

**UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

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**UNITED STATES COAST GUARD  
COMPLAINANT**

**vs.**

**CLINTON GRADY MORTON  
RESPONDENT**

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DOCKET NUMBER 2010-0077  
ENFORCEMENT ACTIVITY No. 3659024

**DECISION & ORDER**

DATE ISSUED: JUNE 3, 2010

ISSUED BY: HONORABLE BRUCE TUCKER SMITH  
ADMINISTRATIVE LAW JUDGE

**APPEARANCES:**

FOR THE COMPLAINANT

LT TRAVIS M. EMGE  
UNITED STATES COAST GUARD DISTRICT SEVEN LEGAL

LT ERIC RIVERA  
UNITED STATES COAST GUARD SECTOR MIAMI

FOR THE RESPONDENT

CLINTON GRADY MORTON, PRO SE

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## I. PRELIMINARY STATEMENT

The instant matter arises out of a collision that occurred on October 19, 2009, in the vicinity of the Port Everglades, Florida, Outer Bar Cut, between a commercial vessel under the control of Clinton Grady Morton, the Respondent herein, and a private recreational/fishing vessel.

On February 9, 2009, the United States Coast Guard (Coast Guard) filed a Complaint against Clinton Grady Morton (Respondent) alleging that he committed Misconduct in violation of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27. Specifically, the Coast Guard alleged that on October 19, 2009, Respondent, while operating the M/V PILOT No. 1, in the vicinity of the Port Everglades Outer Bar Cut, wrongfully failed to proceed at a safe speed so that he could take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances, as required by 33 U.S.C. §1602, the International/Inland Navigation Rules, Rule 6, "Safe Speed." The Coast Guard proposed a 2-month suspension of Respondent's Merchant Mariner's License (MML) and Merchant Mariner's Credential (MMC). (CG Ex. 24).

Although the instant matter arose out of a collision between Respondent's vessel and a private recreational/fishing vessel, Respondent was not charged with causing that collision. Thus, for the purposes of this litigation, causation of the collision is irrelevant and was not considered for any purpose.

The Administrative Law Judge (ALJ) Docketing Center received Respondent's Answer on February 24 2009, wherein Respondent requested a hearing before an ALJ. Accordingly, this matter was thereupon assigned to the undersigned on March 8, 2010.

On March 18, 2010, the court convened a pre-hearing telephonic conference with the parties. During the course of the pre-hearing conference, it was noted that Respondent failed to

indicate whether he admitted or denied the allegations. Respondent orally denied the Complaint's jurisdictional and factual allegations.<sup>1</sup>

The Coast Guard brought this action pursuant to 46 U.S.C. §7703, which provides bases for the suspension or revocation of a mariner's license. The proceedings were conducted in accordance with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§551-59, the marine safety regulations as set forth at 46 C.F.R. Part 5 and the procedural rules as found at 33 C.F.R. Part 20.

On May 12, 2010, this matter came on for hearing in Miami, Florida, at the Claude Pepper Federal Building in the U.S. Tax Courtroom. The Coast Guard was represented by attorney LT Travis M. Emge, District 7, and Investigating Officer LT Eric Rivera, Sector Miami. Respondent appeared in person, pro se.

Both parties appeared and presented their respective cases and rested. The Coast Guard called five witnesses in its case-in-chief and offered seven exhibits into evidence, all of which were admitted.<sup>2</sup>

Respondent called one witness and testified on his own behalf. Respondent offered two exhibits into evidence, both of which were admitted.

The court also took official notice of Rule 6 of the Inland Navigation Rules.

At the conclusion of the hearing, parties made closing arguments; thereafter the court closed the administrative record.

For the reasons set forth herein, the court finds that the that the allegations in the Complaint filed against Respondent on February 9, 2009, and as amended by the Coast Guard on

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<sup>1</sup> On March 18, 2010, the Coast Guard filed an Amended Complaint amending jurisdictional allegation #2, in part, alleging Respondent acted under the authority of his MMC, which was required by his employer as a condition of his employment. On March 22, 2010, Respondent filed an Answer to the Amended Complaint wherein he again denied the jurisdictional and factual allegations.

