



16731  
August 10, 2009

[REDACTED]  
Attn: [REDACTED]  
[REDACTED]  
[REDACTED]

RE: Case No. 3149616  
[REDACTED]  
[REDACTED]  
\$4,500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 3149616 which includes your appeal on behalf of [REDACTED], as operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$6,000.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 104.230(b)	Failure to conduct security drills.	\$2,500.00
33 CFR 104.215(b)	Failure to ensure designated Vessel Security Officer (VSO) is qualified to perform VSO duties.	\$3,500.00

The violations were first observed during a series of Coast Guard Port State Control inspections of the vessel on February 11-14, 2008. Throughout the course of the inspections, the [REDACTED] was in dry dock at International Ship Repair on the Ybor Channel, near Tampa, Florida.

On appeal, although you do not contest the alleged violations you, nonetheless, “ask that the proposed civil penalty for...[the offenses]...be waived.” To support your request for “waiver” of the assessed penalty, you assert that the “Coast Guard has encouraged that the organization

strives to educate and not mediate...[and]...perform functions that do not inhibit commerce.” At the same time, you assert that “[i]n these difficult and down economic times, a \$6,000.00 civil penalty would have a negative impact and [cause] economic hardship on [REDACTED] business operation.” To support you assertion to this end, you assert that “[t]he current economic crisis has put a tremendous strain on...[REDACTED]...cash resources” that has caused the Company to “conduct staff layoffs and many other cost-cutting measures.” You further add that although “the fine assessment amount may not seem like a significant amount, it...[would]...further strain the limited cash available and will force additional cost cutting measure[s].” You conclude by noting that “[REDACTED] diligently strives to maintain and improve its port and vessel operating procedures” and note that the Company’s “goal is to meet or exceed the regulation requirements among all governing agencies, from the United States Coast Guard to the Dept. of Homeland Security to the office of U.S. Customs & Border Protection.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the assessment of the penalties at issue in the instant proceeding. The record shows that marine inspection personnel from United States Coast Guard Sector St. Petersburg, Florida, initially boarded the [REDACTED] on February 11, 2008, while it was in dry dock at International Ship Repair on the Ybor Channel, near Tampa, Florida. The record shows that when the Coast Guard inspectors first arrived at the vessel, they immediately saw that “it was in bad shape” because “[e]verything was still very unorganized and dismantled.” Although the Coast Guard personnel understood and expected the vessel to be in this condition because it was “still in dry-dock,” when they spoke with the vessel’s Master, he informed them that the vessel expected to get underway “later that day.” The inspectors were surprised by that statement, because it was apparent that a lot of work still needed to be completed aboard the vessel. At that point, the inspectors decided to break into teams to conduct the inspection. As a result, one inspecting officer began inspecting the bridge, while two others conducted the inspection of the rest of the vessel. The inspectors immediately noticed that the vessel’s “Line Throwing Appliances were expired” and that the vessel’s “rescue boat was made of fiberglass and looked to be in bad shape.” The inspectors subsequently made inquiries regarding the vessel’s rescue boat with Flag and Company representatives who were aboard the vessel during the inspection and learned that an exemption certificate was not onboard the vessel for the rescue boat. When the inspectors reviewed the vessel’s engine room, they saw that “[a]ll deck plates were up,” “most of the equipment was dismantled,” and that “[n]umerous lose (sic) wiring and inoperable equipment was observed.” Given the state of the vessel, the inspectors elected to stop the inspection until the vessel was actually ready to be inspected. Irrespective of that fact, the inspectors proceeded to the vessel’s bridge to discuss security measures with the Vessel Security Officer (VSO) (the vessel’s 1<sup>st</sup> Officer) and Captain. Subsequent discussions with the VSO and Captain led the inspectors to conclude that the VSO was not completing any training, drills, or exercises to facilitate compliance with the Vessel Security Plan.

Shortly thereafter, the United States Coast Guard Captain of the Port, Sector St. Petersburg, Florida, issued Captain of the Port (COTP) Order No. 08-0005 to the Master of the

[REDACTED] and its operators, [REDACTED] Marine Inc. The COTP Order informed the vessel's principals that "serious Maritime Security Act (MTSA) deficiencies" were observed during the port state control examination of the [REDACTED] on February 11, 2008. The COTP Order specifically identified those violations as follows:

1. The Vessel Security Plan (VSP) was not implemented by evidence that the vessel's master and ship's security officer (SSO) had minimal or no knowledge of security measures required by the vessel's VSP. Additionally, the vessel was unable to provide proof of training, drills, or other security evolutions required to be maintained onboard the vessel.
2. The vessel was in dry dock, not waterborne, and unable to complete a successful Port State Control Examination.

COTP Order No. 08-005 further informed the [REDACTED] principals that the vessel was ordered to remain in port until the required safety and security deficiencies were corrected to the satisfaction of the attending Coast Guard Marine Inspector.

