



16731
MAR 31, 2008

REDACTED
Attn: REDACTED
REDACTED
REDACTED
REDACTED

RE: Case No. 2328317
REDACTED
REDACTED
REDACTED
\$20,000.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2328317 which includes your appeal on behalf of REDACTED REDACTED. ("REDACTED") as operator of the REDACTED. The appeal is from the action of the Hearing Officer in assessing a \$20,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 160.208	Failure to provide changes to a submitted notice of arrival within the times required in 160.212.	\$20,000.00

The circumstances surrounding the violation were first brought to the Coast Guard's attention during an ISPS inspection of the REDACTED that occurred on March 4, 2005. The ISPS inspection was initiated after the Coast Guard learned that three stowaways were found hiding in the vessel's #4 hold during cargo operations in Savannah, Georgia.

On appeal, you deny the violation and assert that the penalty assessed by the Hearing Officer must be "rescinded or reduced." Your appeal centers on your conclusion that the Hearing Officer erred in finding that the REDACTED stop in the Cape Verde Islands to offload a stowaway—a stop that you assert did not include an actual port call and, instead, was comprised of the vessel remaining at anchorage in Praia, Cape Verde, for a duration of only one hour and 18 minutes—amounted to a port/place visited that was required to be reported to the Coast Guard under its "Notice of Arrival" regulations. In that regard, you assert that "the REDACTED short stay at the anchorage off the Cape Verde Islands does not constitute a port call or visit" and "emphasize that the REDACTED never entered the port, choosing instead to have the stowaways expeditiously and efficiently escorted from the ship via launch while outside the port limits." As a consequence, you assert that the vessel's stop at Praia, Cape Verde Islands on February 17, 2005, did not amount to a port or place visited and, as such, was not required to be reported in

any subsequent Notice of Arrival (“NOA”) or amendment thereto filed by REDACTED. Your appeal is denied for the reasons discussed below.

The record shows that the operators of the REDACTED filed a NOA, via e-mail message to the Coast Guard’s National Vessel Movement Center on February 19, 2005. The Notice was filed in advance of the vessel’s anticipated arrival at Houston, Texas, on February 12, 2005. The record further shows that the “Last Five Ports/Places Visited” portion of the Notice identified the vessel’s five prior ports or places visited as: 1) Abidjan, Ivory Coast (arrival February 12, 2005, departure February 13, 2005); 2) Cotonou, Benin (arrival February 10, 2005, departure February 11, 2005); 3) Dakar, Senegal (arrival February 5, 2005, departure February 6, 2005); 4) Houston, Texas (arrival January 22, 2005, departure January 23, 2005; and, 5) Savannah, Georgia (arrival January 18, 2005, departure January 19, 2005). Although the record shows that the vessel stopped, albeit for a short period of time at Porto da Praia, Cape Verde, to offload a stowaway, REDACTED neither reported the vessel’s stop at Praia on it’s initially filed NOA, nor filed an amendment to its NOA to add Praia to its list of prior ports or places visited.

In her final letter of decision, the Hearing Officer addressed the “substance of the case” as follows:

The Coast Guard alleges that REDACTED arrived at the port of Savannah having failed to submit a change to its Notice of Arrival...indicating that its last five ports of call included Porto da Praia, Cape Verde Islands, where the vessel had dropped off a stowaway.

It is not disputed that the NOA for Savannah did not mention Praia. The response contends that the vessel did not actually call at Praia, but only “approached the anchorage and an agent’s boat was sent to the vessel” and no Customs entry or clearance was made. I accept these facts. This raises the question, did the vessel’s brief presence, near enough to Praia for a boat to come and accept a stowaway from the vessel, amount to a visit to a port or place within the meaning of 33 CFR Table 160.206(2)(i)...33 CFR Table 206 is the list of information required in a NOA; item (2)(i) is “Names of last five ports or places visited.”

I conclude that the answer is yes. The manifest purpose of the requirement to list the last five ports or places visited is to enable the Captain of the Port to assess the risk that a dangerous person or device could have been placed aboard the vessel that might endanger the later U.S. port. Although the vessel’s presence near Praia surely entailed less than the usual risk where a vessel remains in port taking on or unloading cargo, it is also true that while a boat attended and took off a person, unauthorized activities were possible. In my view, this risk is clearly more like the risk entailed in a port call than like that of a vessel at sea passing an island without pausing. In the absence of established Coast Guard guidance giving a more limited interpretation, I conclude that the vessel did visit Praia within the meaning of the regulation and the violation occurred. \$20,000.00 is assessed.