<sup>2</sup> Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at \_\_\_). Citations to Coast Guard Exhibits are marked CG Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

March 18, 2009, are found **PROVED**. Further, Respondent's Coast Guard-issued Merchant Mariner's License and Merchant Mariner's Credential is hereby suspended for one month for the reasons discussed, infra.

## II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times herein, Clinton Grady Morton (Respondent) was the holder of and acting under the authority of his Merchant Mariner License and Merchant Mariner Credential. (CG Ex. 24).
2. On October 19, 2009, Respondent was employed by PEP, Inc. as a maintenance shed worker and a pilot boat captain (Tr. at 13-14, 35).
3. PEP, Inc. is an association of twenty harbor pilots who pilot deep-draft vessels in and out of Port Everglades, Florida. Respondent was not a harbor pilot nor was he one of the 20 harbor pilots who comprise PEP, Inc. Rather, Respondent was an employee of PEP, Inc. (Tr. at 13-16).
4. PEP, Inc. required its employee-pilot boat captains to hold Coast Guard-issued licenses and credentials. (Tr. at 16; CG Ex. 21, 22).
5. In his capacity as a pilot boat captain in the employ of PEP, Inc., Respondent's duty was to safely operate a forty-foot craft to ferry harbor pilots to and from larger, deep-draft seagoing vessels. (Tr. at 15).
6. PEP, Inc. specifically required its employee-pilot boat captains to obey "All the customary and legal duties as Master of the Pilot Boat" and to "Operate [the] boat in a courteous, safe and lawful manner." (CG Ex. 21).
7. PEP, Inc. also specifically required its employee-pilot boat captains to follow the instructions from a pilot or officer of the corporation. (CG Ex. 21).
8. The M/V PILOT NO. 1 is and was at all relevant times herein an inboard, diesel-powered, propeller-driven, aluminum-hulled, shallow-draft, commercial transport vessel, measuring forty feet in length. The maximum speed of the M/V PILOT NO. 1 is approximately seventeen knots. (Tr. at 58-59; CG Ex. 16).
9. By virtue of a tubular-pipe, hand-rail framework on the M/V PILOT NO. 1's elongated bow, and the general configuration of the pilot

house/cockpit, the visibility from the pilot house/cockpit of the vessel was restricted. (Tr. at 52; CG Ex. 13, 16).

10. On the morning October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, Respondent was the pilot of the M/V PILOT NO. 1. (Tr. at 141; CG Ex. 16).
11. On the morning October 19, 2009, Respondent was transporting harbor pilot Dean Grant via the M/V PILOT NO. 1 to a cruise ship situated at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut. Dean Grant is employed by the Port Everglades Pilots Association and owns an interest in PEP, Inc. (Tr. at 35).
12. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the prevailing weather conditions included winds of fifteen to twenty knots out of the north-northeast and partly cloudy skies and unlimited visibility. (Tr. at 57-58).
13. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the prevailing sea conditions were three to six foot seas and heavy chop. (Tr. at 57, 137).
14. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, there were few other vessels in the general area. (Tr. at 58).
15. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, and prior to the collision with a private recreational fishing vessel, Respondent operated the M/V PILOT NO. 1 at a speed sixteen to seventeen knots. (Tr. at 59, 139).
16. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, and at the time of the collision with a private recreational fishing vessel, Respondent operated the M/V PILOT NO. 1 at a speed of five to eight knots. (Tr. at 139).
17. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the M/V PILOT NO. 1 collided with a private recreational fishing vessel owned by Ms. Kathy Holmes, a twenty-two foot, center-console, low-profile craft. (Tr. at 68; CG Ex. 7, 41).

