

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

GARY JANIKULA,

Petitioner,

vs.

Case No. 21-0242

LEE COUNTY SHERIFF'S OFFICE-DERELICT
VESSELS,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (“DOAH”) conducted an evidentiary hearing by Zoom conference from Tallahassee, Florida, on March 4, 2021.

APPEARANCES

For Petitioner: Gary Scot Janikula, pro se
132 Tropical Shore Way
Fort Myers Beach, Florida 33931

For Respondent: Antonette D. Hornsby, Esquire
Lee County Sheriff's Office
14750 Six Mile Cypress Parkway
Fort Myers, Florida 33913

STATEMENT OF THE ISSUE

Whether the Lee County Sheriff's Office (“LCSO” or “Respondent”) correctly determined that a vessel owned by Gary Janikula (“Petitioner”) was a “derelict vessel” or an “abandoned vessel” on the waters of the state of Florida, within the meaning of section 823.11, Florida Statutes (2020), and

therefore, subject to the provisions of sections 376.15, 705.101, 705.103, and 823.11, Florida Statutes (2020).

PRELIMINARY STATEMENT

On December 8, 2020, Deputy Tony Smith from Respondent's Derelict Vessels Unit handed Mr. Janikula a Florida Uniform Boating Citation #542737,¹ regarding his "derelict vessel, [a] 1995 35-foot white Amer [sic] houseboat #FL3396HP." Mr. Janikula acknowledged receipt of:

- A letter notifying [him] that [his] vessel has been determined to be derelict (2 pages);
- An Explanation of Rights to an administrative proceeding on the determination that [his] vessel is derelict (1 page);
- An Election of Rights ["EOR"] Form (2 pages); and
- A Petition for an Administrative Proceeding (2 pages).

Through an executed EOR form and a Petition for Administrative Proceeding, each dated December 24, 2020, Mr. Janikula requested an administrative hearing, disputing that:

Vessel is not derelict, abandoned, sunk. Vessel was temporarily placed in shallow water near a sandbar to accomplish repairs sustained from Tropical Storm ETA on 11-11-2020.

On January 19, 2021, LCSO referred the matter to DOAH. Although an Initial Order was issued on January 22, 2021, seeking input from both

¹ This citation contained Lee County Court Case Number 20-564291/W4 and was for a criminal violation which required a court appearance. This is an administrative proceeding. The undersigned was not advised of and has not relied on any action taken by the Lee County Court.

parties to facilitate the hearing, neither party provided any of the requested information.

A Notice of Hearing by Zoom Conference (“Hearing Notice”) and an Order of Pre-hearing Instructions (“OPI”) were issued to both parties on February 2, 2021.

The final hearing was scheduled for and completed on March 4, 2021.

Mr. Janikula appeared and testified on his own behalf. Mr. Janikula did not offer any exhibits during the hearing.² LCSO presented the testimony of Deputy Smith and Deputy Adam Winton. Respondent’s Exhibits A through G³ were accepted into evidence without objection.

At the end of the hearing, the parties were informed of the ten-day timeframe provided by rule for filing proposed recommended orders (“PROs”), running from the later of the filing of the transcript at DOAH or the close of the hearing. When asked if the ten-day deadline would be sufficient, Mr. Janikula requested 14 days to file the post-hearing submission. Respondent did not oppose the request, and it was granted.

On March 17, 2021, an electronic version of the one-volume Transcript of the proceeding was filed with DOAH.⁴ On March 18, 2021, a Notice of

² During his testimony, Mr. Janikula repeatedly testified he could take pictures later in the day and provide them. Both the Hearing Notice and OPI provided directions on how to provide timely exhibits for the hearing.

³ On February 17, 2021, LCSO electronically filed its Witness and Exhibit List. LCSO electronically filed its exhibits. The actual exhibits were filed on March 5, 2021. Respondent’s Composite Exhibit B contained two Florida Uniform Boating Citations, and Respondent’s Composite Exhibit G contained 12 photographs of Petitioner’s vessel and the LCSO’s “NOTICE” that was attached to Petitioner’s vessel on December 8, 2020.

