.C. § 3301(8). Coast Guard inspection regulations require proper stowage of hazardous materials. 46 C.F.R. § 147.95. The black powder used by Captain Parker on board the WENDAMEEN is classified as a Division 1.1D explosive. 46 C.F.R. § 147.3; 49 C.F.R. §§ 172.101(a) *table*; 173.50. Captain Parker primarily used the black powder for his antique black powder pistol as a signaling device/explosive. 46 C.F.R. §147.95(c); (*Tr. vol.2: 127-128, 136*).

Under 46 C.F.R. § 147.95(c)(1), explosive ships' signals, such as the black powder, are required to be stowed in a watertight container. In this case, Captain Parker properly stowed the black powder in a watertight container aboard the WENDAMEEN pursuant to 46 C.F.R. § 147.95(c)(1). (*Exhibit E*). Accordingly, the Coast Guard failed to establish by a preponderance of reliable and credible evidence that Captain Parker violated Coast Guard stowage laws and regulations.

(2) Commandant Approval to Store the Black Powder Aboard

While Captain Parker properly stowed the black powder aboard the WENDAMEEN, he failed to secure Commandant approval prior to carrying the black powder aboard the vessel as required by 46 C.F.R. § 147.40. Under 46 C.F.R. § 147.40(a)(2), Commandant approval is required before a Division 1.1D explosive can be stored aboard a vessel. The mere fact that Captain Parker removed the black powder from the WENDAMEEN after the Coast Guard cited him for carrying the black powder without Commandant approval does not absolve him from the violation of 46 C.F.R. § 147.40. See (*Tr. vol. 1:131, 237-238; Tr. vol. 2:153-154*).

Moreover, while there are several exceptions to the Commandant approval requirement, none of these exceptions apply in this case. Since the black powder is a Division 1.1 explosive, the small quantity exception for Division 4.1 explosives is inapplicable. See 49 C.F.R. §§ 173.2a(c) and 173.4(a). Furthermore, the exception under 46 C.F.R. § 147.9 also does not apply because Captain Parker never submitted a written request to the Coast Guard seeking a waiver of the Commandant approval requirement with respect to the black powder. In fact, prior to the Coast Guard issuing the citation for violating 46 C.F.R. § 147.40, Captain Parker was unaware that he needed Commandant approval to carry the black powder aboard the WENDAMEEN. (*Tr. vol 2:154*). Last, Captain Parker's argument that the Coast Guard waived the requirement

that a mariner obtain Commandant approval prior to carrying an explosive ships' signal, such as the black powder, is untenable. Captain Parker's constructive waiver argument is flawed because waiver requires a showing of intent. 28 Am. Jur. 2d., *Estoppel and Waiver* § 158, at 842-843 (1964). While the Coast Guard may have overlooked its regulation with respect to the black powder, the Coast Guard never exhibited any intent to waive the black powder regulation.⁶ Thus, I find that the Coast Guard did not impliedly or constructively waive the Commandant approval requirement as it relates to carrying black powder aboard the WENDAMEEN.

(3) De minimis Defense

Captain Parker's alternative defense is that the regulations requiring Commandant approval prior to carrying the black powder aboard a vessel are de minimis. This argument is rejected. The term "de minimis" also known as "de minimis non curat lex" refers to an unimportant or trifling matter. BLACK'S LAW DICTIONARY, 431 (6th ed. 1990). Contrary to the inference derived from Captain Parker's argument, violating a hazardous material regulation by failing to secure Commandant approval is not an unimportant or trifling matter. The Coast Guard regulates the carriage of black powder for several reasons. First, black powder is classified as an explosive under 49 C.F.R. § 173.50(b)(1). Second, requiring prior Commandant approval allows the Coast Guard to ensure that mariners fully understand the dangers and risks involved in maintaining black powder on board a vessel. (*Tr. vol. 2:7*). Third, by regulating the carriage of black powder on board a vessel, emergency response personnel are notified of hazardous materials aboard a vessel before boarding said vessel. *Id.*

⁶ See footnote no. 2

VII.
CONCLUSION

The preponderance of evidence in the record does not support a finding that Captain Parker assaulted Mr. Marves when he fired an antique black powder pistol on July 25, 2001 in Pulpit Harbor, ME. The preponderance of evidence in the record also does not support a finding that Captain Parker improperly stowed black powder aboard the WENDAMEEN. However, the Coast Guard has established by a preponderance of evidence in the record that Captain Parker failed to obtain Commandant approval to carry black powder aboard the WENDAMEEN. Thus, Captain Parker is subject to an appropriate sanction.

Given the facts and circumstances of this case, a one month suspension of Captain Parker's license remitted on six months probation is appropriate. Additionally, Captain Parker is prohibited from carrying black powder aboard the WENDAMEEN until he obtain the required approval of the Commandant of the Coast Guard. The maritime community where Captain Parker operates the WENDAMEEN and passengers of the WENDAMEEN highly regard Captain Parker. Moreover, he does not have a record of prior violations. He appears to be a responsible mariner who was not aware of the black powder regulations regarding Commandant approval

WHEREFORE,

VIII.
ORDER

IT IS ORDERED that the charge of Violation of Law for failure to obtain Commandant approval for the carriage of black powder aboard the WENDAMEEN is **PROVED**.

IT IS FURTHER ORDERED that the charge of Misconduct for Assault is **NOT PROVED** and is hereby **DISMISSED**.

IT IS FURTHER ORDERED that the charge of Violation of Law for improper stowage of black powder aboard the WENDAMEEN is **NOT PROVED**, and it is hereby **DISMISSED**.

IT IS FURTHER ORDERED that, if the Respondent wishes to carry black powder aboard any vessel subject to Coast Guard inspection, he must first obtain Commandant approval. Should he fail to obtain Commandant approval to carry black powder or any other material requiring Commandant approval under Part 47 of Title 49 C.F.R., Respondent will be in direct violation of this Order.

ORDERED that the service of this Decision on the Respondent's counsel will serve as notice to the Respondent of his right to appeal, the procedure for which is set forth in 33 C.F.R. 20.1001-20.1003. (Attachment 1).

PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated this March 4, 2002 at
Norfolk, VA

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing DECISION AND ORDER upon the following parties to this proceeding at the address indicated by e-mail and Federal Express:

LT Edmond Miner
Marine Safety Office Portland
103 Commercial Street
Portland, ME 04101-4726
Phone: 207-780-3673

William H. Welte, Esq.
13 Wood Street
Camden, ME 04843-2036
Phone: 207-236-7786

Lucinda H. Shinault, CLA
Legal Assistant to the Administrative Law Judge

Done and Dated this March 4, 2002 at
Norfolk, Virginia

APPENDIX A

LIST OF WITNESSES AND EXHIBITS

Coast Guard's Witnesses:

1. Ryan Marves
2. Eric Roy
3. Joshua R. Lemoi
4. Timothy Carroll
5. Brian Tolman
6. Scott White
7. Randall Place
8. Wayne Hennessy
9. Kenneth Albee

Respondent's Witnesses:

1. Lewis F. Lester
2. Thomas D. Wister
3. Orlando Tibbetts
4. Brenda Walker
5. Ed Glaser
6. Trevor Readinger
7. Daniel Parker
8. Sean Wentworth
9. Emily Morand
10. Kelly Marden
11. Neal Parker
12. Edmond Miner

