Volume 10

Newsletter Date
January 2011

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

Greetings,

This January Newsletter should be reaching you soon after the New Year and the Holiday season. We at the Hearing Office hope that all of our readers have enjoyed some traditional festivities with family and friends. Our work here continues even during the Holiday season. Some people seem to believe that we take some perverse pleasure in spoiling their Holiday by sending them notice of a civil penalty in the mail along with their Christmas cards. But, the fact is, we have to keep our process going year-round to keep up with the steady flow of cases we receive and try to provide notice to the charged party as soon as possible.
In this issue of the Newsletter you will find articles about some recent law-making that has created new civil penalties or, in the case of anchorages, increased the maximum civil penalty; issues related to the charging of boating while intoxicated and negligent operation in the same case; how Hearing Officers handle multiplicious charging based on a single act or incident; and some tips on providing persuasive evidence of compliance.
As always, the reason for this Newsletter is to make the Hearing Office part of the Coast Guard civil penalty process more transparent. The better you understand our process, the easier it is to see that our actions are based on principles of fairness and impartiality.

This and previous newsletters are posted on our website www.uscg.mil/legal/cgho and on the Coast Guard's website HOMEPORT.

HEARING OFFICE NEWS

On December 1, 2010, a member of the Hearing Office administrative staff, Victor Anderson, was advanced to Yeoman Second Class (YN2). YN2 Anderson has worked at the Hearing Office since August, 2007, and he has made important contributions to the processes used by the administrative staff to support the work of our hearing officers and keep the flow of case files moving efficiently.
We could not function effectively without our administrative staff. The administrative staff keeps our case files organized, processes the in-coming mail, and takes care of the out-going mail. They also respond to most of the telephone calls and emails the Hearing Office receives from the general public and from Coast Guard personnel.
With his promotion, YN2 Anderson earns more pay and gains seniority within the enlisted ranks of the Coast Guard. Congratulations YN2 Anderson!

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EVIDENCE OF COMPLIANCE

CDR E. Hudspeth

So you were cited for a vessel safety violation, and without delay you corrected the discrepancy. According to the pamphlet you received in the mail from the Hearing Office, you may submit written statements, photographs, receipts, diagrams or other evidence relating to the case. However, before you decide to include evidence to support your statement that the discrepancy has been corrected, take the time to consider what you're sending, and whether it will persuasively show that you and your vessel are in compliance.

First, how can you show that you now have the previously missing item? They say that a picture is worth a thousand words, but make sure that the picture is meaningful. For example, only providing a picture of the item by itself is not very convincing. More helpful would be an additional picture of the item next to or on board your vessel, with the name and/or state number of the vessel prominently displayed.

Second, what if the item has an expiration date (Certificate of Number, hydrostatic release, life raft, visual distress signals, etc.)? It would be most advantageous to your cause if you included a close-up picture or copy of the document or item that clearly shows the non-expired expiration date.

Finally, how can you show that you corrected the discrepancy in a timely manner? Obviously, if a receipt or invoice is available, you'll want to provide a copy that clearly shows the date of purchase, for comparison to the date of the violation. Another possibility is to arrange for a vessel safety inspection/ exam. You may contact a local Coast Guard unit to arrange a follow-up boarding, or a Coast Guard Auxiliary Vessel Safety Check using the following website: http://SafetySeal.net. You should receive a dated document afterwards that you can copy and include with your response letter. Hearing Officers give substantial weight to a mariner's timely compliance efforts, and such efforts will often result in a mitigation of the final penalty amount.

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IS IT BUI? — NEGLIGENT OPERATIONS? — OR BOTH?

CDR M. Hammond

Consider this hypothetical scenario: A small boat crew discovers a 16-foot recreational boat with one person on board, adrift, and without its navigation lights energized after sunset. Based on that and additional observations during a boarding of the vessel, the boarding officer has reasonable cause to suspect the operator is intoxicated. Following the administration of field sobriety tests and a breath test, the operator is determined to be intoxicated and is subsequently charged for operating under the influence of alcohol or a dangerous drug (BUI), under Title 46 United States Code 2302(c). The operator is also charged under 33 CFR 83.20 for failing to comply with the rules for lights after sunset. Further, the operator is cited for a third charge under 46 U.S.C. 2302(a) – negligent operations. However, the only evidence in the case file to support the third charge is the brief statement "subject operated vsl with no lights and BAC of .086." When the case is reviewed by the Hearing Officer, the negligent operations charge is dismissed. Why?

