



16731

January 30, 2009

[REDACTED]

[REDACTED]

[REDACTED]

RE: Case No. 2322276

[REDACTED]

[REDACTED]

\$2,500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2322276, which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$2,500.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(a)	Operating a commercial vessel in a negligent manner that endangers the life, limb or property of a person.	\$2,500.00

The violation occurred on November 17, 2004, when you allegedly operated the vessel [REDACTED] in a negligent manner in the Emeryville Marina on San Francisco Bay, near Berkeley, California.

On appeal, although you acknowledge that "a boating accident occurred," you contend that "the charge of negligent operation is extreme and inappropriate" and insist that "[a] formal warning would be fair and appropriate" in the case. To support your assertion, you offer reasons as to why the negligent operation charge "cannot be validated given the fact that...[you]...were exhibiting care and caution when operating the vessel." In that vein, you note that "[i]n order to validate the charge it must be shown in specific terms how...[your]...actions were not representative of ordinary care exercised by a reasonably prudent person" and add that the "claim that excessive speed is representative of a breach of ordinary care is insufficient." You further assert that "[t]he claim that...[you]...were doing doughnuts and figure eights at excessive speed is false" and insist that, at the time of the incident, you were "carefully circling the re-fueling station at a safe speed trying to find out the hours of its operation" and contend that the boating accidents at issue here cannot be attributed to negligence but, instead, "can only be attributed to a lack of training and experience." Finally, you assert that an "injustice" occurred here that is evidenced by the fact that you were "treated disrespectfully" by the Coast Guard boarding officer

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who put forth an “innuendo of racism” during the boarding. You conclude by noting that you “do not have the money to pay such a high fine” and insist that you are “a hard working college student with character and integrity” who is “struggling to pay...[your]...college tuition with every dollar...[you]...make and cannot afford this injustice.” Your appeal is denied for the reasons discussed below.

I will begin by addressing the violation. 46 USC 2302(a) states that “[a] person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, a property of a person is liable for a civil penalty.” As the Hearing Officer correctly noted in his Final Letter of Decision, as used in 46 USC 2302(a), negligence is a failure to use that care which a reasonable person would exercise under similar circumstances. It is the operator’s breach of that standard of care that endangers the life, limb, or property of a person and constitutes a violation of the law.

The record shows that you and the Coast Guard present differing accounts of the incident. The Coast Guard alleges that on November 18, 2004, Coast Guard Station San Francisco received an urgent radio relay regarding a hit and run incident in the Emeryville Marina. The radio report, supported by a witness statement contained in the record, stated that the vessel [REDACTED] was observed doing figure eights and doughnuts at high speeds within the Marina’s moorings, an area that is a posted “No Wake” zone and that, as a result of operation in that manner, the vessel’s operator lost control of the vessel and subsequently hit a dock, a boat box, and the fishing vessel RAPID TRANSIT that was docked in the marina. After control of the vessel was regained, you fled the marina. After receiving reports of the incident, an Officer from the Berkeley Police Department observed the [REDACTED] to be the only vessel operating in the vicinity of the incident. He saw that the vessel was being operated at a high rate of speed and was heading northbound towards the Cal Sailing Club area of the Berkeley Marina. The Officer relayed his observations to the Coast Guard and proceeded in his patrol car to the Berkeley Marina in an attempt to intercept the vessel operator. When the patrol officer arrived at the Cal Sailing Club, he observed you exiting the [REDACTED]. The patrol officer said that when he informed you that he was investigating a hit and run in the Emeryville Marina, you acknowledged that you “scraped” the dock but stated that you had not hit a vessel. Thereafter, the patrolman waited with you until the Coast Guard arrived.

The statements of the Coast Guard boarding officers indicate that when they first arrived at the Berkeley Marina and began questioning you, you informed them that nothing had happened at the marina. On further questioning, you acknowledged that you had “barely hit the dock,” but denied hitting a vessel. When you were informed that witnesses from the marina had seen you hit the vessel, you responded that you had “barely hit it” and told the boarding officers that you departed the scene immediately afterward. Shortly thereafter, the boarding officers conducted a blood alcohol test on you, which showed that you had a blood alcohol concentration of 0.00%. Thereafter, the boarding officers instructed you that you would have to provide a written statement of the incident and you indicated that you would be willing to do so. According to the statements of the boarding officers, as you began to write your statement, you “became annoyed with the whole situation and displayed an apathetic approach to your writing.” Your mannerisms lead the boarding officers to believe that you were not taking the process seriously. In addition, the boarding officers all noted that throughout the course of their interactions with you, you were

“out of line at all times and uncooperative.” The record further shows that when the Coast Guard boarding officers gave you the Coast Guard Form 4100 Boarding Report for the incident, you became angry and showed “disbelief.”