### III. DISCUSSION

#### A. General

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea and to maintain standards of competence and conduct. See 46 U.S.C. §7701; 46 C.F.R. §5.5. Title 46 Code of Federal Regulations §5.19 gives an Administrative Law Judge (ALJ) the authority to conduct hearings and to suspend or revoke a license or certificate for violations arising under 46 U.S.C. §§7703 and/or 7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).<sup>3</sup> Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

#### B. Burden and Standard of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703, and the implementing regulations, 46 C.F.R. Part 5; Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges (ALJs). The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701; 20.702(a). “The term substantial evidence is synonymous

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<sup>3</sup> Pursuant to 46 C.F.R. § 5.65, “[t]he decisions of the Commandant in cases of appeal... are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges.”

with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)). Therefore, at trial, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violation charged.

### **C. Jurisdiction**

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) quoting Appeal Decision 2025 (ARMSTRONG) (1975). Where an Administrative forum acts without jurisdiction its orders are void. Id. Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decision 2677 (WALKER) (2008) citing Appeal Decisions 2104 (BENSON) (1977); 2094 (MILLER) (1977); 2090 (LONGINO) (1977); 2069 (STEELE) (1976); and 2025 (ARMSTRONG) (1975). See, Appeal Decision 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER) (1986). See also, Appeal Decision 2025 (ARMSTRONG) (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

Here, the Coast Guard charged Respondent with Misconduct, 46 U.S.C. §77013(1)(B) and 46 C.F.R. §5.27. The Amended Complaint alleges that on October 19, 2009, Respondent, while operating the M/V PILOT NO.1, failed to proceed at a safe speed as required by Rule 6 of the Inland Navigation Rules. The Amended Complaint further alleges that Respondent’s alleged failure to proceed at a safe speed constitutes Misconduct in violation of 46 C.F.R. §5.27.

To establish jurisdiction in this case, the action (or inaction) constituting the alleged act of Misconduct must be proven to have occurred while the mariner was “acting under the authority” of his merchant mariner’s license or credential. Appeal Decision 2516 (DALE) (2000).

The term “acting under the authority” is defined at 46 C.F.R. §5.57 and states, inter alia, “[a] person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is (1) [r]equired by law or regulation; or (2) [r]equired by an employer as a condition for employment.” Id. If neither one of these two criteria is met, then the Coast Guard has no jurisdiction to pursue a Suspension and Revocation proceeding. Appeal Decision 2620 COX (2001).

In his Answer, Respondent denied he was indeed acting under the authority of his MML and MMC on October 19, 2009, by operating the M/V PILOT NO. 1 as required by law or regulation. However, the weight of the evidence clearly proves that Respondent was serving aboard the M/V PILOT NO. 1 as a Master on October 19, 2009, before, during and after the occurrence of a collision. (Tr. at 35, et. seq.). Therefore, Respondent is found to have been acting under the authority of his Coast Guard-issued credential and document at all relevant times.

#### **D. Misconduct**

To prove Misconduct under 46 C.F.R. §5.27, the Coast Guard must prove by a preponderance of the evidence that Respondent engaged in some behavior which violates some formal, duly established rule. Such rules are found in statutes, regulations, the common law, the general maritime law, etc. Misconduct is an act which is forbidden or a failing to do that which is required.

Here, the Coast Guard alleges that Respondent violated 33 U.S.C. §1602, the International/Inland Navigation Rules, Rule 6, which pertains to “Safe Speed.”

Rule 6 provides:

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

(a) By all vessels:

- i. The state of visibility;
- ii. The traffic density including concentrations of fishing vessels or any other vessels;
- iii. The manageability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
- iv. At night, the presence of background light such as from shore lights or from back scatter from her own lights;
- v. The state of wind, sea and current, and the proximity of navigational hazards;
- vi. The draft in relation to the available depth of water.

If the Coast Guard is able to prove a violation of Rule 6, then it is able to prove

Misconduct.

#### **E. Analysis**

The case at bar is not factually complex and the underlying facts are generally uncontroverted.

On October 19, 2009, Respondent was employed by the Port Everglades Pilots Association (PEP, Inc.) as a relief pilot boat captain (Tr. at 13-14, 35). PEP, Inc. is an association of twenty harbor pilots who pilot deep-draft vessels in and out of Port Everglades, Florida. Respondent was not a harbor pilot nor was he one of the twenty harbor pilots who comprise PEP, Inc. (Tr. at 13-16). Rather, he was employed as both a maintenance worker and as a “pilot boat” captain. For the purposes of this decision, a “pilot boat” is a marine vessel used

to ferry harbor pilots to and from deep-draft vessels. A “pilot boat,” as employed by PEP, Inc. is essentially a water taxi and Respondent was a pilot of such a vessel.

