

U.S. Department
of Transportation

**United States
Coast Guard**



COMMANDANT
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16731
January 2, 2003

[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00003175
[REDACTED]
F/V [REDACTED]
\$550.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00003175, which includes your appeal as owner of the F/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing an \$850.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 2033(a) (Rule 33)	Failure to have proper equipment for sound signals for vessels of 12 meters or more in length.	\$100.00
33 CFR 175.125(a)	Use of a boat with signals required by 175.110 not in serviceable condition and/or past the life of service.	\$100.00
33 CFR 175.110(a)	No visual distress signals on board the vessel suitable for day use and for night use, or suitable for both day and night use.	Warning
46 CFR 28.135	Failure to properly mark lifesaving equipment as required.	\$50.00
46 CFR 28.130	Failure to comply with the requirements for survival craft equipment.	\$100.00
46 CFR 25.26-50(a)	Failure to ensure that EPIRB on board is tested and serviced as required by this section.	Warning

46 CFR 181.500	Failure to maintain portable fire extinguisher in compliance with provisions contained in 46 CFR Subpart E.	\$100.00
46 CFR 28.215	Failure to have suitable guards for exposed hazards.	\$100.00
46 CFR 28.240	Failure to comply with the requirements for a general alarm system.	Warning
46 CFR 28.250	Failure to equip a vessel 36 ft or over with the required high water alarm.	\$100.00
46 CFR 28.270	Failure to comply with the requirements for instruction, drills and safety orientations.	Warning
46 CFR 28.250	Failure to equip a vessel 36 ft or over with the required high water alarms.	Warning
46 CFR 28.270	Failure to comply with the requirements for instruction, drills and safety orientations.	\$200.00
33 CFR 164.35(c)	Failure to have a current magnetic compass deviation table or graph or compass comparison record for the steering compass.	Warning

The violations were observed on March 29, 2000, when Coast Guard boarding officers boarded the F/V [REDACTED] approximately 37 nautical miles east of Daytona Beach, Florida.

On appeal, you contend that because the F/V [REDACTED] currently has a safety decal, you “do not feel that any fines are appropriate.” In addition to addressing each of the violations separately, you contend that the boarding is the result of “negligence on the part of the Coast Guard as well as the captain on the boat” and assert that there “has been an ongoing problem with the Coast Guard...[in that]...[t]hey make their boardings when it is convenient to them.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I begin, I believe a brief recitation of the circumstances surrounding this case is in order. The record indicates that the F/V [REDACTED] underwent a courtesy safety examination on December 15, 1999. Although no violations resulted from that examination, several deficiencies

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were observed. Specifically, the vessel's survival craft was found to be expired, guards were not in place on the vessel's generator and its life preservers, ring life buoys, fire extinguishers and EPIRB were found not to be in compliance with Coast Guard regulations. On March 29, 2000, the Coast Guard boarded the vessel as a result of "Operation Safe Catch," and the violations in issue were observed.

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. The procedural rules governing the Coast Guard's civil penalty process, 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.

Pursuant to 33 CFR 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. The record indicates that you did not raise any issues before the Hearing Officer and that you did not respond to his letters until after the issuance of his final decision. While I note that the initial documentation concerning the violation was incorrectly sent to the operator of the vessel, the record clearly evidences that the Hearing Officer's Preliminary Letter of Assessment and Final Letter of Notice were sent to you, at your correct address. Furthermore, your letter of February 16, 2001, confirms that you received the Hearing Officer's Preliminary Letter of Assessment just one day after it was issued. You contend that you were in the hospital "on and off" for several months and were "not able to carry through with gathering the paperwork needed to respond to this matter" but have provided no evidence in support of that claim. Furthermore, the Hearing Officer's Preliminary Letter of Assessment made clear that you had thirty days to respond. The record further indicates that, even though the Hearing Officer waited nearly 90 days to issue his Final Letter of Decision, you made no attempt to contact the Coast Guard concerning the violations. However, in the instance of fairness, I have reviewed the entire record to ensure that the Hearing Officer's decision was based on substantial evidence in the record.