Coast Guard's Exhibits:

1. Navigation Rules
2. Rule 1
3. International Rules 2 & 3
4. International Rule 7
5. International Rule 8
6. International Rules 32 & 33
7. International Rule 34
8. International Rule 36
9. International Rule 37
10. International Rule and stress signal
11. A, B Antique Pistol
11. C, D, E Photos

12. Title 36, Shipping, section 147
13. Title 46, section 147.3
14. Title 46, section 147.15
15. Title 46, section 147.40
16. Hazardous Materials tables
17. 49 C.F.R. section 173.52
18. Title 49, section 173.52
19. 49 C.F.R., section 176.166
20. 49 C.F.R., section 176.137 and 138

Respondent's Exhibits:

- A. Photo, jet ski
- B. Photo, jet ski
- C. Chart, Pulpit Harbor
- D. Boarding Report
- E. Box of Black Powder
- G. Interviews/statements
- H. Interviews/statements
- I. Resume
- J1-J7 Photos
- K. Log
- L. Comments from passengers
- M. Photo
- N. Booklet, History of Schooner
- O. Coast Guard Response
- P. Special Notice to Mariners
- Q. Press Herald Release 8/3/01
- R. Marine Transportation Report
- S. Boating Statistics
- T. Back History Information
- U. Certificate of Inspection
- V. Statement of Mrs. Elizabeth Minot (Not Admitted)
- W. Statement of Adam Campbell (Not Admitted)

APPENDIX B

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. COAST GUARD PROPOSED FINDINGS OF FACT

On January 10, 2002 the Investigating Officer submitted Proposed Findings of Fact and Conclusions of Law. My rulings on the Proposed Findings of Fact are as follows:

1. The Respondent, Neal E. Parker, is the holder of a Coast Guard issued License No. 923467.

RULING: ACCEPTED AND INCORPORATED.

2. That the WENDAMEEN, a certificated passenger vessel, was on the navigable waters of the United States under the command of the Respondent on July 25, 2001.

RULING: ACCEPTED AND INCORPORATED.

3. That the WENDAMEEN was carrying passengers under the authority of its Certificate of Inspection on July 25, 2001.

RULING: ACCEPTED AND INCORPORATED.

4. That at approximately 6 p.m., Eastern Time, on July 25, 2001, the WENDAMEEN was anchored in Pulpit Harbor, North Haven, Maine.

RULING: ACCEPTED AND INCORPORATED.

5. That on July 25, 2001, at approximately 6:00 p.m., Mr. Ryan Marves of North Haven, Maine was operating a jet ski in Pulpit Harbor, Maine.

RULING: ACCEPTED AND INCORPORATED.

6. That the Respondent fired a black powder pistol in the general direction of Mr. Ryan Marves three times. (TR 2, pg. 117 L 7).

RULING: REJECTED.

7. That the Respondent fired the black powder pistol in the direction of Mr. Marves in a threatening manner in order to scare Mr. Marves away from the vicinity of the WENDAMEEN.

RULING: REJECTED.

8. That when the Respondent fired the black powder pistol, Mr. Marves felt threatened and in fear of his safety. (TR 1, pg. 25 L 17-20, Pg 39 L 18-22).

RULING: REJECTED.

9. That the Coast Guard was notified at 1815 hours of a jet ski operating erratically in Pulpit Harbor, North Haven, Maine and responded by sending a Coast Guard boarding team to investigate the report.

RULING: ACCEPTED AND INCORPORATED. The Respondent notified the Coast Guard of the incident.

10. That the Coast Guard Boarding team boarded the WENDAMEEN at 1940 hours on July 25, 2001 in Pulpit Harbor to investigate the report of shots fired.

RULING: ACCEPTED AND INCORPORATED.

11. That the Maine Marine Patrol was notified by the Coast Guard regarding the report of an erratic jet ski operator and responded by sending Maine Marine Patrol Officer Tolman to investigate.

RULING: ACCEPTED AND INCORPORATED.

12. That the USCG Boarding Officer Boatswain's Mate Second Class Joshua Lemoi, USCG took possession of the black powder gun for officer safety and removed the weapon from the WENDAMEEN because it was considered a dangerous weapon. (TR1 Pg 81 L 16-24).

RULING: ACCEPTED AND INCORPORATED.

13. That Marine Patrol Officer Carroll testified that had he been in Mr. Marves position when the Respondent fired his weapon, he would have believed himself to be in imminent danger and would have drawn his weapon in return. (TR 1 Pg 191 L 11-15).

RULING: ACCEPTED AND INCORPORATED.

14. That Marine Patrol Officer Tolman testified that when the Respondent was asked by him to state what happened, the first thing the Respondent stated was that he did something he shouldn't have. (TR1, Pg 195 L 1-2, Pg 208 L 3-6).

RULING: ACCEPTED AND INCORPORATED.

15. That Respondent claims there was no ball in the pistol when he fired the pistol towards the Jet Ski Operator Mr. Marves. That respondent aimed the black powder pistol toward the jet ski operator, Mr. Marves. (TR 1, Pg 195 L 25, Pg 196 L 1-4).

RULING: ACCEPTED IN PART, REJECTED IN PART. The Respondent did not aim at Mr. Marves. (TR. Vol. 1: 69; Tr. Vol 2:38, 45, 49, 52, 116, 120, 162, 166).

16. That Mr. Marves did not know that the black powder pistol was unloaded.

RULING: ACCEPTED AND INCORPORATED. At the time of the incident, Mr. Marves did not know a black powder pistol was involved. (Tr. Vol 1:48, 49, 68).

17. Surrounding boaters located in Pulpit Harbor on July 25, 2001 did not consider Mr. Marves to be operating in a hazardous, or reckless manner. (TR1, Pg 176 L 18-21, Pg 198 L 1-25, Pg 199 L 1-25, Pg 200 L1-7).

RULING: REJECTED.

18. That there was no evidence which led investigators of the Maine Marine Patrol or the U.S. Coast Guard to conclude that Mr. Marves was operating in a reckless or unsafe manner on July 25, 2001 in Pulpit Harbor.

RULING: REJECTED.

19. Maine Marine Patrol Officers would have placed the Respondent under arrest that evening if he did not have passengers aboard his vessel. (TR 1 Pg 202 L 25, Pg 203 L 1-3).

RULING: ACCEPTED AND INCORPORATED. The Officer testified to that effect.

20. Respondent had no reasonable evidence to determine that Mr. Marves was going to ram his vessel and stated, "I don't have to be sure. I just have to feel unsafe." (TR 2 Pg. 169 L 24-25).

RULING: REJECTED.

21. That no passengers onboard the WENDAMEEN have expressed concern for their safety or well being immediately after the incident, or the next day. (TR 1, Pg 93 L 1-3, Pg 155 L 21-24, Pg 197 L 6-14).

RULING: REJECTED.

22. That no entry into the ship's log by the passengers indicate they were in fear of their well being or safety on July 25, 2001 due to Mr. Marves' operation of the jet ski, nor did the Respondent make any entry regarding the threats made against him, nor action to be taken for safety/security of the vessel. (TR 2 Pg 142 L 12-23, Pg 172 L 5-21).

RULING: ACCEPTED AND INCORPORATED TO THE EXTENT THERE IS NO SUCH ENTRY.

