

U.S. Department  
of Transportation

United States  
Coast Guard



COMMANDANT  
U. S. Coast Guard

2100 Second Street, SW  
Washington, DC 20593-0001  
Staff Symbol: G-LMI  
Phone: (202) 267-1527  
FAX: (202) 267-4496

16731

[REDACTED]  
[REDACTED]  
[REDACTED]

June 21, 2002

RE: MV00002230  
[REDACTED]  
[REDACTED]  
\$7,500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Alameda, California, has forwarded the file in Civil Penalty Case MV00002230, which includes your appeal as owner/operator of [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$7,500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 15.605	Failure to have an uninspected passenger vessel under the control of a properly licensed individual.	\$2,500.00
33 CFR 160.105	Failure to comply with a COTP or a District Commander order affecting a vessel or a waterfront facility.	\$5,000.00

The violations result from your operation of a vessel on June 6, 2000, in Aransas Bay, Texas, with four passengers on board, without a valid Captain's license.

On appeal, you neither deny nor affirm the violations. However, you assert four bases of appeal. Specifically, you contend that (1) "[r]egulations between State and Federal has not been considered on this complex issue;" (2) "Investigating Officers had no standard of conduct nor due process by entering personal properly with no standing document;" (3) the Hearing Officer failed to take into account your company's ability to pay, culpability, and the gravity and nature of the offenses alleged in assessing the penalties in issue; and (4) "findings of facts are inappropriate because judgment can not (sic) be based on a resolution of disputed facts." Your appeal is denied for the reasons described below.

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Before I begin, I believe a brief recitation of the circumstances surrounding the violation is in order. In May of 1999, the Coast Guard received several complaints critical of your operation of [REDACTED].<sup>1</sup> While investigating the complaints, the Coast Guard learned that you did not have a valid Coast Guard license. Therefore, the Coast Guard issued Captain of the Port Order (COTP) No. 007-99 on May 7, 1999. The COTP ordered you to “cease acting in capacity of captain or master of any vessel with passengers for hire in the navigable waters of the United States” and made clear that “[t]his order applies to your advertised fishing guide operations.” The record evidences that on June 6, 2000, you were hired to act as a fishing guide for [REDACTED]. On that day, you carried [REDACTED] and three other passengers on a fishing excursion in Aransas Bay, Texas, acting as both the captain of the fishing vessel and fishing guide for the trip. Your operation of the vessel on June 6, 2000, resulted in the violations at issue.

The Coast Guard contends that you committed violations of 46 CFR 15.605 and 33 CFR 160.105. I will begin by addressing your alleged violation of 46 CFR 15.605. In relevant part, 46 CFR 15.605 states that “[e]ach self-propelled, uninspected vessel carrying not more than six passengers...must be under the direction and control of an individual licensed by the Coast Guard.” Since you do not deny that you operated an uninspected passenger vessel without a Captain’s license (with passengers on board) on June 6, 2000, I consider the violation proved based upon the evidence of record. I, likewise find the violation of 33 CFR 160.105 proved. 33 CFR 160.105 makes clear that “[e]ach person who has notice of the terms of an order issued...must comply with that order.” The record clearly evidences that the Coast Guard issued COTP Order No. 007-99 on May 7, 1999. As has been noted above, that order instructed you to “cease acting in capacity of captain or master of any vessel with passengers for hire in the navigable waters of the United States.” The order also stated “[t]his Captain of the Port Order is effective May 7, 1999, and remains in effect until further notice.” The record further evidences that the aforementioned COTP Order was in effect on June 6, 2000, when you conducted a fishing excursion for [REDACTED]. In so doing, you acted as the master of a vessel, in violation of the dictates of the COTP Order, a clear violation of 33 CFR 160.105. Since I have found the violations proved, the only issue remaining is whether mitigation of the penalties assessed by the Hearing Officer is appropriate in light of the arguments that you raise on appeal. For the reasons discussed below, I do not believe that it is.

In your first argument, citing 33 USC 1231, you contend “[r]elations between State and Federal has not been considered on this complex issue.” Your reliance on 33 USC 1231 is misplaced. You seem to argue that, since the Texas Parks and Wildlife Code, at section 47.004 states that “[n]o person may engage in business as a fishing guide unless the person has obtained a fishing guide license,” your compliance with state laws obviates the need for complying with the Federal requirements. This assertion evidences a misunderstanding of the Federal-state relationship.

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<sup>1</sup> Other than serving to alert the Coast Guard to the violations in issue, the complaints are not relevant to the disposition of this action and will not be discussed further herein.

