



16780

March 09, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2546889

[REDACTED]

[REDACTED]

Warning

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2546889 which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$75.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 C.F.R. 175.15(b)	Recreational vessels 16+ ft. must have Type IV PFD on board in addition to at least one Type I, II, or III PFD for each person.	\$75.00

The violation is alleged to have been observed on August 8, 2005, when Coast Guard personnel conducted a boarding of the [REDACTED] on Lake Michigan, near Ludington, Michigan.

On appeal, although you do not deny that the violation occurred, you raise three assertions: 1) that the violation for which you were cited was fixed; 2) that you submitted evidence that the violation was corrected to the Hearing Officer in a timely fashion; and 3) that the Hearing Officer's reply to you failed to mention any of your specific assertions and was "an intellectual embarrassment." You conclude by requesting that I "not only reverse Commander Shelton's [decision] but also reprimand him for his sloppy handling of this case." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both sanctioned by

Congress and upheld in Federal courts. See H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will begin by addressing the procedural progression of the case. The record shows that the Hearing Officer issued his Preliminary Letter of Assessment on October 17, 2006. In addition to describing the alleged violation, stating the maximum penalty available for that violation and informing you that the Hearing Officer had found *prima facie* evidence of the violation in the record, the Hearing Officer informed you that, in accordance with the procedures set forth in 33 CFR Part 1.07, you would have thirty days from receipt of that letter to either admit the penalties and pay the penalty amount initially assessed, submit written evidence in lieu of a hearing, or to request a hearing in the case. Thereafter, on October 26, 2006, you sent a letter to the Hearing Officer wherein you explained that your vessel was boarded three times during the summer of 2005. While you acknowledged that you received violations during the first two boardings, you noted that your vessel successfully completed and passed the third and final boarding that summer. You further noted that your vessel was kept 250 miles away from you over the winter and had no way of proving that the violation had, in fact, been corrected. Irrespective of that fact, you provided the name and number of marina personnel who could confirm that you had achieved compliance with the alleged violation. In response, on November 3, 2006, the Hearing Officer sent you a general notification letter. Although that letter properly informed you that the Hearing Officer was not responsible for gathering evidence in the matter, the letter afforded you and additional thirty days within which to provide further evidence, beyond your own statements, with regard to the alleged violation. At the same time, the Hearing Officer informed you that if you did not present any further evidence, he would make a decision based on the evidence already contained within the case file. Thereafter, on January 30, 2007, the Hearing Officer issued his final decision in the matter, the crux of which stated as follows:

I wrote to you on 03 November 2006 inviting you to submit evidence regarding the matter cited above. You have not responded. Having carefully considered the evidence in the case file, I find that you violated Federal law. My findings are summarized on the Charge Sheet enclosure. I am assessing a civil penalty of \$75.00.

The remainder of the decision informed you both of your appeal rights and of the penalties and interest that could accrue if you failed to either pay the assessed penalty or appeal the Hearing Officer's decision within the 30 day period proscribed by the applicable regulations.

You responded to the Hearing Officer's Final Letter of Decision via a letter dated February 7, 2007. In that letter you curtly asserted that the Hearing Officer's Final Letter of Decision "suggest[ed] the Coast Guard's total lack of accountability" (emphasis omitted). To support your assertion in this regard, you noted both your initial argument that the final boarding of your vessel in the summer of 2005 resulted in no violations and that you had, in fact, gathered evidence in the form of a signed affidavit from a teacher which confirmed that when he was aboard your vessel in May of 2006, he observed that you had a throwable PFD (Type IV), among

other things. In that regard, you further contend that you “personally mailed the affidavit and unless the post office failed to deliver it...[you]...have no doubt that it received the same ‘careful’ treatment as...[your]...first boarding record.” I will note that the case file contains no evidence of that affidavit prior to your letter of February 7, 2007. At the same time you express your dismay that the bulk of the Hearing Officer’s letter detailed the fines that you faced for the violation “while offering no clear explanation” (emphasis omitted) as to how you could appeal. The Hearing Officer responded to your letter via further correspondence dated March 15, 2007. Therein, he noted, among other things, that his decision had not found that he “never received a letter from you” but, rather, that he did not receive a response to his November letter from you (the affidavit you allegedly mailed to the Hearing Office). Irrespective of these findings, the Hearing Officer’s letter extended you an additional 30 days within which to file an appeal of the matter. The record shows that you properly did so.

33 CFR 175.15 establishes the personal flotation devices (PFDs) required aboard boats used on waters subject to U.S. jurisdiction. In addition to requiring that all boats operated on waters subject to the jurisdiction of the United States must have at least one Type I, II, or III PFD on board for each person aboard the vessel, 33 CFR 175.15(b) makes clear that “[n]o person may use a recreational vessel 16 feet or more in length unless one Type IV PFD is on board.” The boarding report for the relevant incident shows that your vessel is 22 feet in length. As a result, it is required to—irrespective of the number of persons present on board—carry at least one Type IV PFD whenever it is being operated. The record shows that, at the time of the boarding, your vessel did not have a Type IV PFD on board. Moreover, in your October 26, 2006, correspondence with the Hearing Officer, you acknowledged that you had “lost a navigation light and...[your]...toss cushion” prior to the relevant boarding.” Therefore, based both on the evidence contained in the case file and your admission, I find substantial evidence in the record to support the Hearing Officer’s conclusion that the violation occurred.

Having determined that the violation occurred, I must now determine whether the penalty assessed by the Hearing Officer was appropriate under the circumstances of the case. After a careful review of the record, I do not believe that the assessment of a monetary penalty is appropriate under the circumstances of this case. I have no reason to doubt your contention that you achieved compliance with the applicable regulations and that your successful completion of a subsequent boarding would provide proof of such compliance. At the same time, however, I am not surprised that evidence of the subsequent boarding was not contained within the case file. When a case package is forwarded to the Hearing Office it is considered complete and is not typically supplemented with additional evidence by the Coast Guard. Regardless of that fact, however, I note that the record does not contain any information to suggest that the Hearing Officer considered your assertions with regard to the subsequent boarding in reaching his decision. Therefore, based on the evidence you submitted and your assertions with regard to the subsequent boarding, I will mitigate the assessed penalty to a warning.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that you are the responsible party. However, for the reasons discussed above, I find a warning, rather than the \$75.00 penalty

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assessed by the Hearing Officer, or \$1,100.00 maximum permitted by statute to be appropriate under the circumstances of this case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

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