23. That a one-pint can of black powder, as defined in 49 CFR Part 173.52 Table 1, which was used as a propellant in the pistol used by the Respondent, was kept in the Captain's cabin on the WENDAMEEN in a canvas bag. (TR 1, Pg 236 L 21-23).

RULING: REJECTED. The small amount of black powder involved was stowed in a water tight container.

24. That the Respondent did not have a letter of authorization from the Commandant of the Coast Guard to have the black powder aboard his vessel. (TR1, Pg 238 L 1).

RULING: ACCEPTED AND INCORPORATED.

25. That Respondent violated 46 CFR Part 147.40 by having black powder aboard his vessel without authorization from the Commandant of the Coast Guard.

RULING: ACCEPTED AND INCORPORATED.

26. That Respondent had black powder stowed improperly in his personal cabin, in a canvas bag, next to the engine room. (TR 1, Pg 235 L 5-18).

RULING: REJECTED. The black powder was stowed in a water tight container.

27. That the required stowage of black powder aboard passenger vessels is set forth in 49 CFR Part 176.

RULING: ACCEPTED AND INCORPORATED.

28. That paragraph 1 (a) of Annex IV of the Rules of the Road states that, "a gun or other explosive signal *fired at intervals of about a minute,*" (emphasis added) indicate distress and need of assistance. IO EXHIBIT 10.

RULING: ACCEPTED AND INCORPORATED.

29. At no time did the Respondent transmit a "Mayday" call, or a request for assistance to justify his use of a distress signal. (TR1 Pg 80 L 2-7, Pg 98 L25, Pg 199 L1-5, PG 176 L2-5, Pg 200 L 12-18).

RULING: ACCEPTED IN PART, REJECTED IN PART. The Respondent did not transmit a "Mayday" call.

30. That paragraph 2 of Annex IV of the Rules of the Road states that "The use or exhibition of any of the foregoing signals *except for the purpose of indicating distress and need of*

assistance (emphasis added) and the use of other signals which may be confused with any of the above signals is prohibited.” IO Exhibit 10.

RULING: ACCEPTED AND INCORPORATED.

31. That Respondent failed to notify the authorities of a dangerous situation involving the operation of the Jet Ski by Mr. Marves until after he had fired his weapon at Mr. Marves.

RULING: ACCEPTED IN PART, REJECTED IN PART. The operation of the jet ski by Mr. Marves did create a dangerous situation to the WENDAMEEN. Respondent timely notified the Coast Guard.

32. That the black powder pistol takes approximately 4 minutes to reload and that to fire three shots would take 12-15 minutes. (TR 2, Pg 123 L 1-13).

RULING: ACCEPTED AND INCORPORATED.

33. Respondent had the responsibility to ensure all requirements set forth in regulation are adhered to with regards to the stowage of hazardous materials aboard his vessel. CDOA No. 2478 (DUPRE).

RULING: ACCEPTED AND INCORPORATED.

34. That Respondent never researched regulations governing storage of black powder because it was his understanding from over 25 years in the Windjammer business that these cans were permissible.” (TR 2, Pg 163 L 5-6). Contrary to his testimony that he had no experience with black powder weapons. (TR 2, Pg 121 L 10-11).

RULING: ACCEPTED AND INCORPORATED.

35. That Respondent admits to using the weapon as a display of force against Mr. Marves. (TR 2, Pg 139 L 3-4).

RULING: ACCEPTED IN PART, REJECTED IN PART. The Respondent acknowledged that he had the black powder pistol in his hand.

36. That after finding out that there was an authorization letter required to carry black powder, Respondent made no effort to comply with the regulations. (TR 2, Pg 76 L 7-11, Pg 176 L 7-9).

RULING: ACCEPTED to the extent that the Respondent did not have the authorization letter as of the date of the hearing.

37. That the Respondent had a responsibility to take other means to defending himself before using force against Mr. Marves.

RULING: REJECTED. The Respondent's actions were reasonable under the circumstances.

38. The Respondent failed to take any other action to defend his apprehension of force from Mr. Marves prior to firing a black powder pistol at Mr. Marves.

RULING: REJECTED. See number 37 above.

39. That Respondent's fear that the jet ski operated by Mr. Marves was going to be physically driven into the WENDAMEEN was unfounded and irrational, and does not serve as an excuse for Counsel for Respondent, in his motion to dismiss, erroneously claims that Mr. Marves did not flee, hence he was not in fear of danger, which is dispelled by the theory that when a person is in a situation of stress, he will either "Fight" or "Flight." Mr. Marves in this case chose the "Fight" track rather than the "Flight" track.

RULING: REJECTED.

B. COAST GUARD PROPOSED CONCLUSIONS OF LAW

1. That 46 United States Code (U.S.C.) § 7701 provides for the conduct of Suspension and Revocation proceedings.

RULING: ACCEPTED AND INCORPORATED.

2. That 46 U.S.C. § 7703(1) When acting under the authority of that license, certificate or document-
- (A) has violated or fails to comply with this subtitle of regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or
 - (B) has committed an act of incompetence, misconduct, or negligence;

RULING: ACCEPTED AND INCORPORATED.

3. That the investigating officer has the burden of proof in Suspension and Revocation proceedings. 46 C.F.R. § 5.539. In order to establish a prima facie case of Assault with a dangerous weapon the Coast Guard must establish that the respondent was the individual who committed the assault, and that it placed Mr. Marves in fear of his well being. In order to establish a prima facie case of Violation of Law or Regulation, the Coast Guard must establish that the Respondent had black powder aboard his vessel without authorization.

RULING: ACCEPTED AND INCORPORATED.

4. That once the Coast Guard presents a *prima facie* case of Misconduct – Assault with a dangerous weapon and Violation of Law or Regulation as grounds for suspension, the burden shifts to the Respondent to show that his conduct did not constitute Misconduct or that he did not violate a Law or Regulation.

RULING: REJECTED. The burden of proof is always on the Coast Guard.

5. That the standard of proof for hearings conducted under 46 C.F.R. Part 5 is that “findings must be supported by and in accordance with the reliable, probative and substantial evidence” which is “of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters.” 46 C.F.R. § 5.63.

RULING: ACCEPTED AND INCORPORATED.

6. 33 C.F.R. Part 20.803 states that hearsay evidence is admissible in proceedings governed by this part. The ALJ may consider the fact that evidence is hearsay when determining the probative value.

RULING: ACCEPTED AND INCORPORATED.

7. The Administrative Law Judge determines how much weight to assign particular evidence. The Federal Rules of Evidence provides guidance in determining what evidence is admissible and may be considered reliable and probative in administrative hearings but strict adherence to the rules of evidence observed in courts is not required. CDOA Nos. 2382 (BRUCE) and 2506 (SYVERSTEN).

RULING: ACCEPTED AND INCORPORATED.

8. That Black’s Law Dictionary, 5th Edition, defines “Assault” as:

“Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An Assault may be committed without actually touching, or striking, or doing bodily harm to the person of another. State v. Murphy, 7 Wash. App. 505, 500 P.2d 1276, 1281 (date). Frequently used to describe illegal force which is technically a battery. For crime of assault, victim need not be apprehensive of fear if the outward gesture is menacing and defendant intends to harm, though for tort of assault, element of victim’s apprehension is required. Commonwealth v. Slaney, 345 Mass. 135 (1962).”