⁴ On March 19, 2021, the “hard” copy transcript was filed.

Deadline for Filing Proposed Recommended Orders was issued, establishing March 31, 2021, as the date for filing the PROs. Respondent filed its PRO on March 30, 2021.

On March 31, 2021, Mr. Janikula filed a letter requesting an extension of time for him “to get completed, what is needed to satisfy the issues in this case.” The undersigned equated this request to Mr. Janikula’s need for additional time to prepare and file his PRO. Mr. Janikula’s letter failed to specify how much time was needed, but it did provide that Respondent’s counsel did not oppose the request. The request was granted⁵ and Mr. Janikula was directed to file his PRO no later than 5:00 p.m. on April 16, 2021.

On April 16, 2021, Mr. Janikula submitted a one paragraph letter accompanied by six photographs of his pontoon houseboat. Because the letter did not reflect that copies of the letter and photographs were sent to LCSO, a Notice of Ex Parte Communication was issued. To the extent that Mr. Janikula’s letter contained a recitation of or advocacy of information presented at the hearing, that information has been considered. However, because the photographs were not offered nor admitted into the record during the hearing, nor subject to examination by LCSO during the hearing, the undersigned has not considered them.

Further, to the extent that either PRO contained hearsay evidence not supported by direct testimony or evidence, or contained information that was not subjected to cross-examination during the hearing, that information has not been considered.

⁵ Mr. Janikula’s letter was filed after 4:15 p.m. on March 31, 2021. The Order Granting Extension of Time was issued the following morning.

Any references to Florida Statutes, administrative rules, or LCSO's rules are to the versions in effect at the time of the allegations, unless otherwise indicated.

FINDINGS OF FACT

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

1. Mr. Janikula is the registered owner of a 35-foot pontoon houseboat,⁶ registration number FL3396HP ("pontoon houseboat"), found in the public waters of Lee County, Florida.

2. LCSO 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 Florida." § 823.11(3), Fla. Stat.

3. Adam Winton is a sworn law enforcement officer ("LEO") working as a Deputy Sheriff for Respondent. Prior to joining Respondent, Deputy Winton was employed by the Florida Fish and Wildlife Conservation Commission ("Commission").

4. The Commission is the primary state agency responsible for derelict vessel enforcement identification and investigation. Deputy Winton received "ongoing training, as well as [law enforcement] academy training in derelict vessel investigations," and he has been assigned to "disaster areas several times for the sole purpose of conducting derelict vessel identification."

5. Deputy Smith has been a LEO for 23 years. Deputy Smith has been with Respondent's marine unit for nine years. In addition to his four-year

⁶ Generally, this type of pontoon boat operates with a motor on each hull.

degree from Florida State University, he has completed 16 hours of derelict vessel investigation training.

6. When a derelict vessel investigation is begun, the LEO starts by identifying the owner of the vessel and finding out the owner's intentions for the vessel. The derelict vessel investigation then determines three things: the vessel is "wrecked;" "junked;" or "substantially dismantled."

7. A vessel is "wrecked when it does not have the ability to extract itself absent some mechanical assistance;" it might be sunk or grounded.

8. A vessel is "junked" when it is substantially stripped of components, the vessel has been discarded, or it could also be sunk.

9. A vessel is "substantially dismantled" if the vessel does not have the power to be steered, there are parts missing from the vessel, or the vessel's integrity itself is compromised.

10 On August 16, 2020, Deputy Winton was working the marine patrol detail in the public waters of Lee County, Florida. While on that patrol, Deputy Winton observed Mr. Janikula's pontoon houseboat in Matanzas Pass⁷ in Lee County, Florida.

11. Deputy Winton observed the pontoon houseboat "listing [leaning] significantly" and the "right [starboard] hull had been compromised." He observed the right hull did not "have an effective means of dewatering ... [and] it's been in the state for quite some time." Although the pontoon houseboat appeared to be floating, Deputy Winton testified the "starboard hull was in shallow water so it's possible it was resting on the bottom." The pontoon houseboat's starboard hull was low in the water while the port (left) side was much higher out of the water, demonstrating the vessel's listing.

