



16731
February 10, 2003

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

RE: MV00001604
[REDACTED]
M/V [REDACTED]
\$250.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Alameda, California, has forwarded the file in Civil Penalty Case MV00001604, which includes your appeal on behalf of the owners of the M/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$750.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 6101(a)&(b) 46 USC 6101 46 USC 6103(a)	Failure to comply with the reporting and/or records requirements for marine casualties.	\$500.00
46 USC 2115	Failure to implement or conduct chemical testing for dangerous drugs or for evidence of alcohol.	\$250.00

The violations were discovered shortly after the M/V [REDACTED]'s allision with the [REDACTED] in [REDACTED] on April 13, 2000.

On appeal, although you do not deny the violation of 46 USC 2115, you do contest the collective violation of 46 USC 6101(a), 46 USC 6101(b) and 46 USC 6103(a). With regard to the latter violation, you contend that "the record of this proceeding does not contain substantial evidence that...[[REDACTED]]...failed to comply with the reporting and/or record requirements for marine casualties and, in fact, conclusively establishes [REDACTED] complied with the reporting requirements prescribed by 46 USC § 6101." You assert that because [REDACTED] ([REDACTED]) submitted a Coast Guard Form 2692 immediately after the incident and because

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the Master of the M/V [REDACTED] submitted supplemental information shortly thereafter, “there is no basis for the imposition of a civil penalty against [REDACTED] for an alleged violation of 46 USC 6101(a) or 46 USC 6101(b).” You further assert that 46 CFR 4.06-60(d) “appears to be the basis for the imposition of the \$500.00 civil penalty” and conclude that, because “[REDACTED] has not been charged with a violation of...[46 CFR 4.06-60(d)]...the record of this proceeding does not contain substantial evidence that [REDACTED] committed such a violation.” You further note that the sworn affidavit of Mr. [REDACTED], the President of the company that performed the drug testing in issue, “confirms that [REDACTED] verbally communicated Captain [REDACTED]’s post-casualty drug and alcohol test results to both [REDACTED] and MSO Mobile” and conclude that “[w]hile MSO Mobile does not have any notes or recollection of the oral report given by [REDACTED], [REDACTED] respectfully submits the lack of such notes or MSO Mobile’s inability to recall the oral communication from [REDACTED] does not rise to the level of substantial evidence indicating a violation of 46 CFR 4.06-60(d).” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

First, I believe a brief recitation of the background of the case is in order. The record indicates that on April 13, 2000, the M/V [REDACTED] struck the [REDACTED] on the Mobile River in [REDACTED], causing damage in excess of \$250,000.00. On April 14, 2000, the Coast Guard informed [REDACTED] that the accident met the definition of a “serious marine incident” and that, consequently, drug and alcohol testing of all of the crewmembers of the M/V [REDACTED] was required by law. [REDACTED] obtained the services of [REDACTED] ([REDACTED]), who took urine samples from all four of the M/V [REDACTED]’s crewmembers on April 14, 2000.

On April 18, 2000, a Coast Guard Investigative Officer from MSO Mobile contacted both [REDACTED] and [REDACTED] to inform them that the Coast Guard required copies of the crewmembers’ drug and alcohol test results when they became available from the testing laboratory. At that time, the Coast Guard learned that although three of the crewmembers’ test results were negative, the test results of a fourth crewmember, Mr. [REDACTED], operator of the M/V [REDACTED] at the time of the incident, were not yet available from the testing lab. Mr. [REDACTED], [REDACTED]’s owner, assured the Investigating Officer that he would forward all of the test results to MSO Mobile once Mr. [REDACTED]’s results were received.

A Medical Review Officer (MRO) confirmed that Mr. [REDACTED]’s sample had tested positive for the presence of illegal drugs on April 24, 2000. At that time, the MRO faxed [REDACTED] a copy of his Drug Testing Report (at 2:15 p.m.). Upon receipt, [REDACTED] asserts that it orally informed both [REDACTED] and MSO Mobile of the results and that, at the same time, it forwarded a “hard copy” to [REDACTED]. The Coast Guard, however, is adamant that [REDACTED] never initiated contact with them to advise that Mr. [REDACTED]’s test results were positive for THC. The record further indicates that [REDACTED] discharged Mr. [REDACTED] for “Failed Post Accident Drug Screening” on April 24, 2000, after receiving the MRO’s confirmation that his test results had been confirmed positive.

With regard to the written test results, you contend that [REDACTED] received those results on Saturday May 6, 2000. On Monday, May 8, 2000, the Coast Guard contacted [REDACTED] in

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an attempt to obtain Mr. [REDACTED]'s results. To that end, you contend that, in an attempt to ensure that they did not wrongfully release Mr. [REDACTED]'s positive test results, [REDACTED] required the Coast Guard to provide proof that it was, in fact, the Coast Guard before faxing the results as requested. Shortly thereafter, MSO Mobile faxed its letterhead to [REDACTED], proving its identity. You further contend that [REDACTED] attempted to fax Mr. [REDACTED]'s results to MSO Mobile upon receiving their confirmation but that it was unable to do so. The following day, May 9, 2000, MSO Mobile requested Mr. [REDACTED]'s test results from [REDACTED]. After [REDACTED] informed the Coast Guard that it was its policy to only release results under subpoena, MSO Mobile obtained a subpoena and subsequently prompted [REDACTED] to release Mr. [REDACTED]'s results. Approximately 3 hours and 45 minutes later, [REDACTED] faxed Mr. [REDACTED]'s results to MSO Mobile. The Coast Guard subsequently brought the instant civil penalty case against [REDACTED] for failure to implement or conduct chemical testing in accordance with 46 USC 2115 and failure to submit required test results following a serious marine incident in accordance with 46 USC 6101.