Both before the Hearing Officer and on appeal, you have provided a different version of the events giving rise to the violation. In that respect, you assert that “[t]he causes leading up to and after the violation...[were]...not due to any deceitful intention, but can be attributed to not only...[your]...own lack of experience operating the club skiff, but also largely to the inadequate employee training.” You further assert that on the day of the violation, you took the “skiff out onto the bay to practice driving, docking, and to become more familiar with the club’s sailing boundaries.” You note that when you noticed the Emeryville Marina in the distance, you decided to investigate the area in an attempt to learn more about the Sailing Club’s boundaries. You contend that as you were “turning the boat, it unexpectedly began to over steer and...[you]...were unable to avoid a minor collision in between a dock and a docked boat.” You add that you “immediately examined the area for any damage that...[you]...might have caused and were unable to find any.” At the same time, you note that as you were conducting your “inspection,” a man approached you regarding the incident and, after he examined the area himself and found no damage, you left. As you were leaving, however, you noticed that water was rapidly filling the vessel and concluded that “the drainage plug for the boat had become removed.” You assert that it was as a result of this flooding and the fact that you were “[u]naware of any alternative solution” that you increased your speed as you were exiting the harbor. While you contend that you subsequently stopped at the request of another person in the vicinity of the incident who informed you that he had your “boat id number,” you did not return to the marina as the man had requested because you did not know what to do, other than to return the boat to its owners, as a result of the continued flooding.

You contend that when you returned to the Berkeley Marina, “[t]he Marina police and the Coast Guard felt it was necessary to detain and intensely question...[you]...for over three hours” and add that during that time you were “treated completely inappropriately by the Coast Guard officers.” You add that their questioning lead you to feel “demeaned, humiliated, threatened and intimidated” and express your certainty that you were “suffering from symptoms of low grade hypothermia” as you were being questioned. Irrespective of that fact, however, you contend that you were “respectful and cooperative with all the intervening individuals” and attempted to “do everything...[you]...thought was right and dutiful.” On appeal, you specifically assert that you believe you were mistreated because of an “innuendo of racism.”

Considering the incident, as a whole, you contend that you did not, at any time, exceed seven miles per hour while operating the vessel and insist that in traveling at such speeds you were exercising “[o]rdinary care and caution.” You further assert that you were not, at any time, doing doughnuts or figure eights, but rather were simply circling a re-fueling station in an attempt to determine its hours of operation. You contend that the collision occurred not because of any negligence on your part, but rather because you “over-throttled” due to your “lack of training and experience.” You further insist that there was “no damage from the impact except for reported scratches to the dock.”

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Although you and the Coast Guard offer conflicting views of the factual occurrences that transpired during the incident, it is the Hearing Officer's role to evaluate the weight of the factual claims and make a determination as to what happened during the incident in question. The record shows that, in his Final Letter of Decision, the Hearing Officer did so, as follows:

The uncontradicted facts indicate that you struck a dock and at least one vessel that had an individual on board. You do not dispute these facts. The investigative report indicates that you actually struck two vessels. The impact from your allision with the dock was enough to knock a boat storage box attached to the pier free from its base. The photographic evidence indicates that the allision was in close proximity to a gas pump that served as a refueling station. The pump is as large as those normally found at a regular filling station so it was clearly visible. There can be no doubt that you put at risk the lives of those in the area as well as the entire pier.

The uncontradicted evidence also shows that you "did doughnuts and figure eights at excessive speeds" in the area. You try to explain your speed by contending that you were attempting to avoid the possibility that the vessel might sink since she was taking on water. You advise that she started taking on water after you had struck the dock and the other vessel but it is apparent that you were operating the vessel erratically and at excessive speeds before striking the dock.

...I find your conduct to be inexcusable. I will not dismiss the violation and I will not reduce the penalty.

In reviewing the record, I do not find the Hearing Officer's conclusion, in this regard, to be an abuse of his discretionary authority. I do not believe that a prudent mariner would have operated a vessel in such a manner or that doing doughnuts and figure eights in the close confines of a marina would ever be appropriate. Although you contend that you did not do so, witness statements in the record from wholly uninterested parties support the Hearing Officer's conclusion that you did. Accordingly, I will not disturb the hearing officer's finding that the violation occurred. Moreover, given the egregious nature of your conduct, I do not find your unsupported assertions regarding your financial position to be sufficient cause to mitigate the penalty assessed by the Hearing Officer.

I will now address your assertions regarding the boarding, itself. A careful review of your assertions indicates that you are most dismayed by the duration of the "boarding." In that vein you imply that it was inappropriate for the boarding officers to question you for an extended duration of time. However, I note that the record contains statements from both the boarding officers and a Berkeley Police Officer which indicate that the investigation was prolonged by your uncooperative behavior. The record shows, and you do not deny, that on the date of the violation a collision occurred in the marina. As such, it was well within the responsibility of all parties involved to conduct a thorough investigation. While I take your allegations of racism seriously, I see nothing in the record to support them, regardless of the duration of your questioning. Your statements are even less persuasive when one considers the fact that the

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record contains statements from numerous parties to indicate that you, yourself, were being uncooperative throughout the course of the incident.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred and that you are the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$2,500.00 penalty assessed by the Hearing Officer, rather than the \$25,000.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$2,500.00** 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. Send your payment 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 you are financially unable to pay these penalties, you may request 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.

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