Volume 13

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Coast Guard Hearing Office

"Hearing Office is our Name,
Maritime Safety and Security is our Aim"

Adjudicate civil penalty cases in support of the Commandant's maritime safety and security strategy to compel compliance with federal laws and regulations, and deter violations in the maritime domain. By balancing national interests, fairness, and the fundamental right to due process, we promote protection of the environment, and the safety and security of vessels, facilities, ports, and waterways.

GREETINGS

From Robert Bruce
Chief, Coast Guard Hearing Office

It is the mission of the Hearing Office to fairly and accurately decide civil penalty cases by a process that is reasonably informal and inexpensive. For persons who have been charged with a violation, the information that the Hearing Office sends with the preliminary assessment letter provides guidance for successfully navigating the civil penalty process. In addition, the Hearing Office website provides more information for anyone who is interested.

Hearing Officers only consider evidence that has been properly presented to them; they do not independently investigate the facts of a case. They start with a case file alleging one or more violations, and if the case file meets the standard of showing on its face that a violation occurred, the complete case file is sent to the charged party. The charged party then has the opportunity to submit any evidence and comment on the allegations.

Sometimes, persons with experience in more formal processes, like litigation in a state or federal court, seem to have a hard time believing our process is really as simple and straightforward as it is. As a result, we sometimes receive requests to dismiss an alleged charge and to have a hearing if the charge is not dismissed. The Hearing Officer then has to explain that the party has a right to a hearing, but our process does not provide for the Hearing Officer to make a decision on the case until all evidence has been presented. If a party wants to reserve their right to submit additional evidence, they cannot at the same time ask for an immediate decision on the case. It would be premature for the Hearing Officer to make a decision before the charged party has fully exercised his or her right to submit evidence and comments.

HEARING OFFICE NEWS

Our office is located in Arlington, Virginia, and in the last few weeks we have experienced the east coast earthquake, Hurricane Irene, and torrential rains from the remnants of Tropical Storm Lee. Some of the folks here had flooding in their yards and had to avoid flooded streets on the way to work, but the Hearing Office staff was fortunate to avoid any serious damage. We are also more prepared, now, to protect ourselves if there is another earthquake.

Even with the unusual natural phenomena, our work routine has continued and all of our cases are being efficiently processed. Like the proverbial mail person, nothing that nature has dealt us recently has kept us from our daily rounds.

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Articles in this issue:

CIVIL PENALTY APPEALS

LCDR Michele Bouziane

By direction of the Commandant, the Chief Judge of the Coast Guard Court of Criminal Appeals is also the Coast Guard Civil Penalty Appellate Authority.

As of this writing, 49 cases are pending review by the Coast Guard Civil Penalty Authority, down from approximately 100 on average in previous years, according to appellate staff. The bulk of the appeals cases are Boating Under the Influence cases.

Most filers of civil penalty appeals hope that the Civil Penalty Appellate Authority will overturn the findings, and hence, the civil penalties, handed down by the Hearing Officer in their cases.

The Civil Penalty Appellate Authority reviews the Hearing Officer's decision to see if the findings of fact are based on substantial evidence. A good explanation of the term "substantial evidence" can be found in the below excerpt from 2009 Civil Penalty Appeal Decision No. 2405585, posted on the Hearing Office website:

> Pursuant to our procedural rules at 33 CFR 1.07, the Hearing Officer's decision must be "based upon substantial evidence in the record." *See* 33 CFR 1.07 -65(a). The Supreme Court defined substantial evidence, both affirmatively and negatively, in *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938). The affirmative definition makes clear that "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. at 229. In the negative, the Court stated that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id*. at 230. Later court decisions have clarified the definition, stating that "substantial evidence" is the quantum and quality of relevant evidence that is more than a scintilla but *less than* a preponderance and that "a reasoning mind would accept as sufficient to support a particular conclusion." (Emphasis added) *See LeFebre v. Westinghouse Elec. Corp*., 747 F.2d 197, 208 (4th Cir. 1984) (overruled on other grounds); *see also United Seniors Ass'n v. Social Sec. Admin*., 423 F.3d 397, 404 (4th Cir. 2005).