12. Deputy Winton also observed that the "interior cabin areas were breached and open to the elements." Several "cabin windows and doors were

⁷ Matanzas Pass is within Estero Bay, Lee County, Florida.

either open, broken, or missing,” allowing air, rain, or salt water into the pontoon houseboat.

13. Further, Deputy Winton observed the pontoon houseboat did not “appear to have any sort of steering device.” He observed that although this pontoon houseboat was supposed to be equipped with two motors, the starboard motor was missing and the port motor had “damage to the cowling area [and] the bottom part was very corroded.” The port motor was “cracked in the back and everything [was] corroded on it.” Deputy Winton determined the port motor was an inoperable outboard engine. The “cables and different control mechanisms that run to where the [other] engine should be or where any sort of steering should be were broken, discarded, just hanging into the water.”

14. As a result of all that he observed, Deputy Winton issued a Florida Uniform Boating Citation V297371⁸ to Mr. Janikula. In addition to including Mr. Janikula’s identification information, and the date, time, and location of the pontoon houseboat, the citation included the following description of the pontoon houseboat as “at-risk of becoming derelict.”

15. Deputy Winton testified that this “at-risk” citation “is usually used as a sort of warning or sort of means to get somebody to fix a problem before it escalates to the point where they are issued a criminal charge for derelict vessel and a removal process is initiated.”

16. In late November 2020, over three months after Deputy Winton issued the “at-risk” citation, Deputy Smith observed the pontoon houseboat partially submerged in Estero Bay in Lee County, Florida. Deputy Smith observed the pontoon houseboat’s pontoons under water, and the vessel was “hard aground” in three feet of water.

⁸ This citation contained Lee County Court Case Number 20-396456/W4 and was for an infraction which did not require a court appearance, but the payment of a fine within 30 days. This is an administrative proceeding. The undersigned was not advised of and has not relied on any action taken by the Lee County Court.

17. Deputy Smith began an investigation of the pontoon houseboat, looking to determine if it met the criteria for a derelict vessel. Deputy Smith spoke with Mr. Janikula about the condition of his pontoon houseboat, and what his intentions were for it.

18. In early December 2020, Deputy Smith observed the partially submerged pontoon houseboat, and again spoke with Mr. Janikula.

19. On December 8, 2020, Deputy Smith again observed the partially submerged pontoon houseboat in Estero Bay. He saw the pontoon houseboat “was definitely in [a] wrecked condition ... sitting on the bottom. And it did not have the ability to remove itself.” The pontoon houseboat was sitting on a sandbar in two-to-three feet of water, and it was listing to the starboard side because the starboard pontoon was full of water.

20. Deputy Smith also observed that the pontoon houseboat was missing the starboard motor and the port motor was inoperable. The cables, necessary to connect the two motors for steering, were “degraded, rotting, and laying in the water.” Deputy Smith observed the “throttle mechanism was rusted and degraded and, ... not in very good shape.” The pontoon houseboat could not move on its own.

21. As a result of his observations, Deputy Smith located Mr. Janikula, and provided him a Florida Uniform Boating Citation, V542737. This citation included Mr. Janikula’s identification information, and the date, time, and the location of the pontoon houseboat. Additionally, the citation included the description that the pontoon houseboat was an “ABANDONED AND DERELICT VESSELS [sic].” Mr. Janikula acknowledged receipt of the derelict vessel citation and the information described in the first paragraph of the Preliminary Statement above.

