



16780
August 04, 2009

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

RE: Case No. 3040645
[REDACTED]
[REDACTED]
\$900.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 3040645 which includes your appeal on behalf of [REDACTED] as owner of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$900.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 181.35	Removal or alteration of a Hull Identification Number without authorization by the Commandant of the U.S. Coast Guard.	\$600.00
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	\$200.00
46 CFR 25.30-20(a)(1)	Required number of Coast Guard approved fire extinguishers not on board.	\$100.00

The violations were first observed on June 21, 2007, when Coast Guard personnel conducted a safety boarding of the [REDACTED] on the Fort Myers Harbor Boat Ramp, in Fort Myers, Florida. Coast Guard personnel conducted an inspection of the vessel at the request of personnel from the Fort Myers Police Department who stopped the vessel as a “vessel of interest” on Fort Myers Harbor.

On appeal, although you do not contest the alleged violation of 46 CFR 25.30-20(a)(1), you contest the remaining violations. With regard to the alleged violation of 33 CFR 181.35 (removal or alteration of Hull Identification Numbers), you contend that the Hull Identification Number “was not removed when the vessel was encountered” and “disagree that the second purchaser, [REDACTED], can be liable when hidden HIN stamps were removed.” With regard to the alleged violation of 33 CFR 173.21(a)(1) (use of a vessel without a valid Certificate of Number), you contend that it is “hyper-technical and not sensible to penalize a boat owner for not having the...[Certificate of Number]...aboard” the vessel and argue that in this case, the vessel was “not on the water” but was on a boat ramp, having been removed from the water. You add that, under such circumstances, the owner was “permitted to place the...[Certificate of Number]...in his truck,” since the boarding at issue occurred on “dry land in a parking lot” and further contend that the Hearing Officer engaged in “unfounded speculation about the validity” of the Certificate of Number which does not form a proper basis to support the assessment of the penalty at issue. Your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the boarding. The record shows that personnel from the Fort Myers Police Department observed the [REDACTED] being operated on the Caloosahatchee River near the Royal Palm Yacht Club at approximately 10:34 a.m. on June 21, 2007. The vessel was subsequently stopped and personnel from the Fort Myers Police Department began conducting a safety inspection. There were three Cuban males and one white male aboard the vessel at the time. Because the vessel’s owner, [REDACTED], did not speak English, an occupant of the vessel, [REDACTED], served as a translator during the boarding. When Officer [REDACTED] of the Fort Myers Police Department asked [REDACTED] for the vessel’s registration, he was informed that it was located in [REDACTED]’ truck. In addition, when Officer Smith asked the gentlemen what they were doing out on the water that day, he was informed that the men had a mechanic onboard the vessel to conduct a “test run” of its engines and were heading back to the Centennial Park boat ramp to trailer the boat at that time. After asking for other required safety equipment, Officer Smith left the vessel and followed it to the boat ramp. Once the vessel arrived at the boat ramp, Officer Smith asked to see the vessel’s registration. In response, [REDACTED] retrieved an enlarged copy of a boat registration covered in plastic from his truck. Officer Smith had never seen a registration issued by the State of Florida in this manner. The record shows that, as a consequence, Officer Smith became suspicious of the document and surmised that the vessel may be involved in some type of illegal activity. As a result, Officer Smith asked for the identification of all of the persons aboard the vessel and ran warrant checks on them. He found two active warrants for [REDACTED] for “failure to appear” and placed him under arrest.

Officer Smith contacted Coast Guard Station Fort Myers Beach at approximately 11:40 a.m. and requested that the Coast Guard conduct a safety inspection of the vessel. When Coast Guard personnel arrived at the Fort Myers Boat Ramp, the vessel was being put on its trailer. The Coast Guard's safety inspection revealed the violations at issue in the instant case: the vessel did not have a certificate of number or temporary certificate on board it, the vessel's Hull Identification Number (hereinafter "HIN") had been removed and reattached with wood screws and both confidential HINs were missing, and the vessel did not have any fire extinguishers aboard it.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety, security 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 due process during informal adjudicative proceedings. The procedures in 33 CFR Part 1.07 have been sanctioned by Congress and upheld in the 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).

I will now address the violations at issue, beginning with the alleged violation of 46 CFR 25.30-20(a)(1). A careful review of the record shows that at the time of the Coast Guard boarding of the vessel, [REDACTED] was unable to present the boarding officer with any type of fire fighting device. Since you do not contest the \$100.00 penalty assessed by the Hearing Officer for the violation on appeal, and given your assertion, while the matter was pending before the Hearing Officer, that [REDACTED] wanted to be afforded the opportunity to "purchase a fire extinguisher and be re-inspected," I find substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred. Moreover, given the fact that the maximum penalty authorized by statute for the violation is \$1,100.00, I do not find the \$100.00 penalty assessed by the Hearing Officer for the violation to be either arbitrary or capricious.

