

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFREY RAY SUNDWALL,

Petitioner,

vs.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

Case No. 19-4039

*AMENDED AS TO LAST
PARAGRAPH OF
PRELIMINARY STATEMENT
ONLY

*AMENDED RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”) in Tallahassee, Florida, on February 7, 2020.

APPEARANCES

For Petitioner: Jeffrey Ray Sundwall, pro se
Jackson Correctional Institution
5563 10th Street
Malone, Florida 32445

For Respondent: Brandy Elaine Elliott, Esquire
Florida Fish & Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether the Florida Fish and Wildlife Conservation Commission (“the Commission”) correctly determined that a sailboat owned by Jeffrey

Sundwall was a “derelict vessel” within the meaning of section 823.11(1)(b)1., Florida Statutes (2017),¹ and thus subject to sections 376.15(3)(a) and 705.103, Florida Statutes.

PRELIMINARY STATEMENT

“It is unlawful for a person, firm, or corporation to store, leave, or abandon any derelict vessel in this state.” § 823.11(2), Fla. Stat. A person who does so is guilty of a first degree misdemeanor. § 823.11(5), Fla. Stat.

Section 823.11(1)(b)1. defines a “derelict vessel” as a vessel that is left, stored, or abandoned “[i]n a wrecked, junked, or substantially dismantled condition upon any public waters of this state.” Section 376.15(3)(a) empowers the Commission to “relocate, remove, or cause to be relocated or removed any derelict vessel as defined in s. 823.11 from public waters.”

In addition, all costs incurred by the Commission during the course of relocating or removing the derelict vessel are recoverable against the vessel owner. § 823.11(3)(b), Fla. Stat.

The Commission issued a notice to Mr. Sundwall stating that he had been identified as the last known owner of a sailboat (“the Sea Joy”) that had been deemed a derelict vessel and transported to a vessel storage facility in the Florida Keys. The notice advised Mr. Sundwall that he had 30 days to claim the Sea Joy and that the Commission intended to destroy the vessel if he failed to do so. Mr. Sundwall responded by requesting an administrative hearing and disputing the Commission’s assertion that he had abandoned the Sea Joy. On July 30, 2019, the Commission referred this matter to DOAH.

The undersigned initially scheduled the final hearing for October 9, 2019, but the parties filed a “Joint Motion for Continuance” on September 1, 2019. After finding that the parties’ request was supported by good cause, the

¹ Unless stated otherwise, all statutory references shall be to the 2017 version of the Florida Statutes.

undersigned issued an Order on September 20, 2019, continuing the final hearing to November 21, 2019.

After learning during a telephonic case management conference on November 7, 2019, that Mr. Sundwall needed additional time to conduct discovery, the undersigned canceled the final hearing and required the parties to submit mutual dates of availability for a final hearing in January or February of 2020. On November 15, 2019, the undersigned issued an Order rescheduling the final hearing for February 7, 2020.

After a great deal of motion practice, the final hearing was held as scheduled on February 7, 2020. Mr. Sundwall appeared telephonically and testified on his own behalf. He also presented testimony from Arnaud Girard-D'alvissin and Scott King. The undersigned accepted Petitioner's Exhibits A through W and Y into evidence.

The Commission presented testimony from Noel Garcia, Officer David Bellville, Tinsley Myrick, Lieutenant Andy Cox, Lieutenant Lindsay McDonald, and Major Robert Rowe. Respondent's Exhibits 1 through 3 and 5 through 12 were accepted into evidence.

Based on an agreement reached at the close of the final hearing, the undersigned established May 7, 2020, as the deadline for the parties to submit proposed recommended orders.

Neither party ordered a transcript of the final hearing.

The Commission filed its Proposed Recommended Order on April 27, 2020. Mr. Sundwall's Proposed Recommended Order was received by DOAH on June 1, 2020, but after the initial version of this Recommended Order was

issued. Because a date stamp on Mr. Sundwall's Proposed Recommended Order indicates that it was provided to prison officials on May 7, 2020, Mr. Sundwall's Proposed Recommended Order is deemed to have been timely filed. *See Haag v. State*, 591 So. 2d 614, 617 (Fla. 1992)(adopting the mailbox rule which provides that a document filed by a prison inmate is deemed filed with the court at the moment the inmate loses control over the document by entrusting delivery or processing to prison officials). Therefore, this Amended Recommended Order is being issued so that the undersigned can note that Mr. Sundwall's Proposed Recommended Order was reviewed but nothing therein persuaded the undersigned that the Findings of Fact, Conclusions of Law, or the ultimate recommendation set forth in the initial version of the Recommended Order needed to be revised.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, and the record as a whole, the following Findings of Fact are made:

The Parties

1. The Commission is empowered to remove, or cause to be removed, derelict vessels from Florida's public waters. §§ 376.15(3)(a) and 823.11(3), Fla. Stat. A vessel is considered to be "derelict" if it is left, stored, or abandoned "[i]n a wrecked, junked, or substantially dismantled condition upon any public waters of this state." § 823.11(1)(b)1., Fla. Stat.

