



16592  
November 12, 2008

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

RE: Case No. 2224564  
[REDACTED]  
[REDACTED]  
\$20,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case 2224564, which includes your appeal on behalf of [REDACTED] (hereinafter "OCC"), as operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$20,000.00 penalty for the following violation:

| <u>LAW/REGULATION</u> | <u>NATURE OF VIOLATION</u>                                                                  | <u>ASSESSED PENALTY</u> |
|-----------------------|---------------------------------------------------------------------------------------------|-------------------------|
| 33 CFR 160.105        | Failure to comply with an order pertaining to the control of vessel or facility operations. | \$20,000.00             |

The incident underlying the violation is alleged to have occurred on or about September 24, 2004. The Coast Guard alleges that OCC failed to comply with Captain of the Port (hereinafter "COTP") Order 120-04 which directed the [REDACTED] to depart Port Canaveral immediately upon the setting of Hurricane Condition Yankee. Hurricane Condition Yankee was set at 8:00 p.m. on September 24, 2004. Rather than leaving port as ordered, the [REDACTED] remained in Port Canaveral, in violation of the COTP Order.

On appeal, you contest the violation and assert, in effect, that neither OCC nor the master of the [REDACTED], erred in refusing to follow the Order. To that end, you assert that the COTP Order was issued "without regard to any extenuating circumstances which may have been presented" by the vessel's operators. At the same time, you note that a "Remaining in Port Checklist" was properly submitted to the Coast Guard and imply that the COTP erred in refusing to consider that request. Your appeal is denied for the reasons discussed below.

Before I begin addressing your appeal, I will address the facts leading up to the violation. The record shows that on September 7, 2004, Hurricane Jeanne was formed from a tropical wave that moved from Africa to the eastern tropical Atlantic Ocean. The wave moved across the Atlantic

Ocean and became a tropical depression on September 13, 2004. On September 14, 2004, the depression strengthened into a tropical storm as it moved over the Leeward and Virgin Islands. The center of the storm moved over Puerto Rico on September 15, 2004, with maximum sustained winds reaching 60 knots. As the storm moved across Puerto Rico and the Mona Passage, it became a hurricane with maximum sustained winds of 70 knots. Shortly thereafter, Jeanne moved into waters north of Hispaniola and weakened to tropical depression status on September 17, 2004. As the storm loitered in the Atlantic Ocean off the Coast of Florida, it completed a 360 degree loop and emerged as a powerful hurricane with sustained winds of 85 knots on September 23, 2004. The hurricane made landfall at 10:00 p.m. on September 25, 2004, near central Florida.

Due to the hurricane's uncertain track, strength, and proximity to the Florida coast, Coast Guard Marine Safety Office Jacksonville, Florida, maintained a vigilant watch on the track and strength of the storm. As a consequence, on September 23, 2004, at 9:30 a.m., the COTP set Hurricane Condition X-Ray for Port Canaveral. With the setting of that Condition, all ocean going vessels over 500 GT were instructed to make preparations to get underway within 24 hours. The record shows the [REDACTED] is 2775 GT. At 4:15 p.m. on September 24, 2004, the COTP issued COTP-Order 120-04 to OCC, ordering the [REDACTED] to depart Port Canaveral upon the setting of Hurricane Condition Yankee. The record shows that at 8:00 p.m. on September 24, 2004, the COTP set Hurricane Condition Yankee for the port. With the setting of that Condition, the port was closed to incoming traffic and all vessels were required to put to sea, unless the COTP had granted them express written permission to remain in port. The record shows that the [REDACTED] did not depart Port Canaveral upon the setting of Hurricane Condition Yankee and, instead, remained in port throughout the approach and subsequent landfall of the hurricane.

I will now address the violation. The record shows that, on September 24, 2004, the COTP of Jacksonville, Florida, issued COTP Order No. 120-04 to the master, owner, agent or person in charge of the [REDACTED]. COTP Order 120-04 made clear that "[d]o (sic) to the size and strength of approaching Hurricane Jeanne, the [REDACTED] is...ordered to depart Port Canaveral immediately upon the setting of Hurricane Condition Yankee." The Order further stated that the "vessel will not be permitted to remain in Port Canaveral, and any request to remain in port will be denied." In addition, the Order made clear that the vessel's owner/operator should "take all necessary steps to depart Port Canaveral in a manner and time that does not put the vessel, its crew and the port at risk." Finally, the Order stated that if any party felt "aggrieved by this decision, you may make an appeal to the Commander, Seventh Coast Guard District...in writing, within 30 days of receipt of this order." The record shows that although OCC received the Order on September 24, 2004, the [REDACTED] remained in Port Canaveral throughout the onslaught of the hurricane.