Next, I will address the alleged violation of 33 CFR 181.35. 33 CFR 181.35 states that "[n]o person may remove or alter a number required by this subpart [Subpart C, of 33 CFR Part 181], unless authorized by the Commandant, U.S. Coast Guard." The regulations in 33 CFR Part 181, Subpart C, prescribe "the requirements for identification of boats to which section 46 USC 4301 applies." *See* 33 CFR 181.21. 46 USC 4301 applies to "a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States and, for a vessel owned in the United States, on the high seas." Since the vessel at issue in this case is a recreational vessel that is owned in the United States, the requirements of 46 USC 4301 apply. With regard to the display of HINs, 33 CFR 181.29(c) states as follows:

Each hull identification number must be carved, burned, stamped, embossed, molded, bonded, or otherwise permanently affixed to the boat so that alteration,

removal, or replacement would be obvious. If the number is on a separate plate, the plate must be fastened in such a manner that its removal would normally cause some scarring of or damage to the surrounding hull area. A hull identification number must not be attached to parts of the boat that are removable.

Under 33 CFR 181.23(a), manufacturers are required to affix two HINs, in the manner set forth in 33 CFR Part 181, Subpart C, to each vessel they produce. The record shows that, in the instant case, the [REDACTED] had only one HIN affixed to it and that the HIN present showed clear evidence, including scarring on the surrounding hull area, to support a conclusion that the HIN had either been removed or altered.

In his final letter of decision, the Hearing Officer addressed the violation as follows:

With regard to the first charge, removing or altering the HIN without authorization, you state your client had no knowledge the vessel's hull plate had been removed and reattached or that the hull identification number stampings were removed. The evidence clearly shows that the HIN plate was removed from the vessel and reattached using non-permanent means and that the secondary HIN had been removed in its entirety. Additionally, I find substantial evidence that [REDACTED], as owner, is the correct charged party in this matter, as he is responsible for the vessel in its entirety. Therefore I find the violation proved. My initial assessed penalty of \$600.00 stands final.

On appeal, you imply that it was improper for the Hearing Officer to conclude that the violation occurred because the HIN "was not removed when the vessel was encountered." [Emphasis in original] At the same time, you assert that you "disagree that the second purchaser, [REDACTED], can be liable when hidden HIN stamps were removed."

The assessment of a monetary penalty for violations of the regulations set forth in 33 CFR Part 181 is authorized by 46 USC 4311. Indeed, 46 USC 4311(c) states that "[a] person violating any other provision of this chapter or other regulation prescribed under this chapter is liable to the Government for a civil penalty." More importantly, under 46 USC 4311(f) a person is not subject to the assessment of a civil penalty for such violations if the person "establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel...does not conform with the applicable safety standards of the Government or that the person was not advised by the Secretary or manufacturer of that vessel...that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public" or if the person "holds a certificate issued by the manufacturer of that recreational vessel...to the effect that the recreational vessel...conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel...does not so conform."

The issue presented here is not whether the HIN was removed at the time of the boarding, but rather, whether, in violation of 33 CFR 181.35, there was substantial evidence in the record to support a conclusion that the HIN had been removed or altered. As the Hearing Officer noted in his final letter of decision, the record contains substantial evidence to support a conclusion not only that the available HIN had been removed or altered prior to the boarding—based on the fact that the HIN was improperly reattached using wood screws—but further, that the additional HIN was entirely absent from the vessel. Such evidence is, in and of itself, sufficient to support a conclusion that the violation occurred. Moreover, because the record does not contain any evidence to suggest that [REDACTED] either exercised reasonable care in ensuring that the vessel met all applicable safety standards when he purchased it, or that [REDACTED] holds a manufacturer's certificate attesting that the vessel conforms to all applicable recreational vessel safety standards, including those regarding identification of the vessel, the assessment of a penalty against [REDACTED] is appropriate under the facts of this case. Accordingly, I do not find that the Hearing Officer erred in finding the violation proved.

Finally, I will address the alleged violation of 33 CFR 173.21(a)(1). 33 CFR 173.21(a)(1) states that “no person may use a vessel...unless it has on board...[a] valid certificate of number or temporary certificate issued by the issuing authority in the State in which the vessel is principally used.” The record shows that when the vessel was boarded by personnel from the Fort Myers Police Department, [REDACTED] confirmed that he did not have a copy of the vessel's registration on board the vessel. Moreover, when the Coast Guard conducted its inspection of the vessel after it had been removed from the water, the record shows that [REDACTED] had to retrieve the vessel's registration from his pickup truck. Although the record contains evidence to suggest that the registration that [REDACTED] presented to the boarding officers may have been fraudulent, that is not the issue presented here. Instead, the issue is simply whether [REDACTED] operated the vessel on the navigable waters of the United States without a valid certificate of number on board. Given the evidence contained in the case file, including the report submitted by the Fort Myers Police Department, I find that there is substantial evidence to support the Hearing Officer's conclusion that the vessel was operated on the navigable waters of the United States without a valid Certificate of Number on board it. As such, the Hearing Officer did not err in finding the violation proved. In addition since the \$200.00 penalty assessed by the Hearing Officer is less than 1/5th the \$1,100.00 maximum penalty available by statute for the violation, I do not find that mitigation of the assessed penalty is appropriate under the circumstances of this case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that [REDACTED] is the responsible party. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$900.00 penalty assessed by the Hearing Officer, rather than the \$8,700.00 maximum permitted by statute, to be appropriate under the circumstances of the case.

Payment of **\$900.00** 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. Payment should be directed 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.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

Sincerely,

/s/

F. J. KENNEY
Captain, U. S. Coast Guard
Chief, Office of Maritime and International Law
By direction

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center