Although the Coast Guard inspection team returned to the vessel the following day, they did not conduct any further inspections of the vessel because it was still obviously in dry dock condition. Because the vessel operators informed the inspectors that they hoped to return the [REDACTED] to the water the following day, the inspectors returned to the vessel on February 13, 2004. During their inspection of the vessel on that day, the inspectors found numerous safety and security deficiencies. When the inspectors again questioned the VSO regarding the procedures and policies within the vessel's Security Plan, they determined that although the VSO showed improvement in these areas, he still seemed very unfamiliar with the Vessel Security Plan and its contents. As a consequence, the inspectors gave a verbal deficiency report to the Vessel's Captain, the flag representative, and the company representative. The verbal report informed the vessel's principals that deficiencies were observed regarding the inadequate rescue boat, a missing life boat, missing equipment from the rescue boat, broken linkage on the vessel's steering gear, an improper version of tide/current tables aboard the vessel, no records on board the vessel regarding the conducting of required security drills and exercises, no records of the lowering of the rescue boat, aerosol paint cans being stowed next to the transformer, the emergency escape hatch was blocked with storage, the identification of numerous electrical hazards, and the emergency switchboard had no non-conductive material in front of it. The record shows that the inspectors elected to provide the vessel's principals with verbal notification of the deficiencies to allow the vessel to address the issues prior to any subsequent inspection.

On February 14, 2008, Coast Guard Marine Inspectors returned to the [REDACTED] and issued a Notice of Violation (NOV) to the company in the amount of \$4,500.00. The NOV cited the violations at issue in the instant case and stated that the "Vessel Security Officer failed to conduct any security drills and was unfamiliar with the vessel's Security Plan." Because [REDACTED] declined the NOV, the COTP, Coast Guard Sector St. Petersburg, Florida,

requested that the U.S. Customs Service withhold the [REDACTED] clearance until a Letter of Undertaking (LOU) or Surety Bond in the amount of \$50,000.00 was delivered to him. In his letter dated February 14, 2008, the COTP explained that the LOU or Surety Bond “was necessary to assure prompt collection of penalties which may be assessed as a result of...[the [REDACTED]]...being cited for violation of 33 CFR 104.215. Because [REDACTED] Marine secured the necessary LOU from Fowler & White on the same day, the COTP notified Customs and Border Protection that the vessel’s clearance could be granted. In addition, because the LOU was provided, COTP Order No. 08-005 was rescinded by the Coast Guard on February 14, 2008.

I will now address the violations at issue, beginning with the alleged violation of 33 CFR 104.230(b). The “Details of the Violation” portion of the Enforcement Activity Summary Report, contained within the case file, shows that the violation was alleged because the [REDACTED] VSO “failed to maintain any records of security training, drills or exercises since being on board [the] vessel.” In addition, although the Report indicated that vessel successfully completed a security drill after the Coast Guard Port State Control team left, the Report showed that, according to the records contained onboard the vessel, a mandatory security drill had not been conducted since September 2007. The record shows that while the case was pending before the Hearing Officer, you asserted as follows with regard to the alleged violation:

...the ship-board logs for security and safety drills had not properly documented recent exercises. The vessel crew was asked to conduct an on-the-spot exercise for the USCG officers and satisfactorily completed it. Although the previous quarter’s log entry was not recorded aboard the ship, the Facility Security Officer has [a] record of drills maintained on behalf of the vessel and these documents were located in the locked office located in Dania, Florida. The crew’s successful exercise is an indication that drills have been completed on a regular basis.

33 CFR 104.230(b) states, in relevant part, that “[t]he VSO must ensure that at least one security drill is conducted at least every 3 months” and adds that “[d]rills must be conducted within one week from whenever the percentage of vessel personnel with no prior participation in a vessel security drill on the vessel exceeds 25 percent.” In his Final Letter of Decision, the Hearing Officer addressed the violation as follows:

With regard to the first charge, failure to conduct security drills, you state that the required exercises had been conducted but that the VSO had failed to log the exercises. You further contend that the Facility Security Officer...maintained the security records on behalf of the vessel. To both of these assertions, you provided no evidence. The Coast Guard inspectors found that the last logged security drill was conducted in March 2007, eleven months prior to the date of the inspection. The evidence in the case file also shows that no crewmembers from the last known security drill remained onboard. Because there is no evidence to show that any security drills were conducted with the crew onboard at the time of the

inspection, I find that the violation did occur. The initial assessed penalty of \$2,500.00 stands final.

In Coast Guard civil penalty proceedings, it is the Hearing Officer's responsibility to decide the reliability and credibility of the evidence presented and to resolve any conflicts presented within that evidence. The Coast Guard asserted—based on a lack of vessel log documentation—that security drills were not conducted aboard the vessel since September of 2007. Moreover, the record shows that the Hearing Officer found the violations proved, despite your assertions to the contrary, based upon the fact that you did not provide any evidence to support your assertions regarding the proper conducting of security drills. Indeed, a review of the record shows that although you assert that the relevant drills were conducted and logged by the Facility Security Officer, you have not provided any evidence to support your assertion to that end. Therefore, given both the evidence contained in the case file and your lack of proof to the contrary, I do not find that the Hearing Officer abused his discretion in finding the violation proved.

