



16731

March 31, 2008

REDACTED
REDACTED
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REDACTED
Attn: REDACTED

RE: Case No. REDACTED
REDACTED
Unnamed REDACTED
DISMISSED

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. REDACTED, which includes your appeal on behalf of the owner of the recreational vessel REDACTED. The appeal is from the action of the Hearing Officer in assessing a \$25,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 107.215(a)	Unauthorized entry into Cuban territorial waters (strict liability) plus any aggravating factors.	\$25,000.00

The violation is alleged to have occurred on July 31, 2004, when Coast Guard personnel engaged in a Homeland Security Patrol in support of Operation Able Sentry and Ocean Reef commenced a boarding of the unnamed recreational vessel REDACTED after observing it underway approximately 5 nautical miles southwest of Carysfort Reef Light near Key Largo, Florida.

On appeal, although you do not specifically address the violation, you make what appears to be a jurisdictional assertion. To that end, you assert that REDACTED was "simply an innocent party to any activity which gave rise to the charged violation, in that she helped someone finance the purchase of the vessel" and insist that she was "misled, by her step-son, as to the purpose of the vessel she assisted him in purchasing." In that regard, you further assert that REDACTED was "unaware that the vessel was to be used as was charged" in this case and "would never have condoned such use of the vessel." In addition to the jurisdictional assertion you raise on appeal, you question the propriety of the Hearing Officer's decision to assess a penalty in the matter without providing REDACTED a hearing. To that end, you assert that "REDACTED is an elderly lady who does not speak or write English" and note that she did not receive relevant Coast Guard notices regarding the case until her husband provided her with the Hearing Officer's Final Assessment letter. Your appeal is granted for the reasons discussed below.

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 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 1.07 have been sanctioned by Congress and have been 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).

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. Therefore, although REDACTED did not raise any issues before the Hearing Officer—and indeed did not respond to any of the Coast Guard's prior correspondence concerning the alleged violation—because the seminal issue that you raise on appeal is one of jurisdiction, it is now appropriate for consideration.

Before I address the violation, I believe a brief recitation of the circumstances surrounding the Coast Guard boarding of the REDACTED is in order. The record shows that on July 31, 2004, personnel from Coast Guard Station Islamorada, Florida, who were engaged in Homeland Security Patrols in support of Operation Able Sentry and Ocean Reef Operations, observed the vessel REDACTED heading inbound at a high rate of speed approximately 5 nautical miles southwest of the Carysfort Reef Light, near Key Largo, Florida. Because the vessel was transiting via a known migrant smuggling route, Coast Guard personnel commenced a boarding of the vessel. When the vessel was first observed, four persons were aboard; however, as the boarding team approached the vessel, only two individuals remained on board. The two individuals were later identified as the vessel's operator, REDACTED, and his passenger, REDACTED—both of whom are suspected of being prolific migrant smugglers. Thereafter, as the boarding officers maneuvered their boarding craft to the stern of the REDACTED, two individuals were observed in the water, attempting to hide under the REDACTED's swimming platform. These individuals were later revealed to be Cuban Nationals who were attempting to enter the United States illegally. A subsequent investigation revealed that although the vessel REDACTED was registered and mortgaged in the name of Carmen Betancourt, REDACTED maintained that he was the actual owner of the vessel and that his step-mother, Carmen Betancourt, registered and mortgaged the vessel in her name only because REDACTED had "bad credit." Indeed, REDACTED acknowledged that he was responsible for making the vessel's mortgage payments and, at the time the vessel was seized as a result of the incidents giving rise to this case, the vessel was located at REDACTED's place of residence.

REDACTED was charged with a violation of 33 CFR Part 107, Subpart B, Unauthorized Entry Into Cuban Territorial Waters. 33 CFR 107.215(a), requires that the "owner, agent, master, or person in charge" of a vessel obtain a written permit from the Commander, Seventh Coast Guard District, prior to entering Cuban territorial waters (after departing U.S. territorial waters). In this case, the record contains substantial evidence to support the Hearing Officer's conclusion that the REDACTED departed U.S. territorial waters (from Homestead Bay Front Park in Homestead, Florida) and entered Cuban territorial waters on July 31, 2004 without obtaining a

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permit from the Coast Guard's Seventh Coast Guard District. As such, a violation of 33 CFR 107.215 clearly occurred. Therefore, the sole issue remaining for consideration is whether REDACTED is an appropriate party to be charged with the violation. After a thorough review of the record, for the reasons discussed below, I do not believe that REDACTED is an appropriate party to be charged with the violation and, as a result, I will dismiss the violation and associated monetary penalty assessed by the Hearing Officer.

Violations of 33 CFR Part 107 may properly be assessed against a vessel "owner, agent, master, officer, or person in charge." *See* 33 CFR 107.210. Many of the regulations the Coast Guard enforces contain similar enforcement provisions. For example, in cases where a vessel discharges oil into the navigable waters of the United States, civil penalties may be assessed against the vessel's "owner, operator, or person in charge." *See* 33 USC 1321(b)(6)(A). However, while an individual in REDACTED position—a so-called "paper owner" of the vessel—could appropriately be charged with a violation of 33 USC 1321(b)(6)(A), where the term "owner" has a customary meaning, I do not believe that the same is true in this case. That is because the regulations in 33 CFR Part 107 are unique in that they expressly define the term "[o]wner, agent, master, officer, or person in charge" as "the persons or entities that maintain operational control over any vessel subject to the requirements" of 33 CFR Part 107. *See* 33 CFR 107.200. There is simply nothing in the record to suggest that REDACTED maintained "operational control" over the REDACTED. Instead, the record shows that REDACTED step-son not only paid for and stowed the vessel at his place of residence, but, more importantly, that REDACTED could not even identify the vessel as her own when she was asked to do so. Moreover, virtually all of the parties to this case, including REDACTED step-son and members of the Coast Guard unit responsible for initiating the instant civil penalty action, refer to REDACTED step-son, Jose, as being the "actual owner" of the vessel. There is simply no evidence in the record to suggest that REDACTED ever controlled the operation of the vessel. As such, REDACTED simply cannot be viewed as an "owner, agent, master, officer, or person in charge of the vessel" under the definition contained at 33 CFR 107.200 and the instant civil penalty case must be dismissed.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

Sincerely,

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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