On appeal, you note that the COTP Order made clear that any request for the [REDACTED] to remain in port would be denied and argue, in effect, that in so doing, the COTP errantly prevented OCC from presenting any "extenuating circumstances" to support a subsequent request to remain in port. After a thorough review of the record, I do not believe that such an argument is properly raised here.

While 33 CFR 160.7(a) allows parties to request reconsideration of any order issued under the authority of the Ports and Waterways Safety Act, 33 CFR 160.7(b) requires that any subsequent appeals be made to “the District Commander through the Captain of the Port.” While such appeals are normally required to be made in writing, 33 CFR 160.7(d) allows appeals in cases where “the delay in presenting a written appeal would have significant adverse impact on the appellant” to “initially be presented orally.” The regulation further makes clear, however, that “[i]f an initial presentation of the appeal is made orally, the appellant must submit the appeal in writing within five day of the oral presentation to the Coast Guard official to whom the presentation was made.” 33 CFR 160.7(c) further states, in relevant part, as follows:

Any person...who receives an unfavorable ruling on an appeal taken under...this section [including oral appeals submitted due to timeliness concerns]...may appeal through the District Commander to the Assistant Commandant for Marine Safety, Security and Environmental Protection...U.S. Coast Guard, Washington, DC 20593. The appeal must be in writing, except as allowed under paragraph (d) of this section. The District Commander forwards the appeal, all the documents and evidence which formed the record upon which the order...was issued...and any comments which might be relevant, to the Assistant Commandant for Marine Safety, Security and Environmental Protection. A copy of this documentation and evidence is made available to the appellant. The appellant is afforded five working days from the date of receipt to submit rebuttal materials to the Assistant Commandant for Marine Safety, Security and Environmental Protection.

A careful review of the record shows that OCC did not make any appeal—at any time prior to the initiation of the instant civil penalty case, either orally or in writing, of COTP Order No. 120-04. Although the regulations do not specify when final agency action occurs with respect to the issuance of a COTP Order where an appeal of the Order is not submitted, the regulations do make clear that “[t]he decision of the Assistant Commandant for Marine Safety, Security and Environmental Protection is issued in writing and constitutes final agency action.” *See* 33 CFR 160.7(c). Since OCC did not request a reconsideration of the COTP Order, or appeal that Order up the appropriate Coast Guard Chain of Command, I believe that COTP Order, itself, constitutes final agency action with respect to the matter. Therefore, because OCC did not avail itself to the regulatory procedures in place to challenge a COTP Order, the company’s right to do so here, has been waived. As such, the case now presented does not center on whether the Order, itself, was properly issued—OCC right to challenge that issue having been waived—but, rather, whether the Hearing Officer was correct to conclude that OCC failed to comply with the Order, itself.

Since, the record shows that COTP Order 120-04 was properly issued to OCC on September 24, 2004, and OCC does not deny receiving the Order on that date, the evidence presented clearly shows that the violation occurred.<sup>1</sup> As such, the Hearing Officer did not err in finding the

---

<sup>1</sup> A careful review of COTP-Order No. 120-04 shows that the Order is dated September 23, 2004; however, both the Coast Guard and OCC refer to the Order as being issued on the following date. LCDR J. R. Barnes of Coast Guard Sector Jacksonville, Florida, specifically addressed this issue in rebuttal comments that were forwarded along with the case package, stating that “the September 23 date on the COTP Order was a ‘typo’ carried over from a

November 12, 2008

violation proved. Accordingly, the sole issue now remaining is whether the penalty assessed by the Hearing Officer is appropriate under the circumstances of the case.

