

U.S. Department
of Transportation

United States
Coast Guard



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16731
January 29, 2003

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00000009
[REDACTED].
M/V [REDACTED]
Dismissed

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00000009, which includes your appeal on behalf of the owners of the Panama-flagged vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$5,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 160.215	Failure to notify the nearest USCG MSO or Group office of a hazardous condition either aboard a vessel or caused by a vessel or its operation.	\$5,000.00

The violation was observed on December 24, 1999, when Coast Guard boarding officers boarded the M/V [REDACTED] to conduct an annual freight vessel examination while it was moored at Port Everglades, Florida.

On appeal, you deny the violation and contend that "the findings of the [H]earing [O]fficer are unsupported by the record." You assert that the Hearing Officer's findings are based upon rebuttal comments that "[REDACTED] did not have an opportunity to cross examine" and contend that his conclusions are not supported by "the ship's engine log, the deck log, the statement of captain, the written statement of the chief engineer, and the testimony of Captain [REDACTED]." You conclude that the Hearing Officer "clearly ignored all of the documents in

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favor of hearsay testimony of the Coast Guard representative who had no knowledge of the incident.” Your appeal is granted for the reasons described below.

Before I begin, I believe a brief recitation of the facts surrounding the incident is in order. At the time of the boarding, the M/V [REDACTED] was making weekly voyages between Port Everglades, Florida and the Bahamas. At some point before the vessel’s arrival at Port Everglades on December 24, 1999, its number 2 port generator became inoperable. The vessel berthed at Port Everglades at approximately 10:45 a.m. and its pilot disembarked at approximately 11:00 a.m. Coast Guard boarding officers boarded the vessel at approximately 11:10 a.m. and completed the vessel’s annual exam by 2:40 p.m. Coast Guard inspectors learned of the generator’s failure when they entered the vessel’s engine room at about 2:00 p.m. and saw that it was dismantled.

Before I address the violation in issue, I will address the procedural concerns that you raise on appeal. The Coast Guard’s civil penalty program is a critical element in the enforcement of numerous marine safety and environmental laws. The civil penalty process is remedial in nature and is designed to achieve compliance through the issuance of either warnings or the assessment of monetary administrative penalties by Coast Guard Hearing Officers when violations are proved. Procedural rules, set forth at 33 CFR 1.07, are designed to ensure that parties are afforded maximum due process during informal adjudicative proceedings. By balancing procedural fairness and legislative intent, the civil penalty process plays an important and essential role in furthering national maritime safety and environmental goals.

While you contend that the Hearing Officer erred by not affording you the “opportunity to cross-examine” parties making rebuttal comments and because he relied on “hearsay testimony” in making his decision, you fail to understand the true meaning of the Coast Guard’s informal process. Section 1.07-55(b) provides that evidence may include “sworn or unsworn testimony.” Section 1.07-55(d) provides that the Hearing Officer is not bound by the strict rules of evidence. Therefore, contrary to your assertion, the Hearing Officer did not commit error by relying on hearsay evidence or in not allowing a formal cross-examination of all parties offering statements in the record.

I will now turn my attention to the violation in issue. The focus of both the hearing and your appeal was the time that the vessel’s number 2 generator broke down. Citing the official logs of the M/V [REDACTED] and the statements of the vessel’s Master and Chief Engineer, you contend that the generator first broke down on December 24, 1999. Contrary to your assertion, the Coast Guard contends that the vessel’s Chief Engineer informed them that the generator had been inoperable for “several voyages.” It is clear from the case file that the Coast Guard chose to pursue this case because of its belief that the generator had been down for an extended period of time. I do not believe the case would have been pursued if the Coast Guard believed the generator malfunctioned for the first time on December 24, 1999. Thus, the sole issue for consideration is whether the Coast Guard has proven, by substantial evidence, that the generator had been inoperable for several voyages.

