

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: HAYES, NEIL  
NOTICE OF VIOLATION**

**AAD NO. 17-003/ENE**

**DECISION AND ORDER**

This matter came on for Administrative Hearing before Chief Hearing Officer David Kerins on July 31, 2018 to consider the Appeal filed by Respondent Neil Hayes (“Respondent”) on July 3, 2017. The Appeal was taken from a Notice of Violation (“NOV”) dated June 13, 2017. The Division was represented by Christina A. Hoefsmit, Esq. and the Respondent was represented by James M. Callaghan, Esq. The Division filed its Post Hearing Memorandum on November 5, 2018 and Respondent filed his Post Hearing Memorandum on January 2, 2019.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I.G.L. §§ 42-17.7-1 et seq.); the Administrative Procedures Act (R.I.G.L. §§ 42-35-1 et seq.); R.I.G.L. §20-2-13; the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters (“AAD Rules”) and the Rhode Island Marine Fishing Regulations, Commercial and Recreational Saltwater Fishing Regulations dated April 28, 2017 (“Regs”).

The issue to be decided in this matter is whether Appellant, Neil Hayes, while operating under Multipurpose License #MPURP001369 was in violation of Rhode Island Marine Fisheries Regulations (“RIMFR”), Part 3, Section 3.14.2(B)(2), by exceeding the daily commercial limit of fifty (50) pounds per calendar day of Black Sea Bass. Section 20-2.1-4(i)(1) of the Rhode Island General Laws state that “[t]he license of any person who has violation the provisions of this chapter, or the rules adopted pursuant to the provision of this chapter or rules and regulations that

pertain to commercial fishing and reporting issued pursuant to this title, may be suspended or revoked by the director as the director shall determine by regulation.”

**STIPULATED FACTS**

The following facts were stipulated to by the parties prior to the Hearing:

1. Respondent possesses a Rhode Island Multi-Purpose Fishing License #MPURP001369.
2. Respondent was engaged in commercial fishing, including but not limited to Black Sea Bass on May 31, 2017.
3. Respondent was engaged in commercial fishing aboard the vessel F/V Panther, Documentation Number 540217.
4. On May 31, 2017, the maximum allowable daily possession per vessel limited for Black Sea Bass was fifty pounds (50 lbs.).
5. On May 31, 2017, Respondent off loaded his commercial fishing catch on Newport State Pier #9.
6. On June 13, 2017, the Department of Law Enforcement (“DLE”) issued a Notice of Violation (“NOV”) to the Respondent regarding violations of the *Rhode Island Marine Fisheries Statutes and Regulations* (RIMFR) for exceeding the daily limit of Black Sea Bass on May 31, 2017 while utilizing Rhode Island Multi-Purpose Fishing License #MPURP001369.

**STIPULATED EXHIBITS**

The following were agreed to by the Parties to be admitted as Full Exhibits.

**Department's Exhibits**

Department's Exhibit 1: Notice of Violation to Respondent dated June 13, 2017.

Department's Exhibit 2: Rhode Island Marine Fisheries Regulations, Part 3 Finfish, dated April 7, 2017.

Department's Exhibit 3: Photograph of tote of Black Sea Bass weighing approximately one hundred and nine pounds (109 lbs.).

Department's Exhibit 4: Photograph of RI Boat Registration Certificate for the F/V Panther.

Department's Exhibit 12: Rhode Island Marine Fisheries Regulation, Part 7 Dealer Regulations, dated March 31, 2016.

Department's Exhibit 13: Rhode Island Marine Fisheries Regulations, Commercial and Recreational Saltwater Fishing Licensing Regulations, dated April 28, 2017

**Respondent's Exhibits**

Respondent's Exhibit 1: Mr. Hayes' Rhode Island Multi-Purpose Fishing License #MPURP001369.

Respondent's Exhibit 2: Rhode Island Vessel Declaration #004158 for boat #540217, Resident, for Mr. Hayes.

Respondent's Exhibit 3: Rhode Island Vessel Declaration #004238 for boat #RI3983S, Resident, for Mr. Hayes.

Respondent's Exhibit 4: Rhode Island Vessel Declaration #004357 for boat #RI4249C, Resident,  
for Mr. Hayes.

Respondent's Exhibit 5: Handrigan's Seafood Sales Receipt.

### HEARING SUMMARY

At the Administrative Hearing the Department presented four (4) witnesses: Officer Jeffrey Mercer; Respondent Neil Hayes; Officer Jennifer Ogren and Nichole Ausfresser Ares.

Officer Jeffrey Mercer testified that he has been employed with the Department for five (5) years, two and a half (2 1/2) in Law Enforcement. On May 31, 2017 he was working in the East Bay Area. While driving on Ocean Avenue in Newport, he observed a commercial fishing boat, the Panther, heading north. He was familiar with the vessel and proceeded to State Pier #9 in Newport where he observed the vessel at the dock.