2. Mr. Sundwall was the registered owner of a 28-foot sailboat named the Sea Joy.

Facts Specific to the Instant Case

3. Lieutenant Andy Cox of the Commission found the Sea Joy anchored off Wisteria Island in the Florida Keys on March 27, 2017. The Sea Joy had an expired registration decal, and a large amount of seaweed on the outboard motor, which probably rendered the motor inoperative. The Sea Joy had been left open and exposed to the elements, and Lieutenant Cox observed one-inch

deep, green water inside the vessel. Lieutenant Cox also determined that the Sea Joy had no working bilge pumps or battery power.

4. Lieutenant Cox initiated a derelict vessel investigation. While the Commission did not take custody of the Sea Joy at that time, Lieutenant Cox affixed a large, red sticker to the Sea Joy announcing that the vessel's owner had 5 days before the Commission disposed of it pursuant to its authority under chapter 705.

5. Lieutenant Cox met with Mr. Sundwall on approximately March 28, 2017, in a Florida Keys jail and served him with three infraction citations. Lieutenant Cox also provided Mr. Sundwall with a written notice indicating the Commission considered the Sea Joy to be a derelict vessel.

6. On July 24, 2017, the County Court for Monroe County issued an Order requiring the Monroe County Sheriff's Office and the Commission to preserve the Sea Joy as essential evidence in a criminal case against Mr. Sundwall. Thus, the Sea Joy could not be "destroyed, removed, altered, moved, or otherwise disposed of."

7. After Hurricane Irma struck Florida in September of 2017 and wrecked several hundred vessels, the Commission partnered with the Coast Guard in an effort to identify and remove derelict vessels. If an owner of a derelict vessel waived his or her ownership interest, then the State of Florida would not charge for a vessel's removal and disposal.²

8. Wisteria Island is owned by the FEB Corporation. In November of 2017, the Commission found the Sea Joy hard aground on the shore of Wisteria Island, and the Sea Joy could not be moved without mechanical assistance. The Sea Joy had no mast or sail, and the vessel was still left open and

² The Commission's attorney announced during the final hearing that the Commission would not seek to recover the costs of removing and disposing of the Sea Joy from Mr. Sundwall. Ordinarily, the owner of a derelict vessel is responsible for all costs associated with its removal and destruction. *See* §§ 376.15(3)(a), 705.103(4), and 823.11(3)(b), Fla. Stat. However, in the aftermath of Hurricane Irma, the State of Florida assumed all of those costs.

exposed to the elements. In sum, the Sea Joy was nothing more than a hull at that point.

9. Contemporaneous photographs and video of the Sea Joy indicate that it was resting on “wrack lines” left by the tide. Those wrack lines demonstrated that the Sea Joy was on public waters at high tide.³

10. In response to a request for reconsideration from the State of Florida, the Monroe County Court issued an Order on December 12, 2017, allowing the State to remove the Sea Joy from Wisteria Island.

11. On December 17, 2017, the Commission transported the Sea Joy to a marina in Marathon, Florida.

12. Officer David Bellville of the Commission met with Mr. Sundwall on January 4, 2018, at the Stock Island Detention Center in Key West. Officer Bellville served Mr. Sundwall with a notice stating that he had 30 days to take possession of the Sea Joy or it would be destroyed pursuant to the Commission’s authority under chapter 705. Officer Bellville also served Mr. Sundwall with an election of rights form stating he had 21 days to protest the Commission’s proposed action. Mr. Sundwall declined to waive his property interest in the Sea Joy and ultimately executed the election of rights form and a request for an administrative hearing on January 20, 2018.

13. Mr. Sundwall’s hearing request was postmarked on January 23, 2018, and received by the Commission on January 29, 2018. Because Mr. Sundwall’s documents were received after the 21-day deadline, the Commission had the Sea Joy destroyed on February 21, 2018, and issued an Order on March 6, 2018, dismissing Mr. Sundwall’s hearing request with prejudice.

14. Mr. Sundwall appealed the Commission’s Order to the First District Court of Appeal, and the appellate court issued an opinion in *Sundwall v. Florida Fish & Wildlife Conservation Commission*, 271 So. 3d 1239 (Fla. 1st

³ This finding is based on the testimony of Major Robert Rowe of the Commission, and the undersigned found him to be a credible and persuasive witness.