I will begin by addressing your assertion that the boarding in issue was "negligence on the part of the Coast Guard" and that Coast Guard boardings, in general, do not take into account "the hours these fishermen put in." I do not agree. It cannot be argued that commercial fisherman are engaged in one of the world's most difficult and dangerous jobs. The Coast Guard is committed to ensuring that that already dangerous profession is not made even more onerous by ensuring that commercial fishermen meet the basic safety requirements outlined by the Coast Guard's regulations. Through endeavors like "Operation Safe Catch," the Coast Guard saves countless

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lives, while ensuring the safety of the commercial fishing fleet. Regardless of the time that the Coast Guard boarded your vessel, I am confident that their doing so was in no way negligent.

Before I address the arguments that you raise on appeal, I will address duplicative violations contained on the Marine Violation Charge Sheet enclosed with both the Preliminary Letter of Assessment and the Hearing Officer's Final Letter of Notice. Specifically, charges 2a. and 2b., as well as charges 6c. and 6g., and charges 6d. and 6h. contain such duplications.

Charges 2a. and 2b. result from the fact that one of the vessel's smoke flares expired in October of 1995. The Hearing Officer issued a "warning" in charge 2b, for your alleged violation of 33 CFR 175.110(a) and a \$100.00 penalty in charge 2a, for your alleged violation of 33 CFR 175.125(a). In relevant part, 33 CFR 175.110(a) indicates that "[n]o person may use a boat 16 feet or more in length...unless visual distress signals selected from the list in §175.130 or the alternatives in §175.135, in the number required, are on board," while 33 CFR 175.125 indicates that "[n]o person may use a boat unless each signal required by §175.110 is in serviceable condition and the service life of the signal, if indicated by a date marked on the signal, has not expired." Although both violations result from the same infraction, I am confident that the violation is correctly described in charge 2a. While 33 CFR 175.110(a) concerns situations where there are no visual distress signals aboard a vessel, 33 CFR 175.125 deals with situations where one or more of the visual distress signals contained on board a vessel are not in a serviceable condition. The record clearly indicates that there were three flares on board the vessel, as required by Coast Guard regulation and that one of those flares had exceeded its expiration date. As a consequence, 33 CFR 175.125 correctly reflects the violation in issue. Therefore, I will dismiss the "warning" issued for your alleged violation of 33 CFR 175.110(a). At this point, I also note that charge 2a incorrectly identifies the regulation violated. The Marine Violation Charge Sheet indicates that the penalty results from a violation of 33 CFR 175.125(a). Although 33 CFR 175.125 is clearly the regulation contemplated by description of the violation, it appears that a typo occurred, charging you with a violation of 33 CFR 175.125(a), a regulation that does not exist. However, since the charge description apprised you of the violation, I am confident that the incorrect documentation of the specific law/regulation violated is harmless error.

Charges 6c. and 6g. both result from your alleged violation of 46 CFR 28.250. Charge 6c. results from the fact that the "high water alarm would not operate manually," while charge 6g. results from the fact that the "alarm would not operate manually." It is evident that both of these charges are the result of the fact that the high water alarm did not operate as required by Coast Guard regulation. The Marine Violation Charge Sheet further indicates that charge 6c. resulted in a \$100.00 violation, while charge 6g. resulted in a "warning." Although you do not deny that the high water alarm did not operate as required during the boarding in issue, the record is, in light of the separate penalties assessed by the Hearing Officer, unclear as to whether he thought a "warning" or a monetary civil penalty was appropriate in light of the circumstances of the boarding in issue. Therefore, I will dismiss charge 6c., leaving the "warning" as the appropriate penalty.

Likewise, charges 6d. and 6h. result from your alleged violation of 46 CFR 28.270. Again, both charges result from the same infraction; safety drills had not been conducted. While charge 6d.

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resulted in a “warning,” charge 6h resulted in a \$200.00 monetary civil penalty. Although you do not deny that the drills were not conducted prior to the boarding in issue, the record is, again, unclear as to whether the Hearing Officer meant to impose a monetary civil penalty or a “warning.” Although this is undoubtedly a serious infraction that could have led to great harm for the Master and crew of the F/V [REDACTED], I will dismiss charge 6h., leaving the “warning” as the appropriate penalty.