When all is said and done, the Coast Guard’s case is based solely upon the statement of CWO [REDACTED], the boarding officer who conducted the [REDACTED]’s vessel examination on

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December 24, 1999. In his statement, attached to the Coast Guard's report of the incident, CWO [REDACTED] indicated that "[t]he vessel's chief engineer, Mr. [REDACTED], stated that...the cylinder head had been removed several voyages ago." Based upon this statement, the Coast Guard initiated a civil penalty case against [REDACTED] for their failure to report this hazardous condition. In addition, a COTP Order was issued detaining the vessel in port pending repair and a demonstration of the generator's proper operation before a USCG marine inspector. This order was rescinded on December 27, 1999 by Lieutenant [REDACTED], USCG.

On March 8, 2000, a Coast Guard Hearing Officer reviewed the Coast Guard's file, consisting of the party's LOU and the report of the incident (containing CWO [REDACTED]'s statement) and determined that there was prima facie evidence of a violation of 33 CFR 160.215. As a result, he issued a preliminary letter of assessment to [REDACTED]. In response to the Hearing Officer's preliminary letter of assessment, you submitted excerpts from the vessel's engine log and statements from the vessel's Master and Chief Engineer. All of the information submitted indicated that the generator failed at 10:10 a.m. and that the Chief Engineer was given permission to dismantle it at 10:30 a.m., and that, just 15 minutes later, the vessel berthed at Port Everglades. In addition, while requesting an in-person hearing on the matter, you stated that the Chief Engineer could not have told the boarding officer that the generator had been inoperable for the past three voyages because he only spoke Russian.

At the Hearing, Captain [REDACTED] and Mr. [REDACTED] testified for [REDACTED]. Captain [REDACTED] works for the Panamanian government as a marine inspector while Mr. [REDACTED] was a representative of the owner. The record contains the Hearing Officer's hand-written notes on the hearing as well as a copy of a Panamanian inspection report that [REDACTED] submitted at that time. A review of those notes indicates that Captain [REDACTED] testified that the vessel made weekly trips to Port Everglades. While the Hearing Officer's notes indicated that the crew of the vessel was from the Ukraine, he also noted that the "Chief Engineer does not speak Russian." This is an obvious error and no doubt the Hearing Officer meant to say the Chief Engineer does not speak English. Further, the Hearing Officer noted that Captain [REDACTED] testified that he was on board the vessel to conduct an annual Panamanian inspection and that he remained on the vessel throughout the entire Coast Guard boarding that was conducted on December 24, 1999. Either Captain [REDACTED] or Mr. [REDACTED] testified that the generator broke down at 10:30 a.m. and that the Coast Guard did not arrive at the engine room until 2:00 p.m. The Hearing Officer further noted that someone testified that a LT [REDACTED], a boarding officer who speaks Russian, arrived at the vessel on December 27, 1999, and was accompanied by Captain [REDACTED]. Testimony was heard that indicated that, although Captain [REDACTED] and LT [REDACTED] were together aboard the vessel, Captain [REDACTED] did not remember hearing any discussion about the number 2 generator being inoperable for the three previous voyages. Additional testimony was heard that indicated that the Coast Guard arrived at least 30 minutes before Captain [REDACTED], although there is no indication as to whether this comment refers to the boarding of December 24, 1999 or December 27, 1999. Finally, the Hearing Officer noted that someone testified that Captain [REDACTED] boarded the vessel during each of its weekly trips to Port Everglades and that he did not see any problem with the number 2 generator prior to the boarding at issue.

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After the hearing was completed, on September 21, 2000, the Hearing Officer requested rebuttal comments from the Commander of the Seventh Coast Guard District. Although the report of the initial boarding indicated that the Chief Engineer told CWO [REDACTED] about the inoperable number 2 generator on December 24, 1999, the Hearing Officer seemed to believe that LT [REDACTED], who speaks Russian, may have been the person to whom the Chief Engineer uttered his comment about the generator being down for several voyages. While the Hearing Officer acknowledged that Captain [REDACTED] did not recall hearing a conversation about the generator in the presence of LT [REDACTED], he, nonetheless, sought clarity as to what language the chief engineer spoke and to whom the statement was made. As will be explained below, the Coast Guard subsequently admitted that LT [REDACTED] did not hear the Chief Engineer make any comment regarding the generator casualty.