After a thorough review of both your letter of appeal and the Hearing Officer's decision, it is clear that the key issue presented in this case is whether the Hearing Officer's determination that the vessel's "brief presence" in Praia constituted a "port or place visited" under the operative regulations. As the Hearing Officer properly noted, 33 CFR Table 160.206 mandates that each NOA filed with the Coast Guard include the names of the last five ports or places visited. *See* 33 CFR Table 160.206(2)(i). In addition, 33 CFR 160.208(a) makes clear, in relevant part, that "when submitted NOA information changes, vessels must submit a notice of change within the times required in § 160.212." For its part, 33 CFR 160.212 states that when, as in this case, a vessel submits a NOA within 96 hours of its arrival at a U.S. port, changes to NOAs are required to be submitted "[a]s soon as practicable but at least 24 hours before entering the port or place of destination." Accordingly, if I agree with the Hearing Officer's determination that the REDACTED stop at Praia constituted a "port or place visited," I would have to find the violation proved.

Pursuant to 33 CFR 160.204, the term "port or place of departure" "means any port or place in which a vessel is anchored or moored." In this case, the record shows that the REDACTED stopped at an anchorage off the Port of Praia to disembark a stowaway. In light of this fact, the key issue presented here is whether the vessel's stop at Praia constitutes a place where the REDACTED was "anchored or moored" when such terms are not expressly defined with the operative regulations. A review of the Federal Register Notification published by the Coast Guard to announce the Final Rule implementing the NOA regulations is particularly illuminative here in that it specifically addresses those "stops" that are required to be reported. In that regard, a review of the Final Rule shows that the Coast Guard specifically stated that "[v]essels that have arrived from or have stopped in foreign ports, however, are required to provide their last five ports of call" in their NOA. *See* Notification of Arrival in U.S. Ports, 68 Fed. Reg. 9537-02 (February 28, 2003). Since the record shows—and indeed you acknowledge that the REDACTED spent 1 hour and 18 minutes at an anchorage in Praia, I find that the record contains sufficient evidence to support a conclusion that you "stopped in a foreign port." Since you did not report that stop to the Coast Guard via either your initial NOA or any subsequent amendments filed with respect to that NOA, I find that the record contains substantial evidence to support the Hearing Officer's conclusion that the violation occurred.

Having determined that the Hearing Officer did not err in finding the violation proved, I will now address whether the \$20,000.00 penalty assessed by the Hearing Officer is appropriate in light of the circumstances surrounding the violation. The record shows that the Coast Guard unit responsible for initiating the instant civil penalty case recommended that the Hearing Officer assess the maximum penalty of \$32,500.00 in this case. Upon consideration of arguments submitted on REDACTED's behalf, the Hearing Officer assessed a penalty of \$20,000.00, and, in so doing, reduced the recommended penalty by more than one-third. After a thorough review of the record, I believe that the Hearing Officer did so, in large part, because REDACTED expressed a sincere desire to not only "completely understand" the Coast Guard NOA reporting requirements but also to ensure that similar violations would not be "repeated by any of the vessels in...[its]...fleet." At the same time, however, I note that the Hearing Officer assessed the penalty after noting that "[t]he manifest purpose of the requirement to list the last five ports or places visited is to enable the Captain of the Port to assess the risk that a dangerous person or device could have been placed aboard the vessel that might endanger the later U.S. port." In this

case, the record shows that when the REDACTED arrived at the port of Savannah, Georgia, the second port it called in the United States during the relevant voyage, three additional stowaways were found in one of the vessel's cargo holds. Under such circumstances, I do not believe that further mitigation of the penalty assessed by the Hearing Officer is appropriate.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that REDACTED is the responsible party. The decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$20,000.00 penalty assessed by the Hearing Officer, rather than the \$32,500.00 maximum permitted by statute to be appropriate under the circumstances of this case.

Payment of **\$20,000.00** 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 1.00% 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 C.F.R. § 1.07, this decision constitutes final agency action.

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