Officer Mercer testified that he asked the Respondent, Mr. Hayes, what he had on board. He specifically asked if there was any Fluke or Sea Bass (Tr. p.11). Mr. Hayes said he had Sea Bass in a blue barrel which is typically used for bait. Officer Mercer said that the barrel contained Black Sea Bass and Scup. The Black Sea Bass were on the bottom of the barrel and the upper layer were Scup (Tr. p.13). The blue barrel was still on the deck of the Panther and had not been off loaded (Tr. p. 12). Upon request the crew picked up the blue barrel and put them into a fish tote which filled nearly to the top. Based on his experience he estimated that there was approximately 100 pounds of fish in the tote. He said he suspected that the Respondent was over the limit of 50 pounds that day.

Officer Mercer testified that the Panther was tied up to State Pier #9 and that there were a number of smaller aluminum boats tied up to it. When Mr. Hayes was told that it looked like he was over the limit and he responded that he thought that he could take two limits because he had a licensed crew member on board as well (Tr. p.13). Officer Mercer said that he never identified the crewman in person but later was informed that it was John King. He did not speak to Mr. King. He never identified him in person (Tr. p.13). At no point during the investigation did he speak with Mr. King (Tr. p.14).

Officer Mercer informed Mr. Hayes that he felt that he was over the limit and took possession of the Black Sea Bass. Mr. Hayes said he was planning to take the rest of his catch to Handrigan's in Galilee. Officer Mercer said that he would follow Hayes to Handrigan's and weigh the Black Sea Bass there.

Officer Mercer testified that Mr. Hayes drove his box truck to Galilee accompanied by another individual. When asked he said that the other individual was not Mr. King so he never personally identified him (Tr. p.15). The Black Sea Bass was weighed and Officer Mercer said he believed it was 109 pounds. A receipt from Handrigan's was later introduced as Respondent's Exhibit 5 which indicated the Black Sea Bass weighed 100 pounds. He said the limit is 50 pounds per vessel, not person. He said that he ran through dispatch and was able to confirm that either one or two of the other vessels being towed by the Panther were also registered.

On cross examination Officer Mercer acknowledged that when he first observed the Panther there appeared to be four or five vessels behind it. He could not see into the vessels from land (Tr. p.20). It took approximately 25 to 30 minutes to travel to State Pier #9. When he arrived at the pier the other vessels were not tied to the dock but were tied up to the Panther. He could not tell if any vessel had left the dock before he arrived. There were approximately seven or

eight crewmen present but Officer Mercer said he did not know John King at the time. He believed that Mr. Hayes had told him that one of his crew had a Commercial Fishing License but is not sure if he identified him by name at that point (Tr. p.22-23).

During the cross examination of Officer Mercer it was established the he did not see the Panther arrive at State Pier #9. The blue barrel was still on the Panther and stayed on the vessel for the entire time he was there (Tr. p.26). The barrel was dumped on the Panther's deck and the black sea bass was loaded in a tote and removed from the vessel. Officer Mercer said he picked up some of the fish but not all of them. He said that he did not think that a "whole lot of ice accompanied the fish" (Tr. p.29).

Officer Mercer was shown Respondent's Exhibit 5 which had been entered by agreement as a full exhibit. The exhibit was identified as a receipt from Handrigan's Seafoods Inc. for the black sea bass weighed on May 31, 2017. The total weight was 100 pounds.

On redirect examination Officer Mercer testified that when he arrived the fish, including the black sea bass, were still on board the Panther. He said that it is illegal to transfer fish between one vessel to another at sea (Tr. p.36). He testified that the regulations require that the fish should come out of the water onto the registered vessel with licensed person and then kept on that vessel all the way to land and landed by that person still on said vessel (Tr. p.38). He said that the definition of "landed" means that the fish is taken directly from the vessel onto land. It is not permissible to take the catch from one vessel and comingle the catch with that of another vessel.

The Division called the Respondent, Neil Hayes, as its next witness. Mr. Hayes testified that he is a commercial fisherman and employs a method of fishing called "trap fishing". He explained the process of trap fishing generally. He said that on the day in question, May 31, 2017,

there were two Commercial Fishing Licenses in play, his and that of an individual named John King. He testified that there were four other vessels with the Panther.

Mr. Hayes explained that when they got back to the pier, they tied up the Panther and he jumped off to get the truck. He described the process used in trap fishing. He said that after they haul the trap they put 50 pounds sea bass in the nozzle boat. When they "got to the dock that day we consolidated that fish onto the Panther." (Tr. p.45). He said that the sea bass were combined on the Panther (Tr. p.46).

