



[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

16731  
January 18, 2007

RE: Case No. [REDACTED]  
[REDACTED]  
[REDACTED]  
Warning

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], 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>
46 C.F.R. § 15.605	Failure to have an uninspected passenger vessel under the control of a properly licensed individual.	Warning

The violation was first brought to the Coast Guard's attention on August 20, 2004, after a Coast Guard Boarding Team discovered that you were operating the [REDACTED] without a valid Coast Guard license.

On appeal, you dispute that you were actually operating the [REDACTED] in a manner which required a valid Coast Guard license under 46 C.F.R. § 15.605 and maintain that you had a duly licensed individual onboard who was actually in control of the vessel while transiting the Indian River near Rehoboth Beach, Delaware.

In addition, you assert that it is unjust, inequitable and unfair for the Coast Guard to seek a civil penalty against you for allegedly operating a vessel without the required license because the Coast Guard sought revocation of your license for the very same offense. You further declare that there is no merit to the underlying charge. Finally, you state that you believe that the Coast Guard's delay in pursuing this civil penalty should result in its dismissal. For the reasons set forth below, I find that there was substantial evidence in the record to support the Hearing Officer's decision and your appeal is denied.

The record shows that on October 17, 2002, the Coast Guard initiated a Complaint against your merchant mariner license alleging that you tested positive for marijuana on October 3, 2002. As

a consequence of this test result, the Coast Guard sought to revoke your license. In order to avoid revocation, you entered into a Settlement Agreement with the Coast Guard in which you agreed to a course of drug rehabilitation that entailed numerous requirements and milestones. As a part of that settlement, you agreed that you would not engage in any activities that required a Coast Guard issued credential. On August 25, 2004, the Coast Guard issued you a "Notice of Failure to Complete Settlement" alleging, among other things, that you operated the [REDACTED] on August 20, 2004, in a manner which required a Coast Guard issued credential under 46 U.S.C. § 8903 and 46 C.F.R. § 15.605. Specifically, the Coast Guard alleged that you were observed maneuvering the vessel in the channel and along side the dock. Additionally, it is undisputed that you announced to the Coast Guard boarding team that you were the "captain" of the vessel.

On October 8, 2004, you appeared at a hearing before an Administrative Law Judge (hereinafter "ALJ") and argued your case contesting the Coast Guard's Complaint. The ALJ issued a Decision and Order (hereinafter "D&O") on January 12, 2005, and found by a preponderance of the evidence that you had in fact violated the Settlement Agreement by operating the [REDACTED] on August 20, 2004, in a manner which required a Coast Guard issued credential. The effect of this decision was the ALJ found proved the charge underlying the Settlement Agreement, namely, that you tested positive for marijuana on October 3, 2002, in violation of 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35. The ALJ revoked your merchant mariner license because you failed to comply with the terms of the Settlement Agreement. The ALJ had no authority to, and did not attempt to, issue any civil penalty or sanction of any kind for the violation of 46 U.S.C. § 8903 and 46 C.F.R. § 15.605, which are at issue in this proceeding.

On appeal, you argue that the Coast Guard is in violation of the "entire controversy doctrine" by bringing this civil penalty action after the suspension and revocation action was already litigated. Black's Law Dictionary (8<sup>th</sup> Ed.) describes the "entire controversy doctrine" as a "principle that a plaintiff or defendant who does not assert all claims or defenses related to the controversy in a legal proceeding is not entitled to assert those claims or defenses in a later proceeding." You essentially claim the Coast Guard is estopped from proceeding with the instant civil penalty case because it was not consolidated with, and raised at, the suspension and revocation proceeding. Interestingly, you have not cited any authority to suggest that the "entire controversy doctrine" is applicable to the instant federal administrative proceedings. Assuming, *arguendo*, that the doctrine applies to these proceedings, it is crucial to note that the two actions the Coast Guard has initiated are completely different and severable. In a suspension and revocation proceeding under 46 CFR part 5, the Coast Guard is only seeking remedial action against the Coast Guard issued merchant mariner credential in the interest of promoting safety of life and property at sea. Conversely, in a civil penalty action under the procedures set forth at 33 C.F.R. § 1.07, the Coast Guard is seeking remedial action against the individual in order to encourage future compliance with law and regulation. Moreover, an ALJ in a suspension and revocation action does not have any authority to assess civil penalties; likewise, a Hearing Officer in a civil penalty action may not take action against any merchant mariner credentials. The two processes are entirely different. Therefore, it would be impossible to combine the two claims in the same forum, and it is wholly permissible for these two administrative actions to occur simultaneously even if the underlying offenses are the same, which in this case they are not. Your merchant mariner license

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was revoked because you tested positive for marijuana and subsequently failed to comply with the terms of the Settlement Agreement. Civil penalty action was initiated against you because you allegedly operated the [REDACTED] without a valid license.

The Hearing Officer considered all of the evidence in the record in order to determine whether you operated the [REDACTED] without a valid license when you were required to possess one. Part of the record included the ALJ's D&O. Other than your renewed denial of operating the vessel with a license, you have not provided any other substantive evidence to prove you were not operating the vessel at the time of the incident. It was entirely proper for the Hearing Officer to consider and weigh all of the evidence contained in the record. Since there is substantial evidence in the record to support the Hearing Officer's finding that you operated the [REDACTED] without a valid merchant mariner license as required by 46 C.F.R. § 15.605, I will uphold the Hearing Officer's determination. In addition, you have neither provided any evidence to support further mitigation of the Hearing Officer's penalty nor have you indicated how any past delay in these proceedings has adversely affected your rights.

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. I find the Warning assessed by the Hearing Officer to be appropriate in light of the circumstances of this case. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed.

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