RULING: ACCEPTED AND INCORPORATED.

9. That a March 1, 2001 decision of the Northern Berkshire District Court, Commonwealth of Massachusetts, (Northern Berkshire (MA) District Court Docket 0028CR000191) held that “producing a weapon is a convictable offense of Assault with a Dangerous Weapon. In that case, the defendant merely held up a weapon in view of another driver while she was driving her car, which resulted in her arrest and a “guilty” finding.”

RULING: ACCEPTED AND INCORPORATED.

10. That Maine Revised Statutes Chapter 17-A, sec. 209 provides that a person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury. Criminal threatening is a Class D crime. That the crime of Criminal threatening in Maine is equivalent to an assault and the 1975 comment to Maine Revised Statutes, Chapter 17-A, section 209 states that, “[i]t (section 209) essentially provides a penalty for committing a common law assault...”

RULING: ACCEPTED AND INCORPORATED.

11. An Assault may be committed without actually touching, or striking, or doing bodily harm to the person of another. State v. Murphy, 7 Wash. App. 505, 500 P.2d 1276, 1281.

RULING: ACCEPTED AND INCORPORATED.

12. Respondent had the responsibility to ensure all requirements set forth in regulation are adhered to with regards to the stowage of hazardous materials aboard his vessel. CDOA No. 2478 (DUPRE) stated, “Fed. Statute and regulations respectfully set forth in 46 USC 3313 & 47 CFR 97.50-1(a) require that a vessel comply with the conditions of operation provided in the Certificate of Inspection at all times unless specifically granted an exemption. The vessel operator is expected to know the requirements and status of the COI for his vessel. . . . The requirement to comply with the COI, being duly established statutory requirement, was clearly violated and consequently, the charge of misconduct was proved.”

RULING: REJECTED to the extent that the Respondent met the stowage requirements involved.

13. A clear prior record does not preclude revocation for a serious act of violence that could have been lethal. See NTSB decision EM-177 (a case of Misconduct with Assault appealed to the NTSB). See also Commandant v. Keating, 2 NTSB 2654, 2657 (1973).

RULING: ACCEPTED AND INCORPORATED.

14. In utilizing a “Self Defense” claim, Commandant clearly states that, “The only real provocation which justifies the use of force is an *actual attack* (emphasis added) leaving the victim with no means of defense except the use of force.” CDOA 2193 (WATSON). See also 2290 (DUGGINS) (Stating that the victim was in reasonable apprehension that the appellant was going to strike him since the appellant was brandishing a fire hose

nozzle in a threatening manner and offering to inflict bodily harm, and using obscene language and threatening him verbally. Additionally stating that "The only real provocation which justifies the use of force is an actual attack leaving the victim with no means of defense except the use of force.)

RULING: ACCEPTED AND INCORPORATED.

15. No Conclusion of Law was given for this number.
16. CDOA 2163 (BERTI) defines an assault as,"An assault is committed by putting another person in apprehension of harm when there is the apparent present ability to inflict injury whether or not the aggressor actually intends to inflict or is capable of inflicting harm. Ladner v. United States (1958), 358 U.S. 169, 177; Guarro v. United States (C.A.D.C., 1956), 237 F.2d 578, 580; Commandant's Appeal Decision No. 1218."

RULING: ACCEPTED AND INCORPORATED.

17. CDOA 2171 (DEIBAN) discussed assault and stated, "A fear or apprehension of imminent harm even though honestly held by the individual does not establish the justification of force. Earlier decisions have referred to the fact that the only real provocation which justifies the use of force is an actual attack.

RULING: ACCEPTED AND INCORPORATED.

18. CDOA 715 (ROLL), a Master of the vessel was found to have committed misconduct for failure to comply with inspection requirements. That decision stated that it was the Master's responsibility to comply with the inspection requirements if the ship's agents failed him: ignorance of the inspection requirements or ability to obtain a waiver was not a defense. The decision stated, "... this was a definite violation of the inspection laws and it cannot be dismissed on the speculative ground that since the Marine Inspection Officer at San Juan would probably have issued a waiver, then this was merely a technical offense which should be overlooked. . . . Regardless of the absence of any resultant injury, this was clearly an act of misconduct by the Appellant." CDOA 715 (ROLL).

RULING: ACCEPTED AND INCORPORATED.

C. RESPONDENT'S PROPOSED FINDINGS OF FACT

On January 10, 2002 the Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law and Post Trial Brief. My rulings on the Proposed Findings of Fact are as follows:

1. The respondent Neal E. Parker is the holder of Coast Guard license, No. 923467 which certifies him as having been duly examined and found competent to serve as master of steam, motor or auxiliary sail vessels of not more than 100 gross tons upon near coastal waters. It was most recently issued on April 19, 2001 for a term of five years and has had five renewals without incident since 1976, its original year of issue. TR. 5/19-25-4/4.

RULING: ACCEPTED AND INCORPORATED.

2. Capt. Neal Parker carries passengers for hire on day and overnight trips in Penobscot Bay, Maine aboard the Schooner WENDAMEEN, a business he runs as a sole proprietor. Tr. V2 at 105.

RULING: ACCEPTED AND INCORPORATED.

3. Capt. Parker is a professional mariner who stays current with industry trends and developments and keeps himself informed as to the nature of the industry. Tr. 260. He is well regarded in the industry and is capable and conscientious mariner. 172. He is not violent by nature. 172, 275. Capt. Parker does not drink alcohol. Tr. 275.

RULING: ACCEPTED AND INCORPORATED.

4. The complaining witness is Ryan Marves of P.O. Box 880, South Shore Road, North Haven, Maine, 04853. Tr. 21/8.

RULING: REJECTED. Mr. Ryan Marves was a witness at the hearing. The Complaint was filed by the United States Coast Guard.

5. On July 25, 2001 Mr. Marves was the owner and operator of a newly purchased, unregistered "Tiger Shark 770" Jet Ski (hereinafter referred to as the "Jet Ski" or "PWC" for personal watercraft) bearing illegal registration numbers. The PWC's registration had expired. Tr. 27/20-22, Tr. 28, 29; Tr. 69.

RULING: ACCEPTED AND INCORPORATED.

6. The Schooner Yacht WENDAMEEN is a 67 foot wood built schooner. She is a documented vessel of the United States of America, bearing official number D210173. The vessel sails under a valid Certificate of Inspection allowing her to carry twenty (20) passengers with one Master and two deckhands. She was built in 1912 and totally rebuilt by respondent in the late 80's. Tr. V2 at 103. The vessel is listed on the National Register of Historic places. Tr. V2 at 103.

RULING: ACCEPTED AND INCORPORATED.

7. Prior to July 25, 2001 Mr. Marves had had no specific or formal training on boat handling or instruction on how to properly and safely operate a jet ski. Tr. V1 at 29.

RULING: ACCEPTED AND INCORPORATED.

8. At or about 5:45 p.m. or some time between 5:30 and 6:00 p.m. on July 25, 2001, Mr. Marves entered Pulpit Harbor on the Jet Ski traveling at 35 miles per hour. Tr. 35/6, 164/165. The Schooner Yacht WENDAMEEN, under the command of the respondent, was already anchored for the night in the harbor with passengers aboard.