Mr. Hayes described the interaction with Officer Mercer. He said that he had the fish in a barrel because it is easier to transfer to the dock. At the request of Officer Mercer he had his crew dump the barrel out so he could count them. He then had his guys put them into totes. The officer lifted the tote and they estimated that it was around 100 pounds. Officer Mercer said he was going to take them in his truck "so I helped him put it onto the dock." (Tr. p.48).

Mr. Hayes said that he felt he could have twice the fishing limit. He said that "my recollection is, I have John King with me." (Tr. p.49). He testified that he told "Mr. Mercer that John King has his license and I have my license, so we have the limits for two licenses." (Tr. p.49).

On cross examination the Respondent testified that he had at least three registered vessels with him on May 31, 2017. He explained the process for trap fishing. He confirmed that when Officer Mercer arrived at the pier he, Hayes, dumped the fish out on the Panther. He said that there was a significant amount of ice with the fish. He put ice back on the fish when they were in the tote. He did not observe the weighing of the fish. He had not asked to watch the fish weighed.

The Respondent testified that he recalled telling Officer Mercer that John King did have a Multi-Purpose License. He provided his own Multi-Purpose License to Mr. Mercer "and I believe

John King did as well.” (Tr. p.58).

On redirect examination, Mr. Hayes said he did not recall Scup on top of the barrel. He said that he did not hear Mr. Mercer testify Hayes that there was Scup in the barrel. Mr. Hayes testified that Mr. King was operating the nozzle boat. He also testified that he has provided three registrations for his boats, one including the nozzle boat.

The Division next called Jennifer Ogren who identified herself as a member of the Division of Law Enforcement. Officer Ogren began testifying about contact she had with the Respondent on May 23, 2017. Attorney Callahan objected and after an offer of proof and argument her testimony was ruled as inadmissible due to lack of relevance.

The Division called as its final witness Nichole Ausfresser Ares who identified herself as an employee of the RIDEM Marine Fisheries Division. Ms. Ares testified regarding its Regulations. She advised that the Regulation regarding Black Sea bass sets a 50 pound limit per day per vessel when operated by a license holder (Tr. p.71). Ares testified that each commercially documented boat would need to have a commercially licensed fisherman on that vessel with a possession limit, and then that possession limit would have to stay with that fisherman on that vessel until it is transferred to the dealer at point of sale (Tr. p.72, 7-11). She said that catches cannot be combined prior to the point of sale. After a brief cross examination both sides rested.

### **BURDEN OF PROOF**

The Department of Environmental Management, Marine Fisheries Division (the “Department” or “Division”) bears the burden of proof in this matter and must prove the

allegations in the Notice of Violation ("NOV") by a preponderance of the evidence. "The burden of showing something by a preponderance of the evidence... simply requires the trier to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the facts existence"

Metropolitan Stevedore Co. V. Rambo, 521 U.S. 121.

### ANALYSIS

The Department alleges that the Respondent is in violation of the Regulations in that he possessed in excess of fifty (50) pounds of Black Sea Bass on his fishing vessel the Panther. The Respondent presents a defense that he is entitled to two (2) limits or one hundred (100) pounds of Black Sea Bass due to the fact there were two (2) licensed commercial fishermen, including himself, in the crew.

The Department's case is fairly straight forward. Environmental Enforcement Officer Mercer testified that he observed a large quantity of Black Sea Bass on the fishing vessel Panther which is owned by the Respondent. The Black Sea Bass was in a blue barrel covered by a layer of Scup. When the fish was dumped out on the deck, at Officer Mercer's request, and put into a tote he estimated the weight of the Black Sea Bass to be approximately one hundred (100) pounds. The fish was transferred to a fish dealer in Galilee, Handrigan's, where it was weighed. Respondent's Exhibit 5 Full shows that the fish weighed one hundred (100) pounds exactly.

The Department has sustained its burden of proof that the Respondent was in possession of one hundred (100) pounds of Black Sea Bass. The Respondent, in his defense,

alleges that he is entitled to one hundred (100) pounds of Black Sea Bass because he was fishing with two (2) declared fishing vessels. He also contends that there was two (2) licensed commercial fishermen onboard the two (2) declared fishing vessels. The Respondent contends that the Department did not provide either testimonial nor evidentiary proof that refutes Respondent's version.

The Department having established a prima facie case of illegal possession of Black Sea Bass, the burden shifts to the Respondent to prove his defense by a preponderance of the evidence. The testimony of Officer Mercer was that although he recalls having heard the name John King, he never met Mr. King either at State Pier #9 or at Handrigan's Seafood. Mr. King never made himself known to Officer Mercer under circumstances that common sense would have dictated that he come forward. The Respondent would like us to accept that there was another licensed commercial fisherman involved in the catch on May 31, 2017 but he presents no evidence except his own testimony to prove that fact. Once the Respondent raises the defense of a second licensed commercial fisherman present he must provide more proof than his statements alone. The Respondent never produced Mr. King under circumstances that would help support his defense. Mr. King was not present as a witness at the Hearing.