The record shows that while the case was before the Hearing Officer, you argued that during a prior hurricane, Hurricane Ivan, the [REDACTED] was ordered to leave Port Canaveral, as it was in this case. With respect to the earlier incident, you note that the vessel was subsequently denied entry at the Port of Jacksonville, Florida, and was subsequently forced to embark on a dangerous journey up the East Coast. Although you acknowledge that the vessel was subsequently allowed to enter the Port of Georgetown, South Carolina, you note that by that time the vessel was dangerously low on fuel and obviously not ready to endure the storm if port entry was again denied. With regard to the relevant incident, you insist that, in refusing to leave port, the vessel owner was attempting to avoid another dangerous incident and insist that the vessel should have been allowed to remain in port because a "Remain in Port" checklist was properly filed with the COTP. The record shows that in assessing the relevant penalty in her Final Letter of Decision, the Hearing Officer addressed your arguments, in this regard, as follows:

I do not find mitigating the concern for whether another harbor could be found. Apparently, the search for another harbor was not commenced early enough or available options were not considered acceptable.

\* \* \*

The possibility of hurricanes and the coming of the particular Hurricane Jeanne did not appear on the horizon without warning on September 24, or even September 23. Therefore, I decline to judge the wisdom of staying in port as if Hurricane Jeanne was a new and unexpected threat on September 23. In fact, I decline to consider the wisdom of staying in port at all, as this would have been the function of the COTP in considering a request to stay in port. Accordingly, I decline your request to me to "be sensitive to the limiting factors and abilities of ...vessels in severe weather" and to "keep in mind that the COTP shall respect a master's decision and not order a vessel to sea if doing so would unduly hazard the vessel." I will not presume to divine what conclusion the COTP would have reached if presented with a request for [REDACTED] to stay in port.

It appears that the vessel interests decided to keep the vessel in port and disregarded the need to obtain Coast Guard permission to do so. Whether this was due to remarkable lack of planning or a preference of profit over safety, I see no basis for reducing the penalty. \$20,000 is assessed.

On appeal, you provided copies of the "Remain in Port" checklist that was allegedly submitted to the Coast Guard for the [REDACTED]. The record shows that LCDR J. R. Barnes addressed the checklist as follows in rebuttal comments forwarded with the case package:

---

previously issued COTP Order." Since the record shows that both the Coast Guard and OCC agree that the COTP Order was issued on September 24, 2004, I accept this proposition.

November 12, 2008

OCC submits for the first time during the civil penalty and/or appeal process a copy of the "Remaining in Port Check List" that was allegedly submitted sometime on September 24 via facsimile. We do not have a record of OCC submitting this request for the vessel to remain in port. Regardless, the COTP considered the vessel's operational limitations prior to the issuance of the evacuation order, and these limitations were determined not [to] be grounds for permitting the vessel to remain in port.

First and foremost, based on LCDR Barnes rebuttal comments, the Coast Guard maintains that it does not have any record of ever receiving a "Remaining in Port Checklist" for the [REDACTED]. Moreover, although you contend that the checklist was submitted to the Coast Guard, the documentation that you provide does not, on its face, show either that the "Remaining in Port Checklist was submitted to the Coast Guard on September 24, 2004, or, more importantly, that such documentation was actually received by the Coast Guard. Irrespective of these facts, even if I accepted your assertion that the documentation was properly submitted to the Coast Guard, the record does not contain any evidence to support a conclusion that OCC's request to remain in port was favorably reviewed by the Coast Guard. Moreover, I note that the record shows that although OCC has asserted that the vessel could not safely leave port on September 24, 2004, the vessel conducted a regularly scheduled cruise between the hours of 11:00 a.m. and 4:00 p.m. on September 24, 2004. At that time, OCC knew not only that the Hurricane was approaching, but also that the vessel would be required to depart Port Canaveral at the onset of Hurricane Condition Yankee. Indeed, at the time the vessel departed for its regularly scheduled cruise, the Port was already at Hurricane Condition Yankee. Under these circumstances, I find OCC's arguments regarding the safety of departing the port to be wholly unpersuasive. As such, I find the penalty assessed by the Hearing Officer to be appropriate under the circumstances of the case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that OCC is the responsible party. The Hearing Officer's decision that the violation occurred was neither arbitrary nor capricious and is hereby affirmed. The record shows that the Hearing Officer assessed a penalty of \$20,000.00 rather than the maximum penalty of \$32,500.00. For the reasons discussed above, I will not mitigate the penalty any further.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$20,000.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties  
P.O. Box 70945  
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost

November 12, 2008

of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//s//

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