DCA 2019), on May 16, 2019, reversing and remanding the Commission's dismissal:

After Hurricane Irma struck Florida in 2017, the Florida Fish and Wildlife Conservation Commission (FWC) identified Mr. Sundwall as the owner of a boat declared derelict upon the waters of Florida. *See* § 823.11, Fla. Stat. (2017) (defining derelict vessels and empowering FWC to deal with them). Mr. Sundwall was incarcerated at the time. FWC sent Mr. Sundwall notice of the declaration, an explanation of his rights, an Election of Rights form, and a form for a Petition for Administrative Proceeding. The notice stated that a failure to make any election within twenty-one days from receipt of the notice would constitute a waiver of the right to a hearing.

Mr. Sundwall signed a receipt for these documents on January 4, 2018. The twenty-first day after that fell on January 25, 2018. He signed the Election of Rights form, requesting a hearing; and also completed the Petition for Administrative Proceeding, dating both of his signatures January 20, 2018. There was no certificate of service or institutional date stamp on any of the papers, nor any institutional mail log indicating when he gave the papers to prison officials. The envelope was postmarked January 23, 2018. FWC stamped it as received on January 29, 2018.

FWC dismissed the petition with prejudice because FWC did not receive it within twenty-one days and Mr. Sundwall did not request an extension within that period. FWC's order of dismissal acknowledged that the envelope from Mr. Sundwall was postmarked January 23, 2018. However, FWC relied on Florida Administrative Code Rule 28-106.104(1), which defines filing as receipt by the agency clerk during normal business hours.

In his pro-se brief, Mr. Sundwall relies on the January 20 date of his signatures and the January 23 postmark date, arguing that he is

entitled to the benefit of the prison mailbox rule under *Haag v. State*, 591 So. 2d 614 (Fla. 1992). FWC does not dispute that argument, but argues that Mr. Sundwall provided no proof that he placed his papers in the hands of prison officials before expiration of the deadline; i.e., no institutional mail stamp or log and no certificate of service. The record does not reflect whether Mr. Sundwall's institution utilizes dated mail stamps or logs, but one reason there were no certificates of service is because none of the forms that FWC supplied to him contained a certificate of service.

In a literal sense, however, Mr. Sundwall "provided" FWC a postmarked envelope that evidences timeliness. He argues on appeal that FWC calculated the time erroneously, and he points out that the envelope was postmarked on January 23. The postmark date was before expiration of the twenty-one-day period for requesting a hearing, and therefore the petition necessarily was submitted to prison officials before the deadline. FWC acknowledged the postmark date in its order of dismissal, and the postmarked envelope is in the record. We therefore reverse the order of dismissal and remand for further proceedings on Mr. Sundwall's petition.^[4]

Ultimate Findings

15. There is no dispute that the Sea Joy was a "vessel" within the meaning of section 327.02(46), Florida Statutes.

16. When it was beached on Wisteria Island, the Sea Joy was a "derelict vessel" within the meaning of section 823.11(1)(b)1. It was left or abandoned in a wrecked, junked, or substantially dismantled condition upon the public

⁴ To whatever extent that Mr. Sundwall is seeking damages from the Commission for the Sea Joy's destruction, he must pursue that claim before a different tribunal. DOAH's role in this matter is limited to making findings as to whether the Sea Joy was a "derelict vessel" within the meaning of section 823.11(1)(b)1. and thus subject to sections 376.15(3)(a) and 705.103.

waters of this state. While the Sea Joy no longer exists, the photographic evidence and the witness testimony conclusively demonstrate that it was wrecked or substantially dismantled by the time it ran aground on Wisteria Island.

17. The photographic evidence also demonstrated that the Sea Joy was upon the State of Florida's public waters at high tide.

18. Mr. Sundwall made several factual arguments during the final hearing. For instance, section 823.11(1)(b)3. defines a "derelict vessel" as one that is "[d]ocked, grounded, or beached upon the property of another without the consent of the owner of the property." Mr. Sundwall testified that he had permission for the Sea Joy to be on Wisteria Island. Mr. Sundwall's argument is not persuasive because the Commission determined the Sea Joy to be a derelict vessel pursuant to section 823.11(1)(b)1., not section 823.11(1)(b)3. However, even if the Commission had deemed the Sea Joy to be derelict pursuant to section 823.11(1)(b)3., Mr. Sundwall's testimony that he had permission to keep the Sea Joy on the shore of Wisteria Island was uncorroborated and unpersuasive.

19. In preparation to take control of the Sea Joy, Mr. Sundwall asserted that a friend of his had attempted to inspect the Sea Joy while it was beached on Wisteria Island. He claimed that the Commission forced Mr. Sundwall's friend away from the wrecked vessel.

