

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

**UNITED STATES OF AMERICA *
UNITED STATES COAST GUARD ***

Docket No. 01-0542

vs.

Case No. PA01001470

**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: 548 Old County Road, Rockland, ME 04841, telephone (207) 594-1751.
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 denimimus. 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 one 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.

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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