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33 USC 1231 grants the Secretary of the department in which the Coast Guard is operating the authority to “issue...amend or repeal, regulations necessary to implement this chapter.” Since 33 USC 1231 is found in Chapter 25 of Title 33 of the U.S. Code, it is evident that the pertinent regulations concern the Coast Guard’s Ports and Waterways Safety Programs. In your argument, you specifically cite 33 USC 1231(b). 33 USC 1231(b) outlines the procedures to be used in issuing, amending, or repealing federal regulations made pursuant to the statute. A thorough reading of the statute reveals its true intent: that the Secretary, in exercising his regulatory authority, should “establish procedures for consulting with, and receiving and considering the views of all interested parties, including...(2) officials of State and local governments.” 33 USC 1231(b)(7) also makes clear that “advisory committees consisting of all interested segments of the public” should also be consulted in certain circumstances. For your argument to have any force, you would have to be contending that when the Secretary issued the regulation authorizing Captain of the Port Orders, the relevant state and local agencies were not duly consulted. You offer no evidence to support such an assertion. Furthermore, I can assure you that the promulgation of this particular regulation was preceded by an Advanced Notice of Rulemaking which called for public comment. The regulation is valid and not affected in any manner by the Texas license requirement. You seem to be arguing that because the state has issued regulations concerning fishing licenses, it is inappropriate for the Coast Guard to regulate the manning requirements for uninspected vessels. This argument is without merit. The waters of Texas are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to issue licenses without regard to the issuance of licenses by a state. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from issuing licenses to the Merchant Marine. Indeed, pursuant to 46 USC 7101, the Coast Guard is given broad authority to do so. While I commend you for being in compliance with the laws of the state of Texas, that compliance does not obviate your need to comply with the Coast Guard’s requirements.

You next contend that “Investigating Officers had no standard of conduct nor due process by entering personal property with no standing document.” In essence, you seem to be contending that the Coast Guard went to your house without a valid search warrant. In your letter dated February 25, 2001, you state that “officers from US Coast Guard...came to my home unannounced with no legal document whatsoever.” Parenthetically, you add that the incident has been “reported to...[your]...local Sheriff’s (sic) Department and agreed that they should have an escort from them.” There is simply no evidence in the record to support your claims. Evidently, the Coast Guard went to your home to discuss the matter with you. When the Coast Guard arrived, you asked them to leave. There is no evidence that the Coast Guard then entered your home or did not leave at your request. In any event, constitutional issues are not resolved at administrative proceedings. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 39 L. Ed. 2d 389, 94 S. Ct. 1160, 1974 U.S. LEXIS 108 (1974); *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 21 L. Ed. 2d 402, 89 S. Ct. 414, 1968 U.S. LEXIS 1 (1968) (Harlan, J., concurring in the result). As such, the Commandant is not vested with the authority to decide constitutional issues; that is exclusively within the purview of the Federal courts.

You next contend that the Hearing Officer violated 33 USC 1232 in that he did not consider your ability to pay the fines assessed, your small business status, your culpability, the fact that you

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were not a willful violator of the law, or the gravity of the violations in issue in assessing the penalties in issue. I note that the case file contains no evidence regarding your financial condition. Furthermore, the Hearing Officer's decision dated May 31, 2001, clearly indicates that he "considered the history of no prior violations" in assessing the relevant penalties. Furthermore, I find your arguments concerning willfulness and culpability to be without merit. The maximum penalty that may be assessed for the violations in issue is \$52,500.00. Given that the penalty assessed by the Hearing Officer is significantly less than the maximum permitted by statute, I am confident that the Hearing Officer considered the criteria set forth in 33 USC 1232.

Finally, you contend "findings of facts are inappropriate because judgment can not (sic) be based on a resolution of disputed facts." It is the responsibility of the Hearing Officer to decide the reliability and credibility of evidence and to resolve conflicts in evidence. Upon a thorough review of the record, it does not appear that any relevant facts are in dispute. You do not deny that you operated a vessel in violation of COTP Order No. 007-99 or that you carried passengers on an uninspected small passenger vessel without a Coast Guard license. Since these facts are sufficient to support the violations, I find your argument to be without merit.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that you are the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$7,500.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances of the case. For the reasons noted above, I do not feel that further mitigation of the penalties is appropriate.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$7,500.00** 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 100160  
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % 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, U.S. Coast Guard Hearing Office  
Commander, Finance Center