On the morning of October 19, 2009, and in the near vicinity of the Port Everglades, Florida, Outer Bar Cut, Respondent was the pilot of the M/V PILOT NO. 1. (Tr. at 141; CG Ex. 16). That morning in the near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the prevailing weather conditions included winds of fifteen to twenty knots out of the north-northeast and partly cloudy skies and unlimited visibility. (Tr. at 57-58). The prevailing sea conditions were three to six foot seas and heavy chop. (Tr. at 57, 137). Accordingly, the Coast Guard had issued a small-craft warning for the area that morning. (Tr. at 39).

On the morning of October 19, 2009, at around 9:00 a.m., EST, harbor pilot Captain Dean Grant rode in the vessel as a passenger as Respondent operated the M/V PILOT NO. 1. (Tr. at 35 – 39). Captain Grant is a member of PEP, Inc. and ostensibly, one of Respondent’s employers. Respondent was ferrying Captain Grant to the cruise ship the CARNIVAL MIRACLE so that Captain Grant could pilot the vessel into port.

Also on the morning of October 19, 2009, a private recreational fishing vessel, owned by Ms. Kathy Holmes, was variously trolling and drift-fishing in the near vicinity of the Port Everglades, Florida, Outer Bar Cut, (Tr. at 68; CG Ex. 7). There was little to no other vessel traffic visible in the general area of Ms. Holmes’ boat (Tr. at 58).

Respondent was at the helm of the M/V PILOT NO. 1 prior to the collision with Ms. Holmes’ fishing boat. AS he ferried Captain Grant to the CARNIVAL MIRACLE , Respondent operated the M/V PILOT NO. 1 at a speed of between sixteen and seventeen knots. Captain Grant sat in the forward seat on the starboard side of the vessel behind Respondent. (Tr. at 40-41, 59, 139).

Captain Grant described the visibility from the cockpit or wheelhouse of the M/V PILOT NO. 1 as “restricted” and Coast Guard Exhibits 13 and 16 support that observation. (Tr. at 52).

As Respondent steered a course toward the cruise ship, he did not see the Holmes' fishing vessel. However, at the last moment and immediately before impact, Captain Grant "saw something out of the port side of the boat . . . [and] was able to jump up and make a slight turn to starboard on the wheel . . . I just jumped out of the seat and grabbed the wheel and turned to starboard." (Tr. at 40).

Captain Grant testified that Respondent apparently reached for the throttle and slowed the vessel simultaneously with Captain Grant's turn to starboard. (Tr. at 40-41). Unfortunately, the M/V PILOT NO. 1 then collided with the Holmes vessel, a twenty-two foot, center-console, low-profile craft. (Tr. at 68; CG Ex. 7, 41). At the time of collision with the Holmes' fishing vessel, the M/V PILOT NO. 1 was making approximately five to eight knots (Tr. at 139).

Causation of that collision is not an issue before this court, nor is any claim for property damage or personal injury. Hence, the collision is irrelevant to these proceedings.

The prime issue before this court is whether on October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, and prior to the collision with a private recreational fishing vessel, Respondent operated the M/V PILOT NO. 1 at an unsafe speed.

As the Commandant of the Coast Guard explained in Appeal Decision 2294 (TITTONIS) (1983), a determination of "safe speed" under Rule 6 "must be determined on a case by case basis after analyzing the facts according to the factors listed in the rule. There can be no general rule for such a concept because of the many variables involved in any situation." Id. Rule 6 provides a list of factors to be considered when making a determination of whether a given vessel was underway at a "safe speed." From the six factors listed in Rule 6, supra, the following four considerations are especially probative, here:

1. The state of visibility
2. The traffic density including concentrations of fishing vessels or any other vessels

3. The manageability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions
4. The state of wind, sea and current, and the proximity of navigational hazards

#### State of Visibility

The sky was clear on the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut. However, the wind, seas and construction of the M/V PILOT No. 1's wheel-house conspired to impair visibility and to obscure the Holmes' low-profile fishing vessel. (Tr. at 52; CG Ex. 7, 13, 16). Given the fact of three to six foot, choppy seas, and the low-profile of the Holmes' craft might easily have been hidden by the waves.