RULING: ACCEPTED except that the exact speed of the jet ski can not be accurately determined. It was at least 25-30 miles per hour. Tr. 35/6.

9. Mr. Marves first went over towards a bridge where there were about four or five young kids who were diving off it and swimming. The watercraft zipped through the bridge, the back creek, came back, and did doughnuts and other maneuvers around the kids and the main bridge pilings. Tr. 148/149 164/165 V2 at 111.

RULING: ACCEPTED AND INCORPORATED.

10. Marves later went towards the mooring, where multiple sailboats and motor boats were moored, and he started ripping through there several times. He proceeded to do doughnuts, quite literally around the entire perimeter of the harbor. V2 at 112.

RULING: ACCEPTED AND INCORPORATED.

11. He eventually came to WENDAMEEN, and circled it several times. As he was circling WENDAMEEN, Captain Parker gestured to him with his hands attempting to get him to slow down and get away from his (Capt. Parker's) vessel. Tr. 148/149 V 112-115.

RULING: ACCEPTED AND INCORPORATED.

12. Marves made a pass coming close to the stern of WENDAMEEN going on the starboard side. At that time he smirked, "really -- he had a nice smirk on his face like, look at me, pay attention to me." Tr. 148/149. He came close enough aboard WENDAMEEN that the passengers almost were sprayed and they looked on in trepidation. Tr. 164/165 V2 at 112-115.

RULING: ACCEPTED AND INCORPORATED.

13. In response to the slow down signal, Marves cursed and said something vulgar at the captain. He then did a couple of passes where he was coming straight at WENDAMEEN, like a torpedo, and then at the last minute he was turning off. Tr. 148/149 V2 at 114.

RULING: ACCEPTED AND INCORPORATED.

14. It then appeared that Mr. Marves was curtailing his harassing behavior and leaving the harbor, so no call was made to the Coast Guard. Instead Marves turned and made another run at WENDAMEEN. 248 V2 at 114.

RULING: ACCEPTED AND INCORPORATED.

15. When Capt. Parker saw the jet ski speeding towards WENDAMEEN, there was a minute or less to take some action. V2 at 114.

RULING: REJECTED. The citation to the transcript does not support the finding.

16. As a last resort Captain Parker told one of his crew members to go below and get the vessel's antique black powder flintlock cap pistol which the vessel used for signaling.

RULING: ACCEPTED to the extent that Capt. Parker told one of his crew members to get a black powder pistol.

17. Because Captain Parker's attempt to get Marves to stop his dangerous navigation around WENDAMEEN had been ignored, Captain Parker was forced to raise the gun in the air away from the jet ski and fire one cap. 225.

RULING: ACCEPTED to the extent Capt. Parker fired the pistol one time.

18. The PWC was heading directly toward WENDAMEEN when the cap was discharged. Tr. V2 at 45. There was no projectile in the pistol, only a percussion cap.

RULING: ACCEPTED AND INCORPORATED.

19. Captain Parker never aimed at Marves. 148/49; 166, 225. He aimed at the water or in the air, depending upon the observer's perspective. 248. Tr. V2 at 45. V2 at 117.

RULING: ACCEPTED AND INCORPORATED.

20. Marves admitted that he ignored the slow down/keep clear signal of WENDAMEEN's Capt. and instead circled that vessel. 238/12-15.

RULING: ACCEPTED AND INCORPORATED.

21. Just after the antique cap pistol was discharged, instead of retreating, Marves returned to within ten to twenty feet of WENDAMEEN from which position he made his threats. Tr. 54, 55. Marves' claim that he was in fear of imminent bodily injury is, therefore, not believable and I find that he was not in such fear.

RULING: ACCEPTED AND REJECTED. ACCEPTED to the extent that Mr. Marves returned to within ten to twenty feet of the WENDAMEEN and threatened the Captain. REJECTED to the extent that it is argumentative.

22. At the time Capt. Parker discharged the cap, he was confronted with a faceless youth on an ultra-hazardous personal watercraft who had already demonstrated extreme, irrational, erratic, and defiant behavior. The PWC was less than twenty feet away, doing over twenty knots. V2 at 117. This was a situation *in extremis*.

RULING: ACCEPTED to the extent that the PWC was approximately twenty feet away doing “twenty miles an hour or better.” (Tr. 117). Otherwise REJECTED as argumentative in nature.

23. The only reason Marves stopped was that he wanted to get into an argument after the Captain signaled him away. Tr. V2 at 46.

RULING: ACCEPTED AND REJECTED. ACCEPTED to the extent that Marves initiated the heated argument with the Captain. Otherwise REJECTED as argumentative.

24. After Capt. Parker discharged the cap, the jet skier stopped, came toward WENDAMEEN and when close to her, began screaming “lots of vulgarities and all kinds of things.” He made terrorist threats to the crew members and the captain. Tr. 26/12, 148/149, 239.

RULING: ACCEPTED AND INCORPORATED.

25. Marves could not hear above the noise of the jet ski upon which he was riding. Tr. 54.

RULING: ACCEPTED AND INCORPORATED.

26. Marves threatened to cut WENDAMEEN from her moorings and to commit bodily harm to Captain Parker. Tr. 71/22, 166, 239.

RULING: ACCEPTED AND INCORPORATED.

27. Marves threatened to kill Capt. Parker and made “lots of threats.” Tr. 59. He threatened to pound Capt. Parker’s head in. Tr. 57, 58.

RULING: ACCEPTED AND INCORPORATED.

28. Those aboard WENDAMEEN were in fear of imminent bodily harm and injury as a result of the actions of Marves. 168, 169.

RULING: ACCEPTED AND INCORPORATED.

29. Given WENDAMEEN’s relatively low freeboard, (three feet, V2 at 117) there was a real risk that both the vessel and those aboard her could have suffered severe injury and damage had the jet ski collided with her. Exs. J1-7.

RULING: ACCEPTED to the extent that a collision between the jet ski and WENDAMEEN could have caused injury and damage.

30. The passengers and crew aboard WENDAMEEN believed, and believe, that Capt. Parker's actions were justified and were carried out to protect the safety of the vessel and those aboard her. Tr. V1 at 169.

RULING: ACCEPTED AND INCORPORATED.

31. The Coast Guard did not interview passengers or crew with direct knowledge of the facts. Tr. V1 at 171.

RULING: ACCEPTED AND INCORPORATED.

32. Mr. Marves did not cooperate with the Coast Guard's investigation of this matter. Tr. V1 at 240.

RULING: REJECTED. Mr. Marves did not appear for a scheduled meeting with the Coast Guard and was subpoenaed. (Tr. 239-240).

33. A Coast Guard statement indicates that after the signal was fired, Mr. Marves made three more runs at WENDAMEEN, a fact which the Coast Guard was aware of within four days of the incident. 226

RULING: ACCEPTED AND INCORPORATED.

34. A Coast Guard statement confirms that Capt. Parker stated at the time, that the Jet Ski drove erratically in Pulpit Harbor, he told the Jet Ski to slow down, but the Jet Ski did not comply; so after some close passes by the Jet Ski to his board, Capt. Parker fired a primer cap from a black powder handgun. 226, 227.

RULING: ACCEPTED AND INCORPORATED.

35. The Coast Guard prejudged Capt. Parker. Tr. V1 at 170.

RULING: REJECTED.

