



16731

August 1, 2002

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

RE: MV01000036
[REDACTED]
F/V [REDACTED]
\$2,100.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV01000036, which includes your appeal on behalf of the owner of the F/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$4,100.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 95 46 USC 2302(c)	Operation of a vessel while intoxicated.	\$4,000.00
33 CFR 151.57	Failure to have a waste management plan on board or failure to follow the plan.	\$100.00

The violations were observed on June 6, 2000, when Coast Guard boarding officers boarded the F/V [REDACTED] while it was moored at the [REDACTED] in Biloxi, Mississippi.

On appeal, you do not raise any specific issues, but "appeal all appealable issues from the decision of [REDACTED], Lieutenant Commander, Coast Guard Hearing Officer." Therefore, I have reviewed the file for substantial evidence to support the Hearing Officer's conclusions. Your appeal is granted, in part, and denied, in part, for the following reasons.

Before I address the violations, I believe some clarification of the Coast Guard's civil penalty process is in order. After a thorough review of the record, it is evident that the Hearing Officer treated your letter dated July 18, 2001, as the appeal for this case. I note that, in that letter, in

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addition to requesting an appeal on Mr. [REDACTED]'s behalf, you "seek to continue the appeal date for sixty days" and request that the Hearing Officer "forward a copy of the administrative record..." to your office so that you can "be more specific and considered." In a follow up letter dated September 20, 2001, while acknowledging that you did not receive the Hearing Officer's reply to your previous letter, you assume that that response would have "contain[ed] instructions on submitting evidence, and a time and place for a hearing to confront adverse witnesses." These comments evidence your lack of familiarity with the civil penalty process.

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 either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are proved. Coast Guard Hearing Officers are obligated to be mindful of national goals underlying the Congressional intent of the regulations that the Coast Guard enforces. 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.

After the Hearing Officer issues his final decision, a further hearing is only available upon a petition to re-open the matter. 33 CFR 1.07-80 makes clear that a hearing may only be reopened on the basis of newly discovered evidence. This newly discovered evidence must be described in the petition to reopen and be accompanied by a written statement detailing why the "evidence would probably produce a different result favorable" to you. Additionally, the petition must state whether this evidence was known to you "at the time of the hearing, and, if not, why the newly found evidence could not have been discovered in the exercise of due diligence." Evidence that was known, or reasonably discoverable, at the time of the hearing will not support a petition to reopen. The record makes clear that no new evidence was secured and that no petition to reopen was made. Therefore, pursuant to Federal Regulation, the only option remaining for Mr. [REDACTED] was an appeal to the Commandant. As such, the regulations do not provide for further hearings on the matter.

I will now address the violations in issue beginning with Mr. [REDACTED]'s alleged violation of 33 CFR 151.57. 33 CFR 151.57(b) makes clear that the "[t]he master or person in charge of a ship...shall ensure that the ship is not operated unless a waste management plan meeting paragraph (c) of this section is on the ship and that each person handling garbage follows the plan." Although you have not specifically addressed the violation, I have reviewed the entire record to determine whether there is substantial evidence to support the Hearing Officer's conclusion that the violation occurred. The Coast Guard report of the boarding indicates that there was no posted waste management plan aboard the vessel. In his letter received by the Hearing Officer on April 18, 2001, Mr. [REDACTED] stated that there was "waste store on [the] vessel" and indicated that the waste was "dispose[d] [of] at [REDACTED]." While I commend Mr. [REDACTED] for taking measures to properly dispose of the waste produced on board his vessel, his statements do not convince me that a violation did not occur. Indeed, the record

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contains no evidence that a waste management plan was operative for the vessel. Therefore, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

I will now address Mr. [REDACTED]'s alleged intoxicated operation of the F/V [REDACTED]. Again, you have not specifically addressed the violation. Therefore, I have reviewed the entire record to determine if there is substantial evidence to support the Hearing Officer's conclusion that a violation of 46 USC 2302(c) occurred. I believe there is. In Mr. [REDACTED]'s undated letter (received by the Coast Guard on April 18, 2001), it appears that he does not deny being intoxicated but contends that he was not "navigating the vessel at the time of the incident." As the Hearing Officer properly noted, 33 CFR 95.015 makes clear that a person is "operating a vessel" when "[t]he individual is a crewmember (including a licensed individual), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel." Since Mr. [REDACTED] is the Master of the F/V [REDACTED], it is evident that he was, contrary to his assertion, "operating" the vessel on the evening of the incident. Given the evidence contained in the record, including Mr. [REDACTED]'s Field Sobriety Test results and the fact that he had a blood alcohol content of .206, I find the violation proved. However, in light of Mr. [REDACTED]'s clean record and his reputation for being "cooperative and polite," I will mitigate the penalty to \$2,000.00.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that you are the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$2,100.00, rather than the \$4,100.00 assessed by the Hearing Officer to be appropriate in light of the seriousness of the violations.

Should Mr. [REDACTED] believe that he is financially unable to pay these penalties, he 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. Payment of **\$2,100.00** 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 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % 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

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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, U.S. Coast Guard Hearing Office
Commander, Finance Center