That Respondent's visibility was impaired is evident from his apparent failure to recognize the Holmes' craft and Captain Grant's subsequent seizure of the wheel and attempt to turn the vessel to starboard. Hence, obscured visibility in the sense of Respondent's ability to see the other vessel, regardless of meteorological conditions, is an essential ingredient, here, in support of the Coast Guard's position that Respondent was operating at an unsafe speed.

#### Traffic Density

The parties agree, there were very few other vessels visible on the water in the near the vicinity of the Port Everglades, Florida, Outer Bar Cut, on the morning of October 19, 2009. The fact of low traffic density militates in favor of Respondent's position, here.

#### State of Wind and Sea

It is undisputed that on the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, a small-craft advisory had been posted—occasioned by winds of fifteen to twenty knots out of the north-northeast and prevailing three to six foot seas and heavy chop. (Tr. at 57-58, 137). Respondent's vessel measured forty feet in length and the court takes notice that "small craft" are generally defined to be no greater than sixty feet in length. (Tr. at 58). The prevalence of fifteen to twenty knot winds and heavy chop ought to have

provided ample notice to Respondent that he reduce his speed accordingly. By his own testimonial admission, Respondent described the seas that morning as “quite rough . . . extremely rough. Those swells crashing on the bow of my vessel covered the windshield, which at times prevented me from seeing anything at all.” (Tr. at 137).

#### Vessel Manageability

Because the wind and sea conditions posed obvious, potential difficulties and because Respondent’s vessel was a small craft, the M/V PILOT NO.1 would have been more difficult to steer safely at a relatively high speed; particularly in regard to Respondent’s ability to turn the vessel. These inherent factors would have presented themselves to Respondent as he headed seaward.

Taken together, these factors clearly establish that a speed of sixteen to seventeen knots was unsafe, given the extant weather and sea conditions.

In defense, Respondent essentially argues that any obligation he had to obey Rule 6 was overcome by superior orders from his employer, PEP, Inc. and Captain Grant. Respondent’s “defense” is summarized by his testimony:

As we exited the port, Captain Grant told me we need to go, which I interpreted as increase my speed. I increased my speed and he had no objections. As we continued out the cut, the visibility was even worse, but I continued on because according to my handbook, I cannot disagree with the orders of the [P]ilot.

(Tr. at 138) (emphasis added).

In his closing argument, Respondent also said that he had been:

[O]rdered by the number one pilot to increase my speed. It’s obvious by the [company] handbook that I had no say so in that matter under conditions of my employment and under punishment of termination from employment, and I’m required to follow those orders.

(Tr. at 143-144) (emphasis added).

Respondent's argument is untenable. First, the court notes that there was no probative evidence that Captain Grant ever gave Respondent a direct order to increase speed in the face of potentially unsafe sea conditions. At most, the evidence reveals that Respondent may have "interpreted" Captain Grant's general guidance as an order to increase speed.

Second, and most important, is the fallacy that Respondent was obliged to follow an order that would have caused him to run afoul of Rule 6.

For more than a century, it has been a constant principle of American maritime jurisprudence that, generally speaking, the pilot supersedes the master for the time that pilot is in command and navigation of the vessel. His orders must be obeyed in all matters connected with its navigation. In other words, the pilot is in supreme command of the vessel while he is navigating it. The Oregon, 158 US 186 (1895). Here, Respondent was the pilot of the M/V PILOT NO.1 and even though Captain Grant, as a principal of PEP, Inc. was technically the vessel's "master" (and Respondent's employer), Respondent's authority at the helm superseded that of any other person insofar as the navigation of the vessel was concerned. See also Ralli v. Troop, 157 U.S. 386 (1895); Atlee v. N.W. Packet Co., 88 U.S. 389 (1874); Cooley v. Board of Wardens for the Port of Philadelphia, 53 U.S. 299 (1851). Hence, it was Respondent's duty, and his alone, to ensure the safe operation of the M/V PILOT NO.1 without regard to whether any adverse employment consequence might follow as a result of his decision-making. See also Coast Guard Exhibit 21.