Apparently side-tracked by the Hearing Officer's reference to LT [REDACTED], a representative from the Seventh Coast Guard District responded by intimating that LT [REDACTED] had been a member of the initial boarding team. Eventually, this proved to be incorrect. The rebuttal comments further indicated that, although LT [REDACTED] did not remember the exact time or content of his discussion with the Chief Engineer or in what language such conversation occurred, he nonetheless was adamant that the conversation occurred because "[h]ad this statement not been made, it would not have been put into the case package." Furthermore, the Seventh District's rebuttal comments noted that, because the Coast Guard arrived approximately 30 minutes before Captain [REDACTED], it was likely that the Chief Engineer's comments were made "during that time." However, as noted above, information conveyed to the Hearing Officer following his decision indicated that LT [REDACTED] had no recollection of information that was of benefit to the Coast Guard. Clearly, it was CWO [REDACTED] who reported hearing the comment from the Chief Engineer. However, it does not appear that he was asked to supplement or clarify his earlier statement.

In response to the Seventh District's rebuttal comments, [REDACTED] submitted an additional statement from Captain [REDACTED]. Captain [REDACTED]'s statement indicated that CWO [REDACTED] was the boarding officer at the time of the initial inspection and that LT [REDACTED] did not board the vessel until December 27, 1999. Captain [REDACTED] further stated that, on December 27, 1999, he was "on board the vessel waiting for him [LT [REDACTED]]." I believe this to be the more accurate account of this incident.

The Hearing Officer issued his final decision to assess a penalty on January 10, 2001. In determining that a violation of Coast Guard regulation had occurred, he found "it inconceivable that some one would fabricate the story [of the incident]." However, it appears the Hearing Officer was of the belief that the Chief Engineer made the comment to LT [REDACTED] and not CWO [REDACTED]. He found that "[t]here...[was]...nothing in the record to preclude the possibility that the lieutenant [[REDACTED]] may have been on board the vessel on both the 24th and 27th of December." While the Hearing Officer stated "[t]here is also the possibility that there may be a real discrepancy about the dates," he nonetheless found "it highly unlikely that the statement [of the Chief Engineer] was not made."

Following the issuance of the Hearing Officer's decision, a representative of the Commander of the Seventh Coast Guard District submitted additional rebuttal comments. In his comments,

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dated April 19, 2001, this individual stated that CWO [REDACTED], who does not speak Russian, boarded the vessel on December 24, 1999, and that LT [REDACTED] was not present at that time. The comments further indicated, for the first time, that CWO [REDACTED] “recall[ed] that the chief engineer spoke enough English to communicate with him” and that LT [REDACTED] “does not recall specific details about the deficiency check he performed.” He specifically does not recall inquiring about the generator. The comments concluded that there was “no reason for CWO [REDACTED] to fabricate a violation” and, therefore, recommends that the violation be found proved on appeal.

Upon a thorough review of the record and in light of the information noted above, I do not find that there is sufficient evidence in the record to support the Hearing Officer’s determination that the violation occurred. The key issue in the instant case is the veracity of the Chief Engineer’s statement that the number 2 generator had been inoperable for several voyages before the one in issue. While CWO [REDACTED] is certain that the Chief Engineer made the statement, the evidence submitted by the Coast Guard simply does not overcome the evidence submitted by [REDACTED]. As noted above, when [REDACTED] asserted that the Chief Engineer did not speak English, the Coast Guard countered that LT [REDACTED], who spoke Russian, may have been the person the Chief Engineer spoke to because he was aboard the vessel at some point after the incident. Dates became blurred and, as noted above, some issue was made as to whether LT [REDACTED] was aboard the [REDACTED] on December 24, 1999, when the statement was allegedly made, or whether he was told the same thing on December 27, 1999, during a follow up examination. In his decision, the Hearing Officer determined that there was “nothing in the record to preclude the possibility that the lieutenant may have been on board the vessel on both the 24th and 27th of December.” As I noted above, the Hearing Officer also found it “inconceivable” that someone would “fabricate” the “story” of the boarding. In his final rebuttal comments, a representative of the Commander of the Seventh Coast Guard District confirmed that LT [REDACTED] was not on board the [REDACTED] on December 24, 1999, and that he did not remember having a conversation about the status of the number 2 generator during his follow up boarding on December 27, 1999. The final rebuttal comments further stated, for the first time, that CWO [REDACTED] recalled that the chief engineer spoke “enough” English to tell him that the vessel’s generator had been inoperable for approximately three weeks. I find it troubling that this statement was not made during the initial stages of the case when the language of the Chief Engineer’s statement first became an issue. I am also surprised that neither CWO [REDACTED] nor LT [REDACTED] submitted supplemental statements articulating their versions of the incident, especially in a situation like this where the record is full of inconsistencies concerning their activities as boarding officers.