Since you do not deny the violation of 46 USC 2115, I consider it proved. It is evident that the Hearing Officer considered [REDACTED]'s financial position as well as all of the information that you submitted regarding this violation when he mitigated the penalty from \$1,000.00 to \$250.00. Therefore, I will neither mitigate nor dismiss the penalty assessed by the Hearing Officer for this particular violation.

I will now address [REDACTED]'s alleged violation of 46 USC 6101(a), 46 USC 6101(b) and 46 USC 6103(a). You contend that although [REDACTED] has not been charged with a violation of 46 CFR 4.06-60(d) "it appears the basis for the imposition of the \$500.00" in issue. I disagree that [REDACTED] has not been charged with a violation of 46 CFR 4.06-60(d). Although both the Hearing Officer's Preliminary Letter of Assessment and the Final Letter of Decision indicate that [REDACTED] was charged with a violation of 46 USC 6101(a), 46 USC 6101(b) and 46 USC 6103, the case file and the Marine Violation Charge Sheet contained with both decisions clearly indicates that charge 1a. results from a violation of "46 CFR 4.06-60(a)-(d)." Because the regulation was correctly cited throughout the case file, I believe that [REDACTED] has been appropriately apprised of the violation and I conclude that no error has been committed.

The Coast Guard's Narrative Statement indicates that the violation is based upon the fact that [REDACTED] "waited 15 days to notify the Coast Guard and, then, only after the results had been obtained from the drug testing company by subpoena." The general case comments included with the Coast Guard's Marine Violation Charge Sheet further indicate that the "company failed to notify to Coast Guard of positive test results from post-casualty drug testing immediately upon company's receipt of the results." 46 CFR 4.06-60(d) states "[u]pon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted." In determining whether a violation of the regulation has occurred, it is important to determine the time that [REDACTED] received the test results at issue. As I noted above, test results were not available for Mr. [REDACTED] until April 24, 2000, when the MRO completed his review and confirmed the positive results. However, the

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record is unclear as to whether [REDACTED] actually had written confirmation of the results on that date. The Coast Guard implies that [REDACTED] had the necessary confirmation of Mr. [REDACTED]'s positive test results on April 24, 2000, when it terminated his employment. This assertion, itself, is not sufficient to support a conclusion that [REDACTED] received written confirmation of Mr. [REDACTED]'s test results on that date. As I noted above, you contend that [REDACTED] received oral confirmation of Mr. [REDACTED]'s test results on April 24, 2000, but that it did not receive written confirmation of those results until May 6, 2000. This assertion is supported by the signed affidavit of Mr. [REDACTED] wherein he confirms that he verbally notified [REDACTED] of Mr. [REDACTED]'s positive test results on April 24, 2000, and that, at that time, he mailed copies of the results to [REDACTED]. You further contend that [REDACTED] did not receive copies of Mr. [REDACTED]'s positive test results until Saturday, May 6, 2000. While two weeks in the mail seems a bit long, it is the only evidence on this point within the case file. There is no evidence in the record to indicate that [REDACTED] had hard copies of Mr. [REDACTED]'s test results before May 6, 2000. Therefore, I will accept [REDACTED]'s contention that it did not receive physical confirmation of the results until May 6, 2000.

It is clear from the record that [REDACTED] did not submit Mr. [REDACTED]'s test results until Tuesday May 9, 2000. Therefore, the sole issue remaining is whether, by submitting the test results on that date, [REDACTED] committed unreasonable delay. I do not believe that it did. The Coast Guard must prove all elements of its case by a preponderance of the evidence. A key element in this case is whether [REDACTED] committed unreasonable delay in submitting Mr. [REDACTED]'s positive test results on May 9, 2000. Under the facts of this case, I do not believe that the Coast Guard has proved that [REDACTED]'s delay in submitting the results was unreasonable. Contrary to some Coast Guard assertions in the record, 46 CFR 4.06-60(d) does not require that chemical test results be **immediately** submitted to the Coast Guard. Rather, the regulation states that reports to the Coast Guard should be submitted "[u]pon receipt." The Coast Guard has based its case largely upon the fact that it had to obtain the test results at issue via subpoena from [REDACTED] rather than voluntarily from [REDACTED]. Contrary to the Coast Guard's assertion, I do not believe that the mere fact that a subpoena was utilized establishes a prima facie case for a violation of 46 CFR 4.06-60(d). The fact that [REDACTED] received the test results on a Saturday cannot be ignored, nor can the fact that the plain language of the regulation does not require immediacy. Furthermore, although the Coast Guard implies that your assertion that [REDACTED] attempted to fax the results on May 8, 2000, is false, it has provided no conclusive evidence to support that assertion. Indeed, a thorough review of the record reveals that there is no evidence in the record to support such an assertion. Absent such evidence, I cannot uphold the Hearing Officer's determination with respect to [REDACTED]'s alleged violation of 46 CFR 4.06-60(d) and I will dismiss the \$500.00 penalty assessed by the Hearing Officer for that violation.

An additional problem with this case file centers on the failure of the Hearing Officer to clearly state what evidence he relied upon in making his decision. *See* Commandant Instruction M16200.5A, Chapter 5. This is particularly important in cases such as this where the facts are in dispute. Having no idea what evidence was relied upon by the Hearing Officer, I am simply unable to determine if he abused his discretion.

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Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation of 46 USC 2115 occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision to assess a \$250.00 penalty for that violation was neither arbitrary nor capricious and is hereby affirmed. However, as I noted above, I do not find that there is substantial evidence in the record to support the assessment of a \$500.00 penalty for [REDACTED]'s alleged violation of 46 CFR 4.06-60(d) and I have dismissed the violation and associated penalty.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$250.00** 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 4.25% 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.

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