Appellate staff would like to remind charged parties that the civil penalty hearing and appellate processes are informal. The charged party's due process rights in these proceedings are not the same as an accused person's rights in a criminal proceeding.

According to appellate staff, typed appeal letters are preferable to hand-written ones, preferably proof-read and spell-checked. See 33 CFR §§ 1.07 -70 and 1.07-75 for more information on the appeal process.

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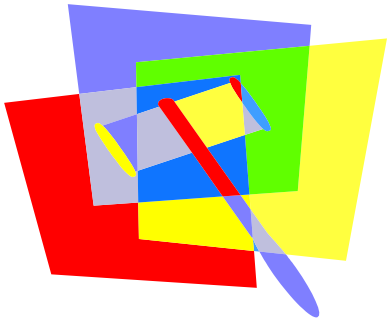


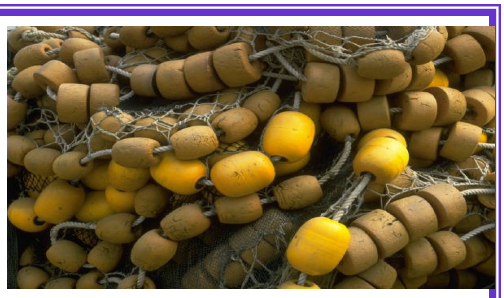
REQUESTS FOR WAIVER OF CITIZENSHIP REQUIREMENTS ABOARD COMMERCIAL FISHING VESSELS

CDR Evan Hudspeth

Occasionally in response to a preliminary assessment letter (PAL) regarding an alleged violation of the citizenship requirements aboard commercial fishing vessels (46 U.S.C. § 8103(i)), the Hearing Officer has been asked to grant a waiver or has been sent an official request for a waiver.

This request stems from 46 U.S.C. § 8103(b)(3), which states: "The Secretary may waive a citizenship requirement under this section, other than a requirement that applies to the master of a documented vessel, with respect to—… (C) any other vessel if the Secretary determines, after an investigation, that qualified seamen who are citizens of the United States are not available." This authority has been delegated to the Commandant, and, with respect to commercial fishing vessels, it was further delegated to the Director of Prevention Policy, Office of Vessel Activities, Fishing Vessels Division (CG-5433). Hearing Officers have no authority to grant a waiver.

The current procedure is to submit official waiver requests directly to Commandant CG-5433 (formerly "G-MOC-3"), according to a Commandant policy letter dated June 28, 2001. Please keep in mind that although a copy of an official waiver request to CG-5433 may indicate the charged party's efforts to comply with applicable law, more helpful to the Hearing Officer would be to include evidence of the date the waiver request was sent, and whether or not the waiver request was approved by CG-5433. When CG-5433 grants/approves a waiver request, it sends a letter to the party saying so, a copy of which is placed in MISLE. During vessel inspections, boarding officers can be on the lookout for these waiver requests. If there is evidence that the waiver was approved for the vessel and the individuals in question, then it is likely that a violation did not occur.



The Coast Guard has initiated the rulemaking process to incorporate its waiver request policy into federal regulations. The proposed rule is at 76 Federal Register 51317 and comments must be submitted to the Coast Guard by November 16, 2011.

