



16780

March 06, 2009

[REDACTED]

[REDACTED]

[REDACTED]

RE: Case No. 2792853

[REDACTED]

[REDACTED]

Dismissed

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2792853 which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a warning 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.	Warning

The violation is alleged to have been observed on July 4, 2006, when Coast Guard personnel conducted a boarding of the [REDACTED] while it was underway on the Valdez Arm in Alaska.

On appeal, although you do not deny that the violation occurred, you provided photographic evidence to show that you have achieved compliance with the applicable regulation. In addition, you note that you "don't want a warning on...[your]...record" and assert that you would like to be able "to set up an appointment with someone in the Valdez Coast Guard to inspect" your vessel. Your appeal is granted 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 [REDACTED] was boarded on July 4, 2006, and that, as a result, two violations were alleged, a violation of 33 CFR 151.59 (failure to display Annex V Placard) and a violation of 33 CFR 175.15(b) (for failure to have a Type IV PFD aboard the vessel). After the boarding occurred, via a letter dated August 21, 2006, the Commander, Seventeenth Coast Guard District, sent you a letter affording you 30 days within which to correct the violations and avoid the initiation of civil penalty action. The record shows that because you did not respond to the Commander's letter, the case file was forwarded to the Hearing Office for further action sometime thereafter.

The record shows that the Hearing Officer issued his Preliminary Letter of Assessment in the matter on November 13, 2007. In addition to describing the alleged violations, stating the maximum penalty available for that violation and informing you that the Hearing Officer had found *prima facie* evidence of the violations 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. You responded to the Hearing Officer's initial notification in the matter by a letter received at the Hearing Office on December 16, 2007. Therein, you asserted that you corrected the violations the following day, although you did not specifically mention obtaining a throwable Type IV PFD. In response, via a general notification letter dated January 2, 2008, the Hearing Officer informed you that you would have 30 days within which to provide pictures or receipts to support your assertion that you had corrected the violations. On January 6, 2008, you responded to the Hearing Officer's request and provided photos depicting an Annex V Placard properly displayed aboard your vessel. In addition, you asserted that your vessel has "a bench seat on the port side...that is for PFDs" and insisted that you have "2 floatcoats, 6 large & XL PFDs and 2 smaller ones...[so that you]...always have a PFD that will fit everyone." The Hearing Officer issued his Final Letter of Decision in the case on February 11, 2008, wherein he dismissed the alleged violation of 33 CFR 151.59 (Annex V Placard) and assessed a warning for the alleged violation of 33 CFR 175.15(b) (Type IV PFD). Accordingly, the sole violation at issue here is that of 33 CFR 175.15(b).

After a thorough review of the case file, I believe that dismissal of the remaining charge is appropriate. While I acknowledge that a careful review of the record shows that you did not specifically address the Type IV (throwable) PFD violation prior to the issuance of the Hearing Officer's Final Letter of Decision, the record shows that you have subsequently provided photographic evidence to show that such a device is presently aboard your vessel. While the applicable regulations make clear that "[t]he only issues which will be considered on appeal are those issues specified in the appeal which were raised before the Hearing Officer and jurisdictional questions," there are substantial errors in the Hearing Officer's Final Letter of Decision which have led me to review the entire record, including the photographic evidence that you submitted after the Hearing Officer issued his Final Letter of Decision in the matter.

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A careful review of the Hearing Officer's Final Letter of Decision shows that although the decision is properly addressed and captioned, the decision was issued to a "[REDACTED]" with regard to violations allegedly committed by the vessel [REDACTED]. Moreover, although the letter's attached Marine Violation Charge Sheet references the two violations alleged in your case, the first paragraph of the Hearing Officer's decision finds that the [REDACTED] did not have the required number and type of PFDs aboard it, had no visual distress signals, had no sound producing device, and had no current Certificate of Documentation on board. In addition, the letter's second paragraph stated that because you "provided receipts that show you purchased the required safety items the same day as the boarding," the violations were dismissed. After a careful review of both the Hearing Officer's final decision and the attached charge sheet, I believe that the record supports a conclusion that the Hearing Officer did, in fact, dismiss the alleged violation of 33 CFR 151.59 because you provided photographic evidence to show that you achieved compliance with the regulation. Irrespective of that fact, given the errors contained in the decision letter—which I believe are the result of improper typing on a form letter—I have, in the interest of fairness, further considered the photographic evidence that you provided with your appeal. Because I believe that the Hearing Officer would have dismissed the violation if he had been provided the photo of the throwable PFD and in consideration of the errors contained in the Hearing Officer's Final Letter of Decision, I will dismiss the warning assessed by the Hearing Officer for the alleged violation of 33 CFR 175.15(b).

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