Cases involving BUI are unfortunately common amongst the cases received by the Hearing Office for adjudication. Generally speaking, charging units are doing an excellent job of thoroughly documenting the critical factual elements of each case and providing the necessary evidence to support a charge of BUI. Hearing Officers routinely receive cases in which a charge under 46 U.S.C. 2302(a) for "Negligent Operations" is also included in addition to the BUI charge. However, more times than not, these cases do not contain additional evidence beyond that pertaining to the BUI charge and therefore the charge under 2302 (a) is typically dismissed. That's not to say that negligence did not occur in a particular circumstance; only that the case file did not contain sufficient evidence to support a prima facie case in order to proceed with a charge under 46 U.S.C. 2302(a).

According 46 U.S.C. 2302(a), a person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, or property of a person is liable to the U.S. Government for a civil penalty. Negligence is the omission to do something which a reasonable person, guided by those common sense considerations which ordinarily regulate human affairs, would do; or the doing of something which a reasonable and prudent person would not do. It is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Negligence can also be established by showing that a person violated an applicable safety law. But 46 U.S.C. 2302(a) also requires proof that the negligent act endangered the life, limb or property of a person. In the example given above, the party is already charged for operating under the influence and for failing to have navigation lights energized after sunset. However, the case file does not contain evidence to show that these alleged violations of safety law endangered the life, limb or property of a person. And, even if there was such proof, the Hearing Officer would have two violations based on the same failure to comply with a safety law. That may be considered a case of multiplicious charging (see the accompanying article), which means that the Hearing Officer may consider the two violations as a single violation for purposes of assessing an appropriate penalty. That would not be the case if the alleged negligent operations violation was based on an act that was independent of the already-charged BUI and navigation lights violations.

Generally, in a case where BUI or another safety law violation is alleged, it may be appropriate to also charge a negligent operation violation if it is based on an independent act that would support pursuing a civil penalty case by itself. Some examples could include: colliding with properly moored or anchored vessels; operating

erratically in dense traffic causing other boaters to take evasive action to avoid collision; operating at a high rate of speed in a no wake zone; and allowing children without PFDs to bow ride at a high speed, etc.

As always, careful attention to ensuring that civil penalty cases forwarded to the Hearing Office contain good and sufficient evidence to support each element of each charge cited will assist in the timely and proper notice to parties.

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COAST GUARD AUTHORIZATION ACT OF 2010 INCLUDES CHANGES AFFECTING CIVIL PENLATIES.

Robert Bruce

On October 15, 2010, President Obama signed the Coast Guard Authorization Act of 2010, Public Law 111-281, into law. This new law contains many provisions on a wide variety of subjects related to the Coast Guard. Three of the provisions provide new authority to assess civil penalties or increase the amount of the civil penalty that may be assessed.

Section 301 of the Authorization Act amends 33 U.S.C. § 471 which authorizes the Coast Guard to establish and regulate anchorages. Among other things, the maximum civil penalty for violating an anchorage regulation is increased from $100 to $10,000. This appears to be the first change to the civil penalty amount since the $100 maximum penalty was enacted in 1915. Clearly, in some circumstances, the old $100 maximum penalty was too small to be a serious factor in obtaining compliance with anchorage regulations. As a result, in at least one instance, the Coast Guard turned to its Ports and Waterways Safety Act authority, which is backed up by a civil penalty of up to $40,000, for enforcement of anchorage regulations. See 33 C.F.R. §§ 109.07 and 110.1a (anchorages included within the Port of New York). The new maximum civil penalty for violating anchorage regulations should provide a stronger incentive for mariners to comply with those regulations.

Section 302 of the Authorization Act amends 46 U.S.C. 70506, part of the Maritime Drug Law Enforcement Act, to add a $5,000 civil penalty for simple possession of a controlled substance on a vessel subject to the jurisdiction of the United States. Before the enactment of this provision, only criminal penalties were available for simple possession of controlled substances. Many of these cases occur in areas of concurrent state and federal jurisdiction. Generally, state laws have provisions that can adequately deal with infractions of this nature. As a result, cases involving simple possession of personal use quantities of controlled substances have routinely been turned over to state authorities for prosecution. Some unusual circumstances that created a strong federal interest in the case would have typically been present to justify bringing such a criminal case in federal court. With the new authority to assess civil penalties for simple possession of controlled substances, there is likely to be less reluctance to pursue federal action. In fact, as we frequently see with boating while intoxicated cases, there may often be cases where both the state authorities and the Coast Guard will commence actions based on the same incident. Although Coast Guard Hearing Officers will consider the results of state actions for the same incident when acting on a civil penalty case, they are not bound by state action and there is no bar to assessing a Coast Guard civil penalty even after an individual has been sentenced by a state court for the same violation.