The record indicates that you do not deny the alleged violation of 46 CFR 28.135. To that end, you contend, “[t]here was 30 feet of reflection tape on the boat which apparently the captain had not installed.” Whether the tape was onboard the vessel, or not, it is evident that it was not attached to the ring buoy, as required by Coast Guard regulation. Therefore, I consider the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

I will now address the remaining violations. 33 USC 2033(a) (Rule 33) states, in relevant part, that “a vessel of 12 meters or more in length shall be provided with a whistle and a bell.” The record indicates that the Coast Guard found that, during the boarding in issue, the F/V [REDACTED] had “no operable means of making a whistle [sound].” Although you contend that “[t]here is a hand-held horn on the boat that has been there for 2 years,” no such horn was produced during the boarding. In addition, you have provided no additional evidence substantiating your claim. Absent such proof, I will neither mitigate nor dismiss the penalty assessed by the Hearing Officer and find the violation proved.

You next contend, with respect to the alleged violation of 46 CFR 28.130, that the raft “was purchased 7/06/98 and was not due servicing until 7/06/00 because it was a new raft which has 2 years before a service is due.” 46 CFR 28.130(a) makes clear that “[e]ach item of survival craft equipment must be of good quality, effective for the purpose it is intended to serve, and secured to the craft.” 46 CFR Table 28.140 further indicates that inflatable liferafts should be inspected annually. However, as you note, 46 CFR 28.140(b) makes clear that the annual inspection requirement does not apply to “an inflatable liferaft or an inflatable buoyant apparatus less than two years of age.” In support of your contention that the F/V [REDACTED]’s liferaft was not required to be tested until July 6, 2000, you have provided a copy of Zodiac International’s certificate number 0807/98. That certificate, indicates that, at the time of its issuance on June 2, 1998, the liferaft in question was “in compliance with SOLAS 74/83 inspection requirements.” I have carefully reviewed the certificate and cannot conclude that the liferaft was built in 1998. The certificate indicates that the liferaft was “serviced” in 1998, not that it was built at that time. Furthermore, the two Zodiac of North America seals on the certificate indicate that the liferaft came from a “liferaft rebuilding station.” Indeed, there is no information on the certificate that you have provided that would allow me to conclude that the liferaft was newly built. Instead, from the evidence that you submitted, it appears that you had the liferaft serviced and/or inspected in 1998. Therefore, for the reasons discussed above, an inspection was required in June of 1999. Because the liferaft was not inspected in 1999, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

You deny the violation of 46 CFR 25.26-50(a) and contend that “[t]he EPIRB was new and registered with NOAA.” In support of your assertion, you have provided a 406 MHz EPIRB Registration Form, signed by yourself and dated July 9, 1999. I do not believe that the

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information that you have provided is a credible indication the F/V [REDACTED]'s EPIRB was registered with NOAA on the day of the incident. The document that you have provided is a "registration form" that you, yourself completed. It does not confirm that the vessel's EPIRB was registered with NOAA on July 9, 1999. Nevertheless, I am not convinced that 46 CFR 25.26-50(a) applies to the owner of the vessel or contains a registration requirement. It does require that the EPIRB be tested and serviced by the master. Therefore, I will dismiss this violation.

You deny the violation of 46 CFR 181.500 and contend that "[t]he fire extinguishers on the boat were in compliance, but in order to satisfy the Port Captain, I replaced them new." However, you have provided no evidence to support of your assertion. Furthermore, the fact that you replaced the vessel's portable fire extinguishers leads me to believe that they were not, as you say, in compliance at the time of the boarding in issue. Therefore, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

Finally, you deny the violations of 46 CFR 28.215, 46 CFR 28.240, and 33 CFR 164.35(c). Although you contend that "[t]he guard was on the boat," that "[t]he switch on the console was marked," and that "[t]here is a compass and deviation table on board the boat," you have provided no documentary or photographic evidence to support these assertions. Therefore, I find the violations proved and will neither mitigate nor dismiss the penalties assessed by the Hearing Officer.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the F/V [REDACTED] was not in compliance with Coast Guard regulations when it was boarded on March 29, 2000. For the reasons discussed above, I find a penalty of \$550.00 rather than the \$850.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances of this case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$550.00** 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 3% 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, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center