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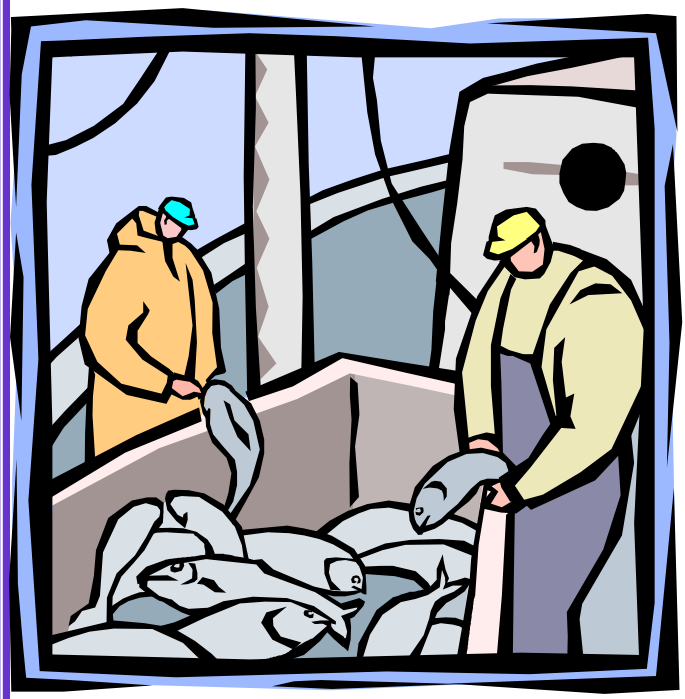

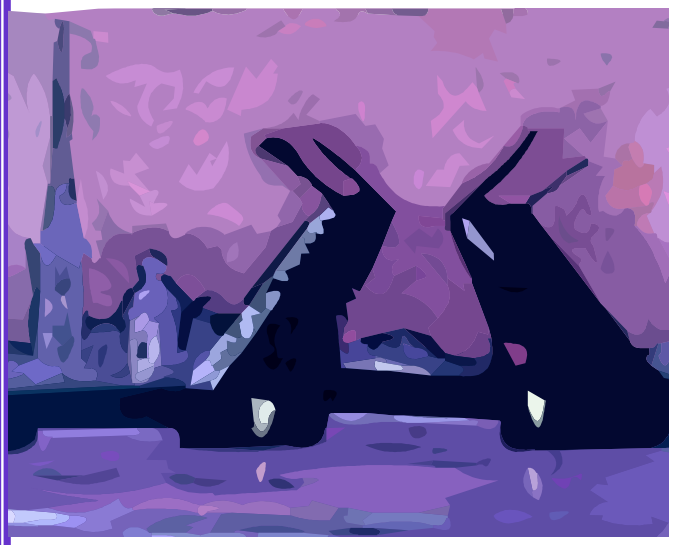

DRAWBRIDGE VIOLATIONS – UNREASONABLE DELAYS AND UNNECESSARY OPENINGS

CDR Mark Hammond

Unreasonable delays and unnecessary openings constitute the majority of the drawbridge operation cases received at the Hearing Office. This article briefly discusses each type of case, and highlights the important elements of each violation as well as challenges that arise in the adjudication of these cases.

The regulations governing the operation of drawbridges are found at Title 33 Code of Federal Regulations (CFR), Part 117. These regulations are divided into two subparts. Subpart A prescribes the general and special drawbridge operating regulations that apply to all drawbridges across the navigable waters of the United States. Subpart B contains the specific requirements for the operation of some individual drawbridges, which may supersede the general requirements of Subpart A where specified. Violations of drawbridge operating regulations are serious and can result in civil penalties of up to $25,000.00.

Unreasonable Delays

33 CFR § 117.5 requires that drawbridges open "promptly and fully" when a request or signal is given. (The means of signaling that may be used are described at § 117.15). Title 33 CFR § 117.9 states: No person shall unreasonably delay the opening of a draw after the signals required by § 117.15 have been given." To find a violation of this cite, there must have been a delay in the opening of the particular drawbridge, and the delay must have been unreasonable--but what constitutes an unreasonable delay?

Given the high-speed, time constrained nature of today's society, I'd be willing to bet that most vessel operators would say that *any* delay in the opening of a drawbridge is unreasonable. Clearly, there are some vessel operations for which a delay in a bridge opening is more burdensome, and presents a greater safety risk, than others. Depending on the circumstances of a particular case, however, a delay may not be deemed "unreasonable" under the applicable regulations.