Finally, Title X of the Authorization Act implements the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001, and Section 1042 of the Authorization Act creates civil penalties to enforce the new law. The maximum penalty for a violation of 33 U.S.C. Chapter 38 or implementing regulations is $37,500, except that, for a recreational vessel the maximum is $5,000. There is also a civil penalty of up to $50,000 for false statements or representations related to these requirements.

The National Oceanic and Atmospheric Administration's General Counsel website includes this information on the Harmful Anti-Fouling Systems ("AFS") Convention:

"The International Convention on the Control of Harmful Anti-Fouling Systems on Ships entered into force on September 17, 2008. Adopted under the auspices of the International Maritime Organization on October 5, 2001, the AFS Convention was signed by the United States on December 12, 2002, and President Bush transmitted it to the Senate for its advice and consent on January 23, 2008. The Senate Foreign Relations Committee reported a proposed resolution of ratification with two declarations on July 29, 2008, and the full Senate approved the proposed resolution of ratification on September 26, 2008. The Convention, which NOAA played an important role in negotiating and developing, bans the application or use of tributyltin (an anti-fouling agent used on the hulls of ships to prevent the growth of marine organisms), calls for its removal from existing anti-fouling systems by January 1, 2008, and establishes a detailed and science-based framework for considering future restrictions on antifouling systems."

Certain vessels, of at least 400 gross tons or of at least 24 meters in length, will be required to have documentation attesting that their anti-fouling system is not harmful.

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APPLYING COMMON SENSE TO AVOID MULTIPLICIOUS CHARGES

CDR Mark Hammond

Hearing Officers routinely receive cases where the party is charged under multiple cites for a single action or incident. Black's Law Dictionary, 9th edition defines "multiplicity" as "The improper charging of the same offense in more than one count of a single indictment or information." It's important to know that in the Coast Guard's civil penalty process, the Hearing Officer has wide discretion in deciding what is a fair penalty amount when the same action is charged in two (or more) different ways. In cases where it appears the party has been charged under different regulatory cites for the same violation, the Hearing Officer will typically dismiss one of the charges as being multiplicious.

Here are a few common examples of the types of cases for which we might see charges dismissed for being improper or multiplicious:

* During the boarding of a 25 net ton Commercial fishing vessel engaged in fishing, the boarding team discovers that the vessel is not documented as required by 46 CFR 67.7. The evidence in this case indicates the vessel owner/operator never documented his vessel. The vessel owner is subsequently charged under 46 CFR 67.323 – *Operation without documentation*. However, the owner is also charged under 46 CFR 67.325 for operating without a fisheries endorsement, and under 46 CFR 67.313 and 315 for failing to have the original Certificate of Documentation (COD), on board and for failing to produce the original COD on demand. Clearly the violation in this example is the vessel was not properly documented as required. Common sense tells us that since the vessel has no COD, there would be no endorsement, a COD would not be on the vessel and the person in command would not be able to produce a COD on demand.

* During an oil transfer from a mobile transfer facility, it is discovered that there is no operations manual on site. The party is then charged under 33 CFR 154.300 for the operations manual not being readily available to the person in charge, and 33 CFR 156.120 for failure to comply with the requirements for oil transfer – specifically (t)(2) which requires that the person in charge have in their possession a copy of the facility's operations manual. As you can see in this case, the party is being charged twice for the same act of failing to have an operations manual readily available to the person in charge.

* During an inspection of a HAZMAT container, it is discovered that the container is not properly placarded. Upon further inspection, it is also discovered that several individual packages containing HAZMAT within the container are not properly labeled. The party in this case is subsequently charged under 49 CFR 172.504 for failing to comply with the general placarding requirements, and 49 CFR 172.400 for failing to comply with general labeling requirements. Additionally, because there were labeling and placarding violations discovered on a container being offered for shipment, the charging unit also charged the party under 49 CFR 172.2 for failing to comply with the general requirements for HAZMAT shipments contained in subchapter C. For the alleged violations in this example, the additional charge under 49 CFR 172.2 charge would appear multiplicitous since the party is already charged with specific placarding and labeling violations detailed in charges 1 and 2.