#### **IV. ULTIMATE FINDINGS OF FACT**

1. At all relevant times herein, Clinton Grady Morton (Respondent) was the holder of and acting under the authority of his Merchant Mariner License and Merchant Mariner Credential. (CG Ex. 24).
2. On the morning October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, Respondent was the pilot of the M/V PILOT NO. 1. (Tr. at 141; CG Ex. 16).

3. The visibility from the visibility from the cockpit or wheelhouse of the M/V PILOT NO. 1 was restricted by virtue of the vessel's construction and particularly the tubular-pipe, hand-rail framework on the vessel's elongated bow. (Tr. at 52; CG Ex. 13, 16).
4. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the prevailing weather conditions included winds of fifteen to twenty knots out of the north-northeast and partly cloudy skies and unlimited visibility. (Tr. at 57-58).
5. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, the prevailing sea conditions were three to six foot seas and heavy chop. (Tr. at 57, 137).
6. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, and immediately prior to the collision with a private recreational fishing vessel, Respondent operated the M/V PILOT NO. 1 at a speed 16 to 17 knots. (Tr. at 59, 139).
7. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut; the state of visibility, traffic density, manageability of the vessel with special reference to turning ability in the prevailing conditions, and the state of wind, sea and current dictated that a vessel speed of sixteen to seventeen knots was excessive and unsafe.
8. On the morning of October 19, 2009, at and near the vicinity of the Port Everglades, Florida, Outer Bar Cut, Respondent operated the M/V PILOT NO. 1 at an unsafe speed.

## V. CONCLUSION

For the foregoing reasons, the court hereby finds that the Coast Guard has **PROVED** its allegations that Respondent committed Misconduct by his failure to proceed at a safe speed as that concept is defined by Rule 6 of the Inland Navigation Rules.

## VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. § 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959). See also, 46 U.S.C. §7701; 46

C.F.R. §5.5. As discussed supra, Respondent committed an act of misconduct while acting under the authority of his license by failing to proceed at a safe speed while serving as pilot and master of the M/V PILOT NO. 1.

To reiterate: causation of the collision with the private recreational/fishing vessel is NOT an issue in this case. Thus, causation is not a factor to be considered in selecting an appropriate sanction for Respondent's Misconduct.

The Complaint seeks a two-month suspension of Respondent's Coast Guard-issued license and credential pursuant to 46 U.S.C. §7703.

Title 46 C.F.R. §5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. 46 C.F.R. §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174.

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action brought against a mariner for misconduct (refusal to submit to a drug test), the NTSB disapproved an order of license revocation order because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569. The NTSB clearly explained that the guidance contained in the Table is “for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered.”

While it is true that 46 C.F.R. §5.569(d) also says: **This table should not affect the fair and impartial adjudication of each case on its individual facts and merits**, it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to **this** Respondent, absent some proof. Id. (emphasis added).

In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by a respondent;

respondent's prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).

**Remedial Action:** Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1).

**Respondent's Prior Records:** The undersigned does note that the Respondent did lawfully have a Merchant Mariner's License and Merchant Mariner's Credential which had never been the subject of previous disciplinary action. See 33 C.F.R. §5.569(b)(2). Apparently, no adverse action had been previously imposed against his license or credential, it is reasonable to infer that he has been a safe mariner.

**Mitigation or Aggravation:** Respondent offered no affirmative proof in mitigation of any potential sanction.

Respondent might have produced independent evidence or testimony from the maritime community to establish his actions were reasonable under the circumstances or that similar future conduct would not pose a threat to safety on the waterways.<sup>4</sup> However, no such evidence was forthcoming.