36. Prior to entering charges against Capt. Parker's license, the Coast Guard had information that those aboard WENDAMEEN feared for their lives as a result of the actions of the jet skier. Tr. V1 at 172/173.

RULLING: ACCEPTED but the witness testified that the passengers feared for their well-being.

37. Capt. Parker was the first to call the Coast Guard and did so immediately following his firing of the danger signal. Tr. V1 at 61, 166, 249.

RULLING: ACCEPTED to the extent Capt. Parker was the first to call the Coast Guard.

38. Mr. Marves testified that he saw the three puffs of smoke as he was leaving the harbor. Tr. V1 at 72.

RULING: ACCEPTED AND INCORPORATED.

39. Mr. Marves testified that he was leaving the harbor at 30 miles an hour when Capt. Parker, without provocation of any kind, fired three flares at him. Tr. V1 at 45, 45.

RULING: ACCEPTED AND INCORPORATED.

40. Mr. Marve's conclusion that he had been fired upon with a flare gun was based solely upon seeing a puff of smoke, he saw no flare or fire. Tr. V1 at 48, 49. Mr. Marves continued to believe that he had been fired upon with a flare gun until just before the hearing. Tr. V1.

RULING: ACCEPTED AND INCORPORATED.

41. Mr. Marve's testimony was fraught with inconsistency and was not credible. Tr. V2/204.

RULLING: ACCEPTED AND INCORPORATED.

42. Marine Patrol Officer Brian Tolman was not familiar with the Colregs. V1. 209. He was not aware that the steering of a jet ski is linked to its power so that a reduction in throttle impacts its responsiveness. 213

RULING: ACCEPTED AND INCORPORATED.

43. The jet ski at high speed bearing down on WENDAMEEN constituted a serious safety threat to her passengers and crew. V1 at 212.

RULING: ACCEPTED AND INCORPORATED.

44. After the incident, the Coast Guard didn't interview passengers because they turned things over to the Marine Patrol. The Marine Patrol didn't interview passengers because they were going to use Coast Guard statements. V1 at 217, 218.

RULING: ACCEPTED AND INCORPORATED.

45. Jet ski operators normally operate at a high rate of speed. All of their turning requires propulsions, which requires speed. They're very loud ... Marves was operating at a high rate of speed on the day in question. Board Officer LEMOI, Tr. V1 at 99.

RULING: ACCEPTED AND INCORPORATED.

46. A jet ski can be a dangerous weapon. V1 at 131, Ex.S.

RULLING: REJECTED. The witness did not use the term "dangerous weapon" in the citation.

47. The jet ski in question was powered by gasoline and could cause an explosion if it collided with WENDAMEEN. V1 Tr. 131

RULING: ACCEPTED AND INCORPORATED.

THE BLACK POWDER ISSUE

48. The Coast Guard made no attempt to determine the quantity of black powder aboard WENDAMEEN other than through an interview of the Captain and Mate. In those interviews, they did not ask how much powder was in the pint can. 242/16.

RULING: ACCEPTED AND INCORPORATED.

49. The issue of certification letter compliance relative to black powder carriage aboard WENDAMEEN and other vessels in the Main Schooner Fleet only arose due to the fact that the Coast Guard had been asked about need for certification by the builder of LYNX, a new vessel to be equipped with multiple cannons. 243, 251 Tr. V1.

RULING: ACCEPTED AND INCORPORATED.

50. Prior to that time (July 2001-Tr. 251/15) the Coast Guard personnel tasked with certification/enforcement of WENDAMEEN "had not really looked into it." 243, and had "to do research" to determine what the requirements were. 251.

RULING: ACCEPTED AND INCORPORATED.

51. Despite awareness that other schooners in the Main Windjammer Fleet carried and carry black powder without authorization of a certification to do so, WENDAMEEN has been the only vessel to be accused of a violation. Tr. V1 at 244, 245.

RULING: ACCEPTED AND INCORPORATED.

52. Coast Guard Inspector Place considers WENDAMEEN to be a beautiful boat, well maintained and an "outstanding" vessel in the fleet. 252/12.

RULING: ACCEPTED AND INCORPORATED.

53. Prior to July 25, 2001 the Coast Guard knew the schooners that carry it [black powder] do carry just a very small amount of the black powder and they [the Coast Guard] “were in the process of finding out if these schooners even were required by law to have a letter such as the Lynx and [they] found out, you know, very schooner had to carry it, regardless of the amount.” 254/3-8. Tr. V2 at page 3. Tr. V2 at 11.

RULING: ACCEPTED AND INCORPORATED.

54. The Coast Guard was aware that the Schooners in the fleet had cannons prior to the subject incident in question. Tr. V1/254, pages 20-23.

RULING: ACCEPTED AND INCORPORATED.

55. Even the Coast Guard investigators were surprised when Capt. Parker was charged with violations relating to black powder. 259.

RULING: ACCEPTED AND INCORPORATED.

56. At least half of the twelve schooners comprising the Rockland Maine windjammer fleet carry cannons and/or black powder which they traditionally use for sunset ceremonies and greeting signals. 266, 271.

RULING: ACCEPTED AND INCORPORATED.

57. Despite cannons being stowed in open and obvious positions aboard Maine windjamming schooners, the Coast Guard has either not noticed them during annual inspection or has not followed up on black powder stowage as part of the inspection and compliance enforcement. 265/18 271 273/17.

RULING: ACCEPTED AND INCORPORATED.

58. On July 25, 2001, WENDAMEEN had aboard about one-half a pint of black powder stowed in a watertight container. Ex. E.

RULING: ACCEPTED AND INCORPORATED.

D. RESPONDENT’S PROPOSED CONCLUSIONS OF LAW

1. The antique pistol is not a firearm. 26 U.S.C., Sec. 5845(a).

RULING: ACCEPTED AND INCORPORATED.

THE COLREGS

2. The antique pistol is a proper signaling device. Rules 2, 34, 36, 37.

RULING: ACCEPTED AND INCORPORATED.

3. A Jet Ski is a means of transportation on water and a vessel, and its operation is the navigation of a vessel, a traditional maritime activity. *Choat v. Kawasaki Motors*, 1996 AMC 2064 (S. Ct. Alabama 1996).

RULING: ACCEPTED AND INCORPORATED.

4. WENDAMEEN was "at anchor, or made fast to the shore, or aground" within the meaning of Rule 3(i) of International Regulations for Preventing Collisions at Sea, 1972, 33 U.S.C. § 1602, 33 foll. 1602 (COLREGS, Rule 3(i)).

RULING: ACCEPTED AND INCORPORATED.

5. The steering and sailing rules are applicable where one vessel is at anchor and another is maneuvering. *Prince v. Thomas*, 1998 AMC 1639 (N.D. Cal. 1998); *Cliffs-Neddrill v. RICH DUKE* 1992 AMC 1 (3rd Cir. 1992) (The rationale behind lighting requirements for vessels under way is equally applicable when one vessel is at anchor; the lookout requirement has been extended to anchored vessels.)

RULING: ACCEPTED AND INCORPORATED.

6. The requirement for and sufficiency of a warning or danger signal is governed by Rule 34(d) (33 U.S.C. § 2034(d)) and Rule 2 (33 U.S.C. § 2002). Rule 34(d) requires that when a vessel is in doubt as to the actions or intentions of another vessel or as to whether that other vessel is taking sufficient action to avoid a collision, a warning signal shall be given. *Fiascone v. Fry*, 1993 AMC 377 (D. Ky. 1992).

