

U.S. Department  
of Transportation

United States  
Coast Guard



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16731

March 06, 2009

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

RE: Case No. 3033981

[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. 3033981, which includes your appeal on behalf of [REDACTED], as owner/operator of the [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 12110(d)       | Command of documented vessel under a person who is not a citizen of the United States. | \$2,500.00              |

The violation is alleged to have been observed on February 20, 2007, when Coast Guard boarding officers boarded the [REDACTED] while it was moored at pier 38 on Honolulu Harbor.

On appeal, you deny the violation and contend that "the evidence presented by the Coast Guard is considerably subjective." In so stating, you reassert, as you did before the Hearing Officer that "[REDACTED][a U.S. citizen] was in fact the commander and operator of the vessel" and "restate...that it was his first time on the vessel." You further explain that the Captain's lack of experience aboard the vessel explains why he was unable to find the vessel's documentation when the Coast Guard asked for it. While you further acknowledge that [REDACTED] was unable to moor the vessel, you assert that "any first time captain on this particular boat would have a difficult time" mooring it due to the fact that the vessel's "pilothouse...is situated much higher" and "larger...than any other vessel...[the captain]...has commanded." In addition, while you acknowledge that one of the vessel's other crew members told the Coast Guard boarding officers that [REDACTED], who is not a U.S. citizen was "in charge" of the vessel, you request

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that I “appreciate the context of the situation” and give little evidentiary weight to the “statement of one crew member who may not have understood the question in its intended meaning.” Finally, you name several vessels that you contend [REDACTED] “has been a captain on” and state that his employment, as such, can readily be confirmed by the owners of those vessels. Your appeal is denied for the reasons described below.

The Coast Guard’s civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection 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 found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both sanctioned by Congress and upheld in Federal courts. See H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

The record shows that, in the case at hand, you and the Coast Guard present decidedly different versions of the events surrounding the incident. The Coast Guard contends that, prior to the boarding, the [REDACTED] was being operated by a “paper captain,” [REDACTED]. In so stating, the Coast Guard was alleging, in effect, that [REDACTED], a U.S. citizen was merely asserting that he was the vessel’s captain to create an illusion that the vessel was in compliance with 46 USC 12110(d), while [REDACTED], a non U.S. citizen, was actually serving as the operator of the vessel. To support this assertion, the Coast Guard contends that when [REDACTED] was asked to provide the Coast Guard with the vessel’s documentation and fishing permits, he was unable to do so, although [REDACTED] easily completed the task when asked. The Coast Guard further notes that [REDACTED] did not moor the vessel at pier 38; that task was performed by [REDACTED]. When the boarding officers asked [REDACTED] why he did not moor the vessel, he informed them that [REDACTED] did so because he “could not see good from the pilot house and... [REDACTED] could see from the aft steering station more clearly.” Moreover, the Coast Guard contends that when one of the boarding team members asked a crew member who directed the crew and made the decisions aboard the vessel, the crew member identified [REDACTED] as that person. Conversely, you assert that you hired [REDACTED] to be the operator of the vessel and insist that [REDACTED] was merely serving as his “helper.” As I have already mentioned, you further contend that [REDACTED] was unable to both find the vessel’s documents and moor the vessel because he was new to the vessel. At the same time, you assert that the crew member who informed the Coast Guard that [REDACTED] was the operator of the vessel misconstrued the question.

On appeal, you imply that the Hearing Officer erred in finding the violation proved because all of the evidence presented to support the Coast Guard’s case was “considerably subjective.” Your assertion in this regard fails to acknowledge the standard of proof applicable to the instant proceeding. Indeed, the standard of proof necessary to impose a civil penalty at an administrative proceeding is less than what is necessary for a finding of guilt at a state or federal

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criminal proceeding. Because of the more serious consequences associated with a criminal trial, due process requires that an individual can only be convicted by proof beyond a reasonable doubt of every element which constitutes the offense. This has generally been described as proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. This is the highest standard of proof in the American judicial system. However, at administrative proceedings, the burden of proof is not as strict. At Coast Guard administrative proceedings, the Coast Guard must prove its case only by a preponderance of the evidence. Preponderance of the evidence means the trier of fact, here the Hearing Officer, is persuaded that the points to be proved are more probably so than not. Stated another way, the trier of fact must believe that what is sought to be proved is more likely true than not true. Moreover, it is the Hearing Officer's responsibility to decide the reliability and credibility of the evidence presented in a particular case and to resolve any conflicts presented in that evidence. The record shows that the Hearing Officer carefully considered the evidence presented and found the violation proved. Given the evidence contained in the case file—including the crew members admission that [REDACTED] was the vessel's captain—I do not find that the Hearing Officer erred in finding the violation proved. Irrespective of that fact, however, I note that even if I accepted your version of the events, I would nonetheless find sufficient evidence in the case file to support a conclusion that the violation occurred.

46 USC 12110(d) makes clear, in relevant part, that “[a] documented vessel...may be placed under the command only of a citizen of the United States.” The record shows—and you do not deny—that during the boarding giving rise to the instant civil penalty case, [REDACTED], who was not a citizen of the United States, was observed operating the vessel to its moorings. Moreover, a review of the record shows that throughout the instant proceedings, you acknowledged that [REDACTED] moored the vessel for [REDACTED] because he was new to the vessel and, given the vessel's particular characteristics, would have had a difficult time successfully completing the mooring. As the Hearing Officer noted in her final letter of decision, “the issue at hand is whether [REDACTED] was in fact in command of the vessel” and “[a] person in command of a vessel is responsible for the vessel and its crew, and the safe navigation and conduct of the vessel.” Irrespective of your assertions to the contrary, when a vessel is being moored, it is being commanded by whoever is responsible for the mooring. Therefore, based on both your admission and the evidence contained in the case file, I find that the record is undisputed in indicating that [REDACTED] commanded the [REDACTED], a documented vessel of the United States, while he was not a U.S. citizen.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that [REDACTED], is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$2,500.00 penalty assessed by the Hearing Officer, rather than the \$4,000.00 penalty preliminarily assessed or \$11,000.00 maximum penalty permitted by statute to be appropriate under the circumstances of this case.

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 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