Likewise, the Coast Guard did not present any matters that would support any particular period of suspension. 46 C.F.R. Table 5.569 provides a range of months wherein a mariner's license might be suspended for failure to comply with U.S. law, namely 33 U.S.C. §1602 and 46 U.S.C. 7703(1)(B) as alleged in the Complaint and Amended Complaint. It is incumbent upon the Coast Guard, via testimony or evidence, to substantiate the basis for its proposed sanction. The Coast Guard might have alleged and proved that Respondent's failure to proceed at a proper speed was a cause of the collision at issue here, but it did not. Likewise, the Coast Guard might

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<sup>4</sup> Even assuming an industry standard exists, it may be inadequate, cf. The T. J. Hooper, 60 F.2d 737, 1932 A.M.C. 1169 (2d Cir. 1932) and compliance with the law is still required.

have presented expert testimony from an experienced master or a safety investigator to explain how Respondent's conduct posed a threat to life or safety on the waterways, but it did not. Beyond a speculation, the Coast Guard provided no direct evidence regarding the threat Respondent's actions actually posed to the safety of life or property on the waterways. See 33 C.F.R. §5.569(b)(3).

Absent evidence in either aggravation or mitigation, the court finds that departure from 46 C.F.R. §5.569 and its attendant table is not warranted. There the suggested range of appropriate orders for Misconduct, "Failure to comply with U.S. law or regulation" suggests a range of suspension of between one and three months for Misconduct.

The Coast Guard has proved that the Respondent did operate a vessel in violation of 46 C.F.R. §5.27, in that he committed Misconduct by failing to proceed at a safe speed. Yet Respondent's record reflects that prior to October 19, 2009, he had been a safe and prudent mariner. The Coast Guard did not articulate a clear basis for the two-month suspension it seeks. (Tr. at 148-149).

The court does note that, during the Coast Guard's investigation of these matters, Respondent was offered a "warning letter" in lieu of a formal suspension and revocation proceeding. (Resp. Ex. B). However, Respondent declined the "warning letter" and opted for these proceedings; by doing so, he chose the risk of lengthy suspension over a relatively painless warning letter. Conversely, the proposal of a warning letter in lieu of a disciplinary proceeding provides some insight into the Coast Guard's actual "price tag" for Respondent's actions.

Based upon the record as a whole, the appropriate sanction is one month outright suspension of Respondent's Merchant Mariner's License and his Merchant Mariner's Credential.

**VII. ORDER**

**IT IS HEREBY ORDERED**, that all allegations of the Complaint filed against Respondent Clinton Grady Morton on February 9, 2010 and on March 18, 2010, are found **PROVED**.

**IT IS FURTHER ORDERED**, that Respondent Clinton Grady Morton is **SUSPENDED OUTRIGHT FOR ONE MONTH** from acting under the authority of his Merchant Mariner's License and Merchant Mariner's Credential.

**PLEASE TAKE NOTE**, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

**IT IS SO ORDERED.**

  
**Bruce Tucker Smith**  
**Administrative Law Judge**  
**US Coast Guard**  
Date: June 03, 2010

## VIII. ATTACHMENT A, LIST OF WITNESSES AND EXHIBITS

### **Coast Guard Witnesses**

1. James Ryan
2. Dean Grant
3. Kathleen Ann Holmes

### **Coast Guard Exhibits**

- CG Ex. 6: Property Damage Release
- CG Ex. 7: Photograph Holmes' fishing vessel
- CG Ex. 13: Photograph view from cockpit of Respondent's vessel
- CG Ex. 16: Photograph of exterior of Respondent's vessel
- CG Ex. 21: "General Duties, Pilot Boat Captain"
- CG Ex. 22: "General Duties, Maintenance/Relief Pilot Boat Captain"
- CG Ex. 24: Photocopy Respondent's Merchant Mariner Credential

### **Respondent's Witnesses**

1. LT Michelle Schopp, USCG
2. Clinton Morton

### **Respondent's Exhibits**

- Resp. Ex. A: Statement of Kathleen Holmes
- Resp. Ex. B: Coast Guard Warning Letter