The term "unreasonable delay" is not defined in 33 CFR 117 Subpart A. The maximum time permitted for delay for some specific bridges however, is defined in Subpart B. For example, for bridges across the Hackensack River, 33 CFR § 117.723(a)(3) states: "Train and locomotives shall be controlled so that any delay in opening the draw shall not exceed 10 minutes…"

The typical cases received by the Hearing Office for alleged violations under 33 CFR § 117.9 involve railroad bridges and delays associated with train crossings. 33 CFR § 117.9 contains a note which states: "Trains are usually controlled by the block method. That is, the track is divided into blocks or segments of a mile or more in length. When a train is in a block with a drawbridge, the draw may not be able to open until the train has passed out of the block and the yardmaster or other

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manager has 'unlocked' the drawbridge controls…"

For example, a delay might not be unreasonable if a train were "in the block" of a drawbridge at the time that the signal to open was received. If a drawbridge operator were to allow additional trains to approach and enter the block while the first train was crossing the bridge, however, and delayed the bridge opening further until subsequent trains cleared the bridge, then the resultant delay might be considered unreasonable.

Oftentimes case files received by the Hearing Office lack sufficient evidence to support a conclusion that a delay was unreasonable. Detailed evidence, including logbook entries showing times, locations, communications, mechanical issues etc., is helpful to the Hearing Officer in determining if a violation under 33 CFR § 117.9 did or did not occur.

Unnecessary Openings

According to 33 CFR § 117.11, no vessel owner or operator shall "(a) Signal a drawbridge to open if the vertical clearance is sufficient to allow the vessel, after all lowerable non-structural vessel appurtenances that are not essential to navigation have been lowered, to safely pass under the drawbridge in the closed position; or (b) Signal a drawbridge to open for any purpose other than to pass through the drawbridge opening."

In the typical case received by the Hearing Office for an alleged violation under this cite, a sport fishing vessel operator requests a bridge opening to accommodate the height of the vessel's outriggers or antennae. In most cases those outriggers or antennae can be made lowerable. These types of cases are often returned for correction or dismissed for lack of evidence.

In order for a violation under this cite to have occurred, it must be shown that after all lowerable, non-structural vessel appurtenances that are not essential to navigation have been lowered, the vertical clearance of the subject bridge was sufficient to allow the vessel to safely pass. It must also be shown that the appurtenance(s) for which the bridge opening was requested is/are lowerable, non-structural, and not essential to navigation.

It's important to have a clear understanding of what "lowerable non-essential vessel appurtenances not essential to navigation" means. The following definitions are found at 33 CFR § 117.4:

Lowerable means a non-structural vessel appurtenance that is or can be made flexible, hinged, collapsible or telescopic so that it can be mechanically or manually lowered. (Underlining added.)

Nonstructural means that the item is not rigidly fixed to the vessel and can be relocated or altered.

Appurtenance means an attachment or accessory extending beyond the hull or superstructure that is not an integral part of the vessel and is not needed for a vessel piloting, propelling, controlling, or collision avoidance capabilities.

Not essential to navigation means that a nonstructural vessel appurtenance, when in the lowered position would not adversely affect the vessel's piloting, propulsion, control, or collision-avoidance capabilities.

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Detailed evidence, including the vertical clearance of the bridge involved, the reason for the requested opening, and the subject vessel's height when all non-structural appurtenances are lowered, among other factors, can be helpful to the Hearing Officer in making her/his determination.

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DECKPLATE RIVETS

Prior to forwarding a case for adjudication, case processing officials should carefully review the entire case file and pay close attention to the quality of case enclosures, particularly when generating the party's copy of the case file. A party has the right to review all evidence contained within the case file. Copies of case documents that are of poor quality or are totally illegible must be regenerated, which may delay the adjudication process. Remember to redact from the documents Personally Identifiable Information, such as Dates of Birth, Social Security Numbers, etc., that do not belong to the charged party.