22. LCSO provided photographic evidence (Respondent’s Composite Exhibit G) of the condition of the pontoon houseboat between December 2020 and February 2021. A brief description of each photograph is provided:

G-1: The front of the pontoon houseboat is listing to the starboard side, with barnacles exposed on the port hull, rub railing is broken, and port side is missing windows;

G-2: The front of the pontoon houseboat is listing to the starboard side, with barnacles exposed on the front port bow;

G-3: The pontoon houseboat registration number is visible, barnacles on the port side exposed pontoon above the water line are visible, rub railing is broken and coming apart, windows are broken out, and the LCSO's Notice is visible;

G-4: Starboard lower back side panel is shredded, hatch cover is missing, starboard motor is missing, throttle cables are unattached and hanging in the salt water;

G-5: Starboard stern close-up of the damaged steering position, throttle cables are hanging down, starboard lower back side panel is shredded, stern back-door frame is rusted, and the back door open;

G-6: Full stern view of the inoperable port side outboard motor, starboard motor is missing, starboard side steering cables laying in the salt water, and starboard lower back side panel is shredded;

G-7: Navigational lights on starboard are visible, and bow appears to be a receptacle for a number of unrelated, discarded items, including a wheel and ice chest;

G-8: Starboard lower back side panel is shredded, open hatches or windows are visible, port engine is out of the water, starboard motor is missing, steering cables are in the water, and pontoon houseboat is visibly listing to the starboard side;

G-9: Full stern view of the inoperable port side outboard motor, starboard motor is missing, starboard side steering cables are laying in the salt water, stern back door frame is rusted and back door is open, and starboard lower back side panel is shredded;

G-10: Port side pontoon is partially out of the water, rub rail is broken, windows are broken or missing, stern back door is open, port side outboard motor is out of the water, and starboard motor is missing;

G-11: LCSO Notice posted on the pontoon houseboat on December 8, 2020; and

G-12: Bow of the pontoon houseboat is listing to the starboard side, barnacles are exposed on the front port bow, and rub railing is broken.

23. Mr. Janikula testified that the pontoon houseboat is “an ongoing project” of his, yet he failed to provide credible evidence of any repairs being made to it. He offered that someone was living on it and the person had a “hot shower last night.” Mr. Janikula testified that his pontoon houseboat was “currently in about 7 feet of water floating just fine. Right next to me. I can see it from here.”

24. Mr. Janikula testified that the one outboard motor “got damaged,” his pontoon houseboat “doesn’t have any functioning engine” on it, and currently it is incapable of being moved on its own. Although he claimed the pontoon houseboat only had one motor when he purchased it, Mr. Janikula claimed the steering components were all present, and the vessel only needed one engine to steer.

25. Lastly, Mr. Janikula testified that the pontoon houseboat was “technically ... a residential barge ... it looks like a mobile home on pontoons.” LCSO’s photographs provide proof that this is not a barge as defined in section 327.02(3), Florida Statutes,⁹ but a pontoon houseboat, and it is in a wrecked condition. There can be no dispute that the pontoon houseboat was a “vessel” within the meaning of section 327.02(46).

26. Based on the evidence (both testimony and photographic), the undersigned finds that at the time of the hearing, Mr. Janikula’s testimony regarding: substantial repairs having been made to the pontoon houseboat;

⁹ Section 327.02(3) provides: “Barge” means a vessel that does not have living quarters, is not propelled by its own power, and is designed to be pushed or pulled by another vessel.

the description of the pontoon houseboat as floating in “7 feet of water”; the claim that the pontoon houseboat was sold with only one engine; and the claim that it is a residential barge, to be unpersuasive and self-serving.

27. Further, the pontoon houseboat was a “derelict vessel” within the meaning of section 823.11(1)(b)1. It was left in a wrecked, junked, or substantially dismantled condition upon the public waters of this state. The testimony and photographic evidence conclusively demonstrate that the pontoon houseboat was a junked and/or substantially dismantled vessel when it was observed by the deputies.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569, 120.57(1), and 120.65(6), Fla. Stat.

29. Section 705.101(3) provides in pertinent part:

“Abandoned property” means ... includes derelict vessels as defined in s. 823.11.