20. Because the Commission was dealing with several hundred displaced vessels in the aftermath of Hurricane Irma, it is very unlikely that the Commission would have been in a position (or to have been inclined) to prevent any willing person from removing the derelict Sea Joy from Wisteria Island or inspecting it. Moreover, the undersigned generally found Mr. Sundwall's testimony on this point to be unpersuasive and self-serving. Mr. Sundwall's witnesses did not present any persuasive testimony to corroborate his assertions.

21. Mr. Sundwall also argued that the instant case is part of the Commission's ongoing effort to retaliate against him for undermining a criminal investigation. Even if that were the case, there is no evidence that the Commission left the Sea Joy anchored off Wisteria Island or caused it to become a derelict vessel.

22. Mr. Sundwall asserts that he has been denied due process. However, the facts refute that assertion because: (a) he was given notice of the Commission's proposed action to dispose of the Sea Joy; (b) he had an opportunity to request a hearing; (c) his case was referred to DOAH; and (d) a formal administrative hearing was conducted on February 7, 2020, at which he fully participated.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

24. It is unlawful for a person to store, leave, or abandon any derelict vessel in this State. § 823.11(2), Fla. Stat.

25. Sections 376.15(3)(a) and 823.11 empower the Commission to remove derelict vessels from public waters.

26. Section 823.11(1)(b)1. defines a "derelict vessel" to include "a vessel, as defined in s. 327.02, that is left or abandoned . . . [i]n a wrecked, junked, or substantially dismantled condition upon any public waters of this state."

27. When a statute does not define terms used therein, one can refer to a dictionary in order to ascertain their intended meaning. *See L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997)(stating that "a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term.").

28. The online edition of the Merriam-Webster Dictionary defines the term "left" as the past tense of the word "leave." It defines the term "abandoned," in pertinent part, as to leave "without needed protection, care, or support." The term "wreck" is defined, in pertinent part, as "something cast up on the

land by the sea” or “a hulk or the ruins of a wrecked ship.” See “left,” “abandoned,” and “wreck,” <https://meriam-webster.com> (last visited May 13, 2019).

29. Because it is asserting that the Sea Joy was a “derelict vessel” within the meaning of section 823.11(1)(b)1., the Commission bears the burden of proof. *Fla. Dep’t of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981)(stating that “[i]n accordance with the general rule, applicable in court proceedings, ‘the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.’”)(quoting *Balino v. Dep’t of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977)).

30. Because section 823.11(1)(b)1. does not provide for a standard of proof in proceedings such as the instant case, chapter 120, Florida Statutes, indicates that the preponderance of the evidence standard applies. § 120.57(1)(j), Fla. Stat. (providing that “[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence or record and on matters officially recognized.”). However, one could reasonably argue that the Commission should be required to prove its case by clear and convincing evidence. See *Dep’t of Law Enf. v. Real Property*, 588 So. 2d 957, 968 (Fla. 1991)(holding that “due proof” under the Florida Contraband Forfeiture Act “constitutionally means that the government may not take an individual’s property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime.”).

31. Any uncertainty about the appropriate standard of proof is a moot point in the instant case because the Commission proved by clear and convincing evidence that the Sea Joy became a “derelict vessel” within the meaning of section 823.11(1)(b)1. after Hurricane Irma left it beached on Wisteria Island. The Sea Joy had been “left,” “abandoned,” “wrecked,” and “substantially dismantled” by that point in time. Moreover, the wrack lines

on the shore where the Sea Joy rested demonstrated that the vessel was on public waters at high tide. Waters of the State include “the shores between ordinary high and low water marks.” *See, e.g., Walton Cty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110 (Fla. 2008); *Brickell v. Trammel*, 77 Fla. 544, 558 (Fla. 1919); *State v. Gerbing* 56 Fla. 603, 610 (Fla. 1908).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Fish and Wildlife Conservation Commission issue a Final Order deeming the Sea Joy to have been a “derelict vessel” within the meaning of section 823.11(1)(b)1. and that the Commission was authorized under section 376.15(3)(a) to relocate or remove the Sea Joy.

DONE AND ENTERED this 4th day of June, 2020, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 2020.

COPIES FURNISHED:

Brandy Elaine Elliott, Esquire
Florida Fish & Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399
(eServed)

Jeffrey Ray Sundwall, 829113
Jackson Correctional Institution
5563 10th Street
Malone, Florida 32445

Eric Sutton, Executive Director
Florida Fish and Wildlife Conservation Commission
Farris Bryant Building
620 South Meridian Street
Tallahassee, Florida 32399-1600
(eServed)

Emily Norton, General Counsel
Florida Fish and Wildlife Conservation Commission
Farris Bryant Building
620 South Meridian Street
Tallahassee, Florida 32399-1600
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.