For alleged violations under 46 USC 8103(b) or (i), in addition to information pertaining to the vessel and its operation, it is a good practice to list the name, citizenship, and position held of each person on board the vessel in question. This information not only helps with the Hearing Officer's determination in such cases; it also provides charged parties with a better understanding of the alleged violation and the basis upon which to make informed decisions. Conclusory statements such as: "One of the three unlicensed crewmen on board was a non-U.S. citizen with a valid work visa"; or, "Two of the vessel crew self-admitted to being in the U.S. illegally," may not be as persuasive in establishing that a violation occurred as detailed information that identifies each individual on board and provides his/her citizenship status. This becomes particularly important when a party responds with evidence of a waiver of the crew citizenship requirements, or proof of citizenship, for persons that were not previously identified in the Coast Guard's case package. (Refer to Hearing Office Newsletter Volume 3, December, 2008, for more specific information pertaining to charging violations of 46 USC 8103.)

Boarding Officers should routinely check the driver's license of the party responsible for alleged violations observed during a boarding, and use the information from the license to fill out the Boarding Report. It is also a good practice for Boarding Officers to ask the party if the address on the license is in fact the party's current address. If the party's current address is different from the address shown on the license, the Boarding Officer should record the current address in the Boarding Report. The Boarding Officer should also record the old address shown on the driver's license and include that information in the civil penalty case file. In most cases, the current address supplied by the party will be valid. If not, the old address may help in finding a valid address.

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K N O T

(Knowledge Note or Tip)

The only valid authority for assessment of a civil penalty for simple possession of a controlled substance by a CG Hearing Officer, is 46 USC § 70506, which is part of the Maritime Drug Law Enforcement Act (MDLEA).*

Authority to enforce this section has not yet been delegated by the DHS Secretary to the Coast Guard. Additionally, Coast Guard program managers may want to provide guidance to the field on the CG's enforcement posture with respect to civil penalties for simple possession in violation of the MDLEA. Until such time as the delegation from DHS occurs, the Hearing Office is not authorized to process charges alleging simple possession of a controlled substance.

* Subsection (c) of 46 USC § 70506 states, "...Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance...shall be liable to the United States for a civil penalty of not to exceed $5,000 for each violation…" This was an amendment to the MDLEA made by section 302 of The Coast Guard Authorization Act of 2010 (Public Law 111-281).

WHAT'S IN A NUMBER?

A number is nothing in and of itself. A number is a creation used in counting and measuring. Numbers can convey "magnitude " or "degree." Numbers are relative and can be expressed as a ratio or percentage. Sometimes numbers are used simply as convenience for certain functions such as telephone numbers, lock combinations, etc. Today we hear much about business measures or business metrics. Often these "metrics" are used to measure the success or failure of a desired outcome.

Here are some Coast Guard Hearing Office metrics (as of September 30, 2011) that provide a "how goes it" glimpse into our work:

Number of case files received by the Hearing Office with violation dates in 2008: 946

Number of case files received by the Hearing Office with violation dates in 2009: 1442

Number of case files received by the Hearing Office with violation dates in 2010: 1486

Number of case files received by the Coast Guard Hearing Office with violation dates in 2011: 734

Number of case files received by the Hearing Office in 2011 regardless of violation date: 1192

Number of preliminary assessments issued in 2011: 1056

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2011: 710

Number of violation case files returned to the program manager for deficiencies in 2011: 155

Number of hearings held in 2011: 14

JUST FOR FUN: Word Search

SEARCH AND RESCUE

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PAY
DISTRESS
DRAWBRIDGE
REGULATION
NAVIGABLE
CIVIL
PENALTY

CASUALTY
CITE
BUI
HEARINGOFFICER
IMPOSED
ASSESSMENT
MARINESAFETY

FAIRNESS
COMPLIANCE
DETERRENCE
WARNING
VIOLATION
EVIDENCE
SOUND
HEARING