RULING: ACCEPTED AND INCORPORATED.

7. Rule 2 of the 72 Colregs, 33 U.S.C. § 1602, allows a vessel to take "any precaution which may be required by the ordinary practice of good seamen, or by the special circumstances of the case." Just as "It is certainly prudent seamanship to attempt radio contact with an approaching vessel on a reciprocal course, especially where there is no indication that the approaching vessel is aware of the circumstances" and the Capt. "should have done everything possible to warn the other vessel of its intentions, including communication by VHF radio," so, too, should Capt. Parker have attempted to get Marves's attention as he did. *G&G SHPG. CO.* 1994 AMC 170 (D.P.R. 1994).

RULING: ACCEPTED AND INCORPORATED.

8. I find as a matter of law that the actions of Marves on July 25, 2001 created a “special circumstance” within the meaning of Rule 2 of the Colregs and that firing the pistol was a precaution which was required by the ordinary practice of good seamen.

RULING: ACCEPTED AND INCORPORATED.

9. Rule 34(d) provides that at least five short and rapid blasts on the whistle should be sounded when a vessel is in doubt as to the actions of another vessel ... “regardless of whether Capt. Parker actually gave five short rapid blasts,” Capt. Parker “appropriately gave a blast as a warning when a risk of collision appeared imminent.” *Fiascone v. Fry* 1993 AMC 377 (D.Ky 1992).

RULING: ACCEPTED AND INCORPORATED.

10. There is an objective component in the requirement of a danger signal, see *Buculo, Inc. v. S/V Jaguar*, 1970 AMC 2379, 2380-81, 428 F.2d 394, 396 (1 Cir. 1970), *aff’d* 304 F.Supp. 1403, 1406, 1970 AMC 511 (Sy.)(DMass 1969); *Arthur-Smith Corp. v. Gulf States Marine & Mining Co.*, 1958 AMC 2107, 258 F.2d 449 (5 Cir. 1958), so that it applies whenever the danger of collision is *or should be* recognized. 6 HOSEI KAIUN SHOJI CO., LTD., Plaintiff v. TUG SEASPAN MONARCH, BARGE SEASPAN 250, ET AL., AND SEASPAN INTERNATIONAL, LTD., Defendants. 1981 AMC 21621981 5th Cir. 1981.

RULING: ACCEPTED AND INCORPORATED.

11. 33 U.S. Code, sec 292 (Rule 27) allows for departure from Rules to avert immediate danger. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

RULING: ACCEPTED AND INCORPORATED.

12. Every vessel or seaplane on the water may, if necessary in order to attract attention, in addition to the lights which she is by sections 145-145n of this title required to carry, show a flare-up light or use of detonating or other efficient sound signal that cannot be mistaken for any signal authorized elsewhere under said sections. 33 U.S. Code, sec. 145j.

RULING: ACCEPTED AND INCORPORATED.

13. The danger signal should be used also in some cases not strictly within the letter of Article 18, Rule III. Thus, ... if he thinks the other vessel’s proposal dangerous, he should, ordinarily at least, blow the danger signal ... **And the danger signal may be used in general to indicate danger ...** *Griffin On Collision*, Sec. 80, Sound Signals, citing SILK, 1927 A.M.C. 915.

RULING: ACCEPTED AND INCORPORATED.

14. As to a warning signal "the manner employed to warn should have a meaning, either technical, or, in the nature of the case, necessarily understood. Precisely what it should be need not be decided; it is of those skilled in the art to determine it. Ordinary prudence demands that something appropriate be done or provided. *The H.S. Beard*, 134 F. 654.

RULING: ACCEPTED AND INCORPORATED.

15. The master of a vessel *in extremis*, is not held to an exercise of that cool and deliberate judgment which facts later developed show would have been a better course. *Sullivan v. Pittsburgh SS. Co.* 230 Mich. 414 (Mi. 1925).

RULING: ACCEPTED AND INCORPORATED.

16. If one vessel places another in a position of extreme danger through wrongful navigation, the other is not to be held in fault if she is not navigated with perfect skill and presence of mind. *The Lafayette*, 269 F. 917 (CCA NY 1920).

RULING: ACCEPTED AND INCORPORATED.

17. The Coast Guard is bound to follow its own regulations, see *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

RULING: ACCEPTED AND INCORPORATED.

18. The Coast Guard regulations include 46 U.S.C. 2302 (the rail jumper statute) and the authority to charge the operator of any vessel with negligent navigation. In not charging Mr. Marves, I find that the Coast Guard did not follow its own regulations and is therefore estopped from charging the respondent.

RULING: REJECTED.

19. Capt. Parker's firing of the pistol was in compliance with the applicable COLREGS and, in fact, required by them. He has justification for a defense to an assault charge.

RULING: ACCEPTED AND INCORPORATED.

BLACK POWDER

Constructive Waiver

20. Constructive notice is sufficient to establish the knowledge element of waiver. See *Barry-Dorn, Inc. v. Texaco, Inc.* No. 74-5526, slip op. (SDNY 1978) (discussing with approval Memorandum-Order by Judge Metzner of October 12, 1976, where constructive notice was found to be sufficient to establish element of waiver); see also *Leasing Service*

Corp. v. Diamond Timber, 559 F.Supp 972 (SDNY 1983) (“A person is deemed to have notice when he has actual knowledge or from all the facts and circumstances known to him at the time in question, he has reason to know that it exists”), *aff’d*, 727 F.2d 1442 (2 Cir. 1983).

RULING: ACCEPTED AND INCORPORATED.

21. Here, the Coast Guard had either direct knowledge that Main Coasting Schooners, and particularly WENDAMEEN, were carrying small quantities of black powder to use in their cannons, or had constructive notice as a result of inspecting the vessels which had cannon in plain view.

RULING: REJECTED.

22. I find that although “WENDAMEEN” did not have a letter endorsed by the Commandant waiving the requirements for carriage of black powder, such waiver has been made out on the basis of constructive notice. Accordingly, I find that the specifications alleging a violation of 46 CFR 147.40 has not been proved.

RULING: REJECTED.

De Minimus

23. If there was a violation of the regulations as a result of WENDAMEEN having aboard her a half-pint of black powder stored in its shipping container, such a violation was de minimus and should not have been prosecuted.

RULING: REJECTED.

Arbitrary and Capricious

24. Familiar standards of the Administrative Procedure Act, 5 U.S.C. § 701 et seq., allow agency actions to be overturned, *inter alia*, for errors of law or where arbitrary and capricious, *id.* §§ 706(2)(A), (C).

RULING: ACCEPTED AND INCORPORATED.

25. Courts must hold unlawful and set aside agency action that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations or short of statutory right,” 5 U.S.C. § 706(2)(A) and (C).

RULING: ACCEPTED AND INCORPORATED.

26. Because the Coast Guard was itself unfamiliar with the regulations regarding the carriage of black powder by Maine coasting schooners and because only WENDAMEEN and

Capt. Parker were cited for the subject violation despite other obvious instances of the same activity occurring on other schooners, I find that the agency action was arbitrary and capricious and should be overturned.

RULING: REJECTED.