I will next address the alleged violation of 33 CFR 104.215(b). In relevant part, 33 CFR 104.215(b) makes clear that the "VSO must have general knowledge, through training or equivalent job experience...[of, among many other things]...the VSP and related procedures." The "Details of Violation" portion of the Enforcement Activity Report shows that the violation was alleged because the Coast Guard Inspectors believed that the VSO "was unfamiliar with the vessel's security plan" and that when the VSO was "asked numerous security related questions," he "failed to answer." While the matter was pending before the Hearing Officer, you addressed the violation as follows:

...[REDACTED] [the VSO] admitted he was initially nervous when approached by new, previously unknown USCG officers from Sector Tampa. Consequently, he [was] not able to provide acceptable answers to in-depth questions posed regarding the [V]essel [S]ecurity [P]lan on the first day February 11, 2008. When asked questions on the following day, February 12<sup>th</sup>, all proper answers were elicited and [REDACTED] was congratulated by the USCG officers. A copy of the test given by our Facility Security Officer, [REDACTED], to [REDACTED] is attached which further supports his knowledge and understanding of the vessel security plan. Once he was able to overcome his inhibitions, the VSO, Cesar Estrada [was able to] successfully answer question[s] according [to] the duties assigned [to] him.

The record shows that, in finding the violation proved, the Hearing Officer stated as follows:

With regard to the second charge, failure to ensure designated Security Officer is qualified to perform VSO duties, you state that the VSO was nervous when approached by Coast Guard Inspectors from Sector Tampa. His nervousness directly contributed to his inability to answer questions concerning the Vessel Security Plan... You also contend that on the following day, he answered all

questions properly and was congratulated by the USCG inspectors. You have provided a copy of [REDACTED]'s VSO Security Test proctored by [REDACTED], [REDACTED] Marine Company Security Officer on February 18, 2008. The lead inspector states that although improvement was shown, the VSO still seemed very unfamiliar with the VSP and its contents. I do not find the fact that the VSO passed an internal exam seven days after the alleged violation occurred persuasive. It is expected that a party would act with all due diligence to correct discrepancies once discovered. Because [REDACTED] demonstrated a lack of knowledge of the VSP, he did not meet the qualification requirements for the VSO. Therefore, I find that the violation did occur. The initial assessed penalty of \$3,500.00 stands final.

As I have already noted, it is the responsibility of the Hearing Officer to determine the reliability of any evidence presented and to resolve any conflicts presented within that evidence. Although you contend that the VSO was simply nervous during the inspection and insist that his nervousness errantly led the Coast Guard inspectors to conclude that he lacked the requisite familiarity with the VSP, a review of the record shows that you failed to provide substantial evidence to support your assertions to that end. Moreover, the statement of the lead boarding officer does not support your assertion that in the days following the initial inspection, the VSO overcame his nerves and showed that he had an appropriate knowledge of the Vessel Security Plan. Accordingly, I do not find that the Hearing Officer erred in finding that the record contained substantial evidence to support a conclusion that the violation occurred.

Having determined that the record contained substantial evidence to support the Hearing Officers conclusion that the alleged violations occurred, I must now determine whether the penalty assessed by the Hearing Officer is appropriate under the circumstances of this case. The record shows that although the maximum penalty available for the violations at issue is \$50,000.00, the unit responsible for initiating the instant civil penalty case recommended a total penalty of \$4,500.00 for the violations—\$1,500.00 for the violation of 33 CFR 104.230(b) and \$3,000.00 for the violation of 33 CFR 104.215(b). Irrespective of that fact, after a review of the case file, the Hearing Officer elected to assess a total penalty that was \$1,500.00 more than the amount recommended by the initiating unit. Although I do not find that the Hearing Officer abused his discretion in so doing, given the evidence contained in the record, including your assertions regarding the current financial status of [REDACTED] Marine, I will mitigate the penalty assessed by the Hearing officer to \$4,500.00 and in so doing, assess penalties that mirror those recommended by the initiating unit.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that [REDACTED] is the responsible party. For the reasons discussed above, the Hearing Officer's determination that the violations occurred was neither arbitrary nor capricious and is hereby affirmed. However, I find a total penalty of \$4,500.00, rather than the \$6,000.00 assessed by the Hearing Officer, or \$50,000.00 maximum permitted by statute, to be appropriate under the circumstances of the case.

Payment of **\$4,500.00** 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. Payment should be directed 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 1.0% 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 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.

Should you still believe that [REDACTED], is financially unable to pay the assessed penalty, you may request the establishment of a payment plan. Requests for relief should be directed to the Chief, Claims Branch, Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California 94501-5100.

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

Sincerely,

/s/

F. J. KENNEY  
Captain, U. S. Coast Guard  
Chief, Office of Maritime and International Law  
By direction

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