

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

William Cloud,

Respondent.

DOCKET NUMBER:

AK1202525

F/V ARCTURUS

ORDER GRANTING DISCRETIONARY REVIEW

On July 18, 2014, the National Oceanic and Atmospheric Administration (NOAA or “the Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) charging Respondent, William Cloud, with unlawfully harassing an observer on July 8, 2012 with conduct that had sexual connotations, had the purpose or effect of interfering with the observer’s work performance, or that otherwise created an intimidating, hostile, or offensive environment in violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) (16 U.S.C. § 1857(1)(L)) and its implementing regulations (50 C.F.R. §§ 600.10 and 679.1(b)). In the NOVA, the Agency assessed a civil penalty of \$17,500. On October 31, 2016, the Administrative Law Judge (ALJ) issued the Initial Decision finding that the Agency failed to establish by a preponderance of the evidence that Respondent harassed an observer in violation of the Magnuson-Stevens Act and its implementing regulations.

The Agency filed a Petition for Administrative Review, pursuant to 15 C.F.R. § 904.273, requesting discretionary review by the Administrator of the ALJ’s October 31, 2016 Order dismissing the charges against Respondent. As grounds for review, the Agency alleges that the ALJ relied on an incorrect legal standard and an invalid administrative case decision.

Based on the administrative record in this matter, I have determined that the Agency has stated valid grounds for discretionary review by the Administrator. Specifically, I have determined that the ALJ failed to apply the correct legal standard for analyzing whether Respondent harassed a fishery observer in violation of 50 C.F.R. § 679.7(g)(5). The ALJ focused on whether Respondent could have objectively viewed his conduct to be inoffensive. Consistent with more recent NOAA administrative decisions involving observer harassment, the ALJ should have applied the “reasonable person similarly situated” standard when objectively assessing whether Respondent’s actions constituted harassment under 50 C.F.R. § 679.7(g)(5), in addition to considering whether the fishery observer subjectively believed she was harassed. *See In the Matter of: Hai Van Nguyen*, 2016 WL 5747067, *27 (NOAA ALJ Aug. 22, 2016); *In the Matter of: Kenneth Lee House*, 2011 WL 7030843, *7 (NOAA ALJ July 12, 2011); and *In the Matter of: Sang Yeol Kim and Kim Fishing Company, Inc.*, 2011 WL 7030845 at *2 (NOAA ALJ July 26, 2011).

Accordingly, I grant the Petition and hereby request that the Agency and Respondent submit briefs addressing the following issues:

- Whether, when applying the “reasonable person similarly situated” standard, Respondent’s conduct had sexual connotations, had the effect of interfering with Grimes’ work performance and/or created an intimidating or offensive environment in violation of 50 C.F.R. § 679.7(g)(5).
- Whether, in accordance with Section 308 of the Magnuson-Stevens Act, 16 U.S.C. § 1858, and NOAA’s July 1, 2014 “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions,” \$17,500 is an appropriate civil penalty amount to assess if it is determined that Respondent violated 50 C.F.R. § 679.7(g)(5).

I decline to review any other issues raised by the Agency in its Petition.

Briefing Schedule and Format

The Parties’ briefs shall be submitted in accordance with the following schedule and with the following page limits:

The Agency’s opening brief shall be no longer than 10 pages, double-spaced, 12 point type, and shall be served within 30 days after the date of this order.

The Respondent’s brief shall be no longer than 10 pages, double-spaced, 12 point type, and shall be served within 30 days after the date on which the Agency’s opening brief is due.

The Agency’s reply brief, if it chooses to file a reply brief, shall be no longer than 5 pages, double-spaced, 12 point type, and shall be served within 15 days after the date on which the Respondent’s brief is due.

In briefing the above issue, the Agency and Respondent are reminded that I will not consider new or additional evidence that was not part of the record before the ALJ. *See* 15 C.F.R. § 904.273(d)(7). Therefore, the parties should refrain from submitting proof that is outside the existing administrative record.

The Agency’s and Respondent’s briefs must be served on the Administrator by registered or certified mail, return receipt requested, by mailing them to:

Administrator
National Oceanic and Atmospheric Administration
Herbert Hoover Building
1401 Constitution Avenue, N.W., Room 51030

Washington, DC 20230

In addition, an electronic copy of the Agency's and Respondent's briefs must be emailed to Jackie Rolleri, Attorney-Advisor, NOAA Office of the General Counsel, Oceans and Coasts Section at jackie.rolleri@noaa.gov.

Copies of all briefs must be served on the other party's counsel (or the party, if that party is proceeding without a lawyer). Each party shall serve its briefs so that they are received by the Administrator, Jackie Rolleri, and the other parties on or before the date on which they are due.

Thereafter, I will issue a written decision regarding the issues under review which will be transmitted to the parties in accordance with the requirements of 15 C.F.R. § 904.273(k).

3/20/17

Date

Ben Friedman

Benjamin Friedman
Deputy Under Secretary for Operations
Performing the duties of Under
Secretary of Commerce for
Oceans and Atmosphere and
NOAA Administrator