The record contains many statements from both the Coast Guard’s Seventh District and the Hearing Officer that indicate that the case should be considered proved because CWO [REDACTED] would have no reason to “fabricate” the statement contained in the Coast Guard’s report. Statements of this nature are simply insufficient to support a violation absent convincing evidence to the contrary. While I do not believe that the CWO fabricated his statement, I do believe that there is, under the facts of this case, sufficient evidence to allow me to conclude that a misunderstanding may have occurred during the boarding at issue. [REDACTED] consistently maintained that the Chief Engineer did not speak English, a notion supported by the fact that his statement was submitted in Russian. While rebuttal comments indicated that the Chief Engineer

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“spoke enough” English to communicate with CWO [REDACTED], the timing of those comments, as noted above, negates any probative value that they may have had. I believe that the truth of the matter is somewhere in between. Certainly, even if the Chief Engineer spoke “broken” English, there is ample room for a misunderstanding to arise between him and the boarding officer.

Inconsistencies in the record also prevent me from accepting the Coast Guard’s version of the incident. First, the Coast Guard stated that CWO [REDACTED] heard the Chief Engineer’s statement and then, when the statement came into question, the Coast Guard implied that LT [REDACTED], who spoke Russian, was the person actually told the statement. When [REDACTED] questioned the Coast Guard’s contention and asserted that LT [REDACTED] was not present at the time the statement was allegedly made, the Coast Guard acknowledged LT [REDACTED]’s absence but nonetheless asserted that the Chief Engineer spoke “enough” English to have made the statement to CWO [REDACTED]. While I acknowledge that [REDACTED] may have had reason and opportunity to falsify the documents that they submitted, I cannot ignore the fact that their story of the incident remained consistent throughout the entire case. Therefore, I find that, given the evidence contained in the record, a misunderstanding likely occurred as CWO [REDACTED] and the Chief Engineer discussed the number 2 generator during the boarding. The weight and majority of the evidence contained in the record supports this conclusion and, consequently, I will not accept the findings of the Hearing Officer.

Finally, I wish to address the final rebuttal comments submitted by the Seventh Coast Guard District regarding the incident at issue. 33 CFR 1.07-75(a) states that, when a Hearing Officer’s decision is appealed, the District Commander is allowed to submit “comments” on the case. In addition, 33 CFR 1.07-70(a) states that only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. Furthermore, 33 CFR 1.07-80 makes clear that new evidence may only be submitted when a party makes a written request to reopen the hearing. The District Commander’s rebuttal comments are meant to be a final clarification of the evidence already contained in the record. Since the party is not afforded an opportunity to respond to these comments, they are clearly not meant to provide an opportunity to submit new evidence. In this case, the final rebuttal added new evidence to the record including, among other things, that LT [REDACTED]’s records confirmed that he was not present during the initial boarding and CWO [REDACTED]’s contention that the Chief Engineer spoke “enough” English to inform him of the problems with the generator at the time of the initial boarding. This information, while admittedly adding support to both sides, should not have been submitted at the final stages of the case. Instead, if the Coast Guard wanted to submit addition information, it should have been required to petition to reopen the hearing.

Accordingly, I find that there is not substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and I will dismiss the penalty assessed against [REDACTED]. In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

Sincerely,

RE: CIVIL PENALTY

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January 29, 2003

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DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center