The credibility of the Respondent is crucial to his defense. His credibility came into question during the testimony of Officer Mercer when he described that the one hundred (100) pounds of Black Sea Bass was in a blue barrel covered by a layer of Scup. At the hearing Mr. Hayes testified that he "didn't put Scup in that barrel". (Tr. p.59, 22) He said he did not recall Officer Mercer's testimony that there was Scup on the top of the barrel although he was present during that testimony. (Tr. p.60, 6-12)

**CONCLUSION**

The Department has met its burden of proof that the Respondent was in possession of one hundred (100) pounds of Black Sea Bass on May 31, 2017. This was fifty (50) pounds in excess of the permitted limit. The Respondent has not met his burden of proof that there was another commercial licensed fisherman, John King, sharing the catch. It is not credible that under the circumstances John King wouldn't have come forward to clear up any confusion. Simply saying that another commercially licensed fisherman was involved does not establish that fact. It would have been helpful to the Respondent's defense if Mr. King had been produced as a witness at the Hearing. If he had come forward and testified under oath that he was there on May 31, 2017 that would have gone a long way in establishing a defense. This matter can rightfully be labeled "The Case of the Missing Fisherman".

The Respondent's Appeal should be denied and dismissed.

**FINDINGS OF FACT**

After consideration of the documentary and testimonial evidence of record I find as fact the following:

1. Respondent possesses a Rhode Island Multi-Purpose Fishing License  
#MPURP001369.
2. Respondent was engaged in commercial fishing, including but not limited to Black Sea Bass on May 31, 2017.
3. Respondent was engaged in commercial fishing aboard the vessel the F/V Panther,

Documentation Number 540217.

4. On May 31, 2017, the maximum allowable daily possession per vessel limit for Black Sea Bass was fifty pounds (50 lbs).
5. On May 31, 2017, Respondent off loaded his commercial fishing catch on Newport State Pier #9.
6. On May 31, 2017, the Respondent did not weigh the Black Sea Bass prior to consolidating all of the Black Sea Bass on the F/V Panther.
7. On May 31, 2017, one hundred and nine (100) pounds of Black Sea Bass was on board the F/V Panther.
8. On May 31, 2017 Respondent was in possession of one hundred (100) pounds of Black Sea Bass.
9. On May 31, 2017 the Respondent was in possession of fifty (50) pounds of Black Sea Bass in excess of the legally permitted limit.
10. Respondent did not establish the presence of another commercial licensed fisherman involved with the catch of May 31, 2017.
11. Respondent's testimony was not credible.

#### **CONCLUSIONS OF LAW**

Based on all of the findings of fact I conclude as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over Respondent.
2. On May 31, 2017, Respondent was not entitled to multiple possession limits for Black

Sea Bass.

3. The Respondent has not proved by a preponderance of the evidence that he was fishing with another commercial license fisherman and therefore entitled to a catch of one hundred (100) pounds.
4. The Division of Law Enforcement has proved by a preponderance of the evidence that on May 31, 2017, the Respondent violated Part 3 Section 3.14.2(B)(2) of the Rhode Island Marine Fisheries Regulations, Finfish, by exceeding the possession limit for Black Sea Bass in the amount of approximately fifty (50) pounds.
5. The imposition of a twenty (20) day suspension of Respondent's Rhode Island commercial fishing licenses for a violation of Part 3 Section 3.14.2(B)(2) of RIMFR, Finfish, is appropriate and warranted in this matter.

**ORDERED**

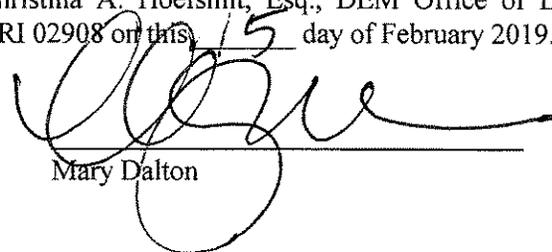
1. The NOV issued on June 13, 2017 against the Respondent, Neil Hayes, is hereby **SUSTAINED.**
2. The Appeal filed by the Respondent, Neil Hayes, is hereby **DENIED** and **DISMISSED.**

Entered as an Administrative Order this 15<sup>th</sup> day of February 2019 as a Final Agency Order.

  
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David Kerins  
Chief Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
235 Promenade Street, Third Floor  
Providence, RI 02908  
(401) 222-4700 x4600

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail, postage paid to James M. Callaghan, Esquire, Callaghan & Callaghan, 3 Brown Street, North Kingstown, RI 02852 and Christina A. Hoefsmit, Esq., DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 15 day of February 2019.



A handwritten signature in black ink, appearing to read 'Mary Dalton', is written over a horizontal line. The signature is fluid and cursive.

Mary Dalton

**NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI general Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.