Hazardous Ship Stores

27. Hazardous ships' stores means ships' stores that are hazardous materials. Ships' stores means materials which are on board a vessel for the upkeep, maintenance, safety, operation, or navigation of the vessel or for the safety or comfort of the vessel's passengers or crew. 46 CFR 147.3.

RULING: ACCEPTED AND INCORPORATED.

28. Commandant approval is required before the following hazardous materials may be on board a vessel as ships' stores:

..(2) Explosives of Divisions 1.1 or 1.2. 49 CFR 147.40

RULING: ACCEPTED AND INCORPORATED.

29. 49 CFR 173.170 is entitled "Black powder for small arms" and states in pertinent part that: Black powder for small arms that has been classed in Division 1.1 may be reclassified as a Division 4.1 material, for domestic transportation by motor vehicle, rail freight and cargo vessel only, subject to the following conditions:

- (a) The powder must be examined and approved for Division 1.1 and Division 4.1 classification in accordance with Secs. 173.56 and 173.58;
- (b) The total quantity of black powder in one motor vehicle, rail car, or freight container may not exceed 45.4 kg (100 pounds) net mass, and no more than four freight containers may be on board one cargo vessel;
- (c) The black powder must be packed in inner metal or heavy wall conductive plastic receptacles not over 454 g (16 ounces) net capacity each, with no more than 25 cans in one outer UN 4G fiberboard box. The inner packagings must be arranged and protected so as to prevent simultaneous ignition of the contents. The complete package must be of the same type which has been examined as required in Sec. 173.56;
- (d) Each completed package must be marked "BLACK POWDER FOR SMALL ARMS" and "NA 0027"; and
- (e) Each package must bear the FLAMMABLE SOLID label.

RULING: ACCEPTED AND INCORPORATED.

30. I find that EX. E, the container in which the black powder stowed aboard WENDAMEEN was contained, substantially meets the requirements of section 173.170 and further demonstrates that the powder was shipped to a retailer pursuant to that

section. Accordingly, the black powder was reclassified to 4.1 and should not have been characterized by the Coast Guard as a 1.1 or 1.2 explosive for which the Commandant required a waiver letter.

RULING: REJECTED.

31. Coast Guard EX. 01-05425-015 clearly refers to black powder for small arms as being classed "4.1" with a vessel stowage designation letter of "E."

RULING: REJECTED.

32. Coast Guard EX.01-05425-016 clearly shows that vessel stowage designation letter of "E" under 49 CFR 172.101 means the material may be stowed "on deck" or "under deck" on a cargo vessel and on a passenger vessel carrying a number of passengers limited to not more than the larger of 25 passengers ... Accordingly, I find that there was not violation by WENDAMEEN or Parker with respect to the presence of the black powder aboard the vessel stowed in its watertight shipping container which bore appropriate warnings.

RULING: ACCEPTED AND INCORPORATED.

33. 46 CFR 147.95(a) states that "Except as provided for elsewhere in this subchapter, explosives which are hazardous ships' stores must be stowed in a magazine which is constructed and located in accordance with 49 CFR 176.12 through 176.138." However, elsewhere in the subchapter as subsection (c) it states, "Ship's signals and emergency equipment. Explosive ships' signals and emergency equipment, including pyrotechnic distress signals and line throwing equipment, must be stowed in watertight containers *or* wood lined magazine chests." 46 CFR 147.95(c)(1) (emphasis provided).

RULING: ACCEPTED AND INCORPORATED.

34. I find that the small quantity of black powder used for the antique cap pistol aboard WENDAMEEN constitutes explosive ships' signals and emergency equipment which was stored in Ex. E, a watertight container. Accordingly, the specifications charging a violation of 49 CFR 173.170 regarding stowage have not been proved and are hereby dismissed.

RULING: ACCEPTED AND INCORPORATED.

Reclassification

35. The respondent did not violate Title 46 of the Code of Federal Regulations 127.40 – by having a quantity of black powder (defined as an explosive in Title 49, 173.50) aboard the sailing vessel WENDAMEEN without the authorization required.

RULING: REJECTED.

36. The respondent did not violate Title 46, Code of Federal Regulation, 147.95 by not storing the black powder in an approved magazine in accordance with the referenced regulation.

RULING: ACCEPTED AND INCORPORATED.

JET SKIS

37. Personal watercraft are ultra-dangerous as a matter of law. (In 1998 the National Transportation Safety Board criticized the basic design of all personal watercraft: "Personal watercraft have no braking mechanism. They coast to a stop, and while coasting, there is no turning ability." Tom Ebro, president of Aquatic Risk Management in Florida, concurs. "What makes personal watercraft so ultra-dangerous is the fact that is will not steer when you suddenly have a surprise and let off the throttle." Unlike traditional boats jet skis' are rudderless. And when the throttle is off, a speeding jet ski is like a car on ice. It can't stop. It can't turn, and the driver has no control. Rockwell, Paul; Why Jet Skis Kill, Reckless Endangerment on the Water, Motion Magazine 8/16/2001.

RULING: ACCEPTED AND INCORPORATED to the extent a jet ski can be operated in a dangerous manner.

SELF DEFENSE

38. Marves was the aggressor in that he made numerous unsafe runs at WENDAMEEN, putting her crew and passengers in fear and jeopardy. This authorized Capt. Parker to use sufficient force to cause Marves to desist. In Re License of William H. Hall, Commandant Decision No. 1852. The force used by Capt. Parker clearly did not go beyond the bounds of necessity.

RULING: ACCEPTED AND INCORPORATED.

39. "The only real provocation which justifies the use of force is an actual attack leaving the victim with no means of defense except the use of force." Appeal Decisions 2193 (WATSON) and 2290 (DUGGINS). Even when force is authorized in self defense, it is well settled that only so much force may be used as is required to cause an aggressor to desist. Force which goes beyond the bounds of necessity is not justified. Appeal Decisions 2291 (MARGIOTTA), 1852 (HALL), AND 1803 (PABON).

RULING: ACCEPTED AND INCORPORATED.

40. In cases of assault and battery when self-defense is in issue, the test is whether under all the circumstances the use of a weapon by the party threatened by an aggressor is reasonable. IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. **[REDACTED]** AND ALL OTHER SEAMAN DOCUMENTS Issued to JAMES H. CHILDRESS DECISION OF THE COMMANDANT UNITED STATES COAST GUARD 1552.

RULING: ACCEPTED AND INCORPORATED.

41. Here, as in Childress, Capt. Parker was within the limited confines of his vessel “where he had a right to be when he was approached by a man with a dangerous weapon,” to wit a jet ski, “who had threatened him on numerous occasions, and who had, earlier that same day, assaulted him by” making passes at his vessel under high speed in an ultra-hazardous craft known for its steering instability. Capt. Parker “did not know what Mr. Marves at that time might do to him.” *Under the circumstances described in this record and upon the substantial evidence presented, “the [respondent’s] instinctive reaction to the menace presented by his persistent tormenter was [not] unreasonable.”* IN THE MATTER OF MERCHANT MARINER’S DOCUMENT NO. [REDACTED] AND ALL OTHER SEAMAN DOCUMENTS Issued to: JAMES H. CHILDRESS
DECISION OF THE COMMANDANT UNITED STATES COAST GUARD 1552.

RULING: ACCEPTED AND INCORPORATED.

[REDACTED]