30. Section 705.103(4) provides:

(4) The owner of any abandoned or lost property who, after notice as provided in this section, does not remove such property within the specified period shall be liable to the law enforcement agency for all costs of removal, storage, and destruction of such property, less any salvage value obtained by disposal of the property. Upon final disposition of the property, the law enforcement officer shall notify the owner, if known, of the amount owed. In the case of an abandoned vessel or motor vehicle, any person who neglects or refuses to pay such amount is not entitled to be issued a certificate of registration for such vessel or motor vehicle, or any other vessel or motor vehicle, until such costs have been paid. The law enforcement officer shall supply the Department of Highway Safety and Motor Vehicles with a list of persons whose vessel registration privileges or whose motor vehicle

privileges have been revoked under this subsection. Neither the department nor any other person acting as agent thereof shall issue a certificate of registration to a person whose vessel or motor vehicle registration privileges have been revoked, as provided by this subsection, until such costs have been paid.

31. Section 823.11 provides in pertinent part:

(1) As used in this section, the term:

* * *

(b) "Derelict vessel" means a vessel, as defined in s. 327.02, that is left, stored, or abandoned:

1. In a wrecked, junked, or substantially dismantled condition upon any public waters of this state.

* * *

(2) It is unlawful for a person, firm, or corporation to store, leave, or abandon any derelict vessel in this state.

(3) The commission, officers of the commission, and any law enforcement agency or officer specified in s. 327.70 are authorized and empowered to relocate, remove, or cause to be relocated or removed a derelict vessel from public waters if the derelict vessel obstructs or threatens to obstruct navigation or in any way constitutes a danger to the environment, property, or persons. The commission, officers of the commission, or any other law enforcement agency or officer acting under this subsection to relocate, remove, or cause to be relocated or removed a derelict vessel from public waters shall be held harmless for all damages to the derelict vessel resulting from such relocation or removal unless the damage results from gross negligence or willful misconduct.

32. Section 376.15(3)(a) provides:

The commission, officers of the commission, and any law enforcement agency or officer specified in s. 327.70 are authorized and empowered to relocate, remove, or cause to be relocated or removed any derelict vessel as defined in s. 823.11 from public waters. All costs, including costs owed to a third party, incurred by the commission or other law enforcement agency in the relocation or removal of any abandoned or derelict vessel are recoverable against the owner of the vessel. The Department of Legal Affairs shall represent the commission in actions to recover such costs.

33. Section 327.02 provides in pertinent part:

Definitions.—As used in this chapter and in chapter 328, unless the context clearly requires a different meaning, the term:

* * *

(46) “Vessel” is synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.

* * *

(47) “Waters of this state” means any navigable waters of the United States within the territorial limits of this state, the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state, and all the inland lakes, rivers, and canals under the jurisdiction of this state.

34. The above listed statutes do not define some of the terms used therein, and therefore one can refer to a dictionary to ascertain the 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.”).

35. The online edition of Merriam-Webster’s Dictionary defines the following terms:

“left” as the past tense of the word “leave”;

“wreck” – in pertinent part, “something cast up on the land by the sea” or “a hulk or ruins of a wrecked ship.”

See <https://meriam-webster.com> (last searched April 26, 2021).

36. Because LCSO is asserting that Mr. Janikula’s vessel was a “derelict vessel” within the meaning of section 823.11(1)(b)1., LCSO 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)).

37. Section 823.11(1)(b)1. does not provide a standard of proof in proceedings such as the instant case. Section 120.57(1)(j) provides the following:

Findings 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 of record and on matters officially recognized.

38. Case law could possibly offer that Respondent should be required to prove its case by the higher standard of proof: clear and convincing. 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.”).

39. Even if one could (or would) argue that the higher clear and convincing standard of proof should be used in this case, Respondent proved by the clear and convincing standard that the pontoon houseboat was a “derelict vessel” within the meaning of section 823.11(1)(b)1.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Lee County Sheriff’s Office issue a final order deeming the pontoon houseboat to be a “derelict vessel” within the meaning of section 823.11, and the Lee County Sheriff’s Office is authorized under section 376.15(3)(a) to relocate or remove it.

DONE AND ENTERED this 30th day of April, 2021, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2021.

COPIES FURNISHED:

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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.