When choosing a regulatory cite, applicability to the vessel, party, etc should be verified. The cite used for a particular charge should be supported by the factual elements of the case. If there are multiple charges, each charge should be based on independent evidence that supports the particular violation alleged. There may be cases where exigencies of proof or other factors make it prudent to charge a single act or incident in more than one way. Still, attention should be given to ensure you're not needlessly "piling on" and charging the party under different cites for the same activity. Applying common sense when determining how to charge a single act or incident can save all of the participants in the civil penalty process from having to spend time on multiple charges that really add nothing in terms of establishing the charged party's culpability or that the alleged act violated more than one distinct standard of conduct.

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K N O T

(Knowledge Note Or Tip)

Proof of Knowledge/Notice. In most of the cases the Hearing Office decides, there is an alleged violation of a statute or regulation of which all persons subject to our jurisdiction are deemed to have knowledge. This presumed knowledge is referred to as "constructive notice." Because the applicable statutes and regulations are matters of public record, as a matter of law, persons are deemed to have knowledge of them, whether or not they actually possess such knowledge. There are some regulations and orders that the Coast Guard enforces which are not considered matters of public record because they are triggered by an exercise of judgment or discretion of a Coast Guard officer in a particular situation. When "constructive notice" is not available to establish knowledge of the law or another required fact, the Coast Guard must provide evidence of actual knowledge of the law or fact. The best evidence of actual knowledge is direct evidence such as an admission from the charged party that he or she had

knowledge of the order to be enforced, or a statement that the order was physically delivered to the charged party in person, either orally or in writing. However, circumstantial evidence might also be sufficient to prove actual knowledge. Further discussion of the difference between direct and circumstantial evidence is beyond the scope of this "KNOT," but if you have questions about it in a particular case, you should seek legal advice.

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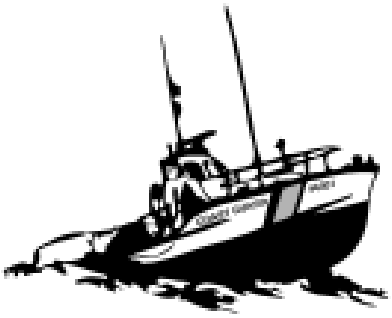

JUST FOR FUN

Alicia Scott, YN2 Pamela Conlee, and YN2 Victor Anderson

SCRABBLE GRAMS

Make a word using no less than two letters. Your goal is to use all the letters in all the boxes; you can only use each of the letters in your tray once. Under each letter in your tray is a point value number for that letter. Once you have made your word, use the number to add up your point value. If you use all the letters, you get an additional ten points for the word. Here is a hint. For the best score make words found in 33 C.F.R. 95.010.

						Total Points
L	O	C	O	A	H	L	
1	1	3	1	1	3	1	
O	R	E	F	C	I	F	
3	1	1	1	4	1	3	
D	O	R	G	N	U	A	
3	1	3	1	1	3	1	
P	L	A	C	B	A	E	
3	1	1	2	3	1	1	

DECKPLATE RIVETS

For alleged violations under 46 USC 8103 it is a good practice to ensure that the correct citation for the violation is reflected on the Enforcement Summary (ES). The evidence must directly support the citation on the ES. With respect to violations under 46 USC 8103, citing the entire section can be ambiguous and confusing. The case package should cite the specific subsection alleged to have been violated, such as 46 USC 8103(i). Cases submitted to the Hearing Office without the correct cite will typically be returned to the program manager. (see Volume 3. of our Newsletter, "Special Edition" for useful information in preparing 8103 violations for referral to the CGHO).

Always check for applicability when selecting an appropriate cite for an alleged violation. Improper cites will result in the case being returned to the program manger and slow the adjudication process. The following are some common errors encountered by the CGHO: (1) using a cite pertaining to a recreational vessel when the subject vessel in the case is a commercial fishing vessel; (2) citing for a missing Certificate of Number or temporary certificate on board when the vessel is a Documented vessel; (3) citing for missing safety equipment where not required due to vessel length, gross tonnage, or route of service; (4) using the "applicability" or "definitions" cite as the charged cite; (5) using a cite that pertains specifically to a vessel operator when the party is charged as the vessel owner.

For cases involving more than one charge, the Violation details and Factual Elements contained the Enforcement Summary should be specific to each charge. It is not helpful to the Hearing Officer if all factual elements are identical (cut and pasted) from other charges.

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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's some Coast Guard Hearing Office metrics that provide a "how goes it" glimpse into our work:

Number of case files received by the Coast Guard Hearing Office with violation dates in 2007: 1449

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 944

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1435

Number of case files received by the Coast Guard Hearing Office with violation dates in 2010: 1004

Number of case files received by the Coast Guard Hearing Office in 2010 regardless of violation date: 1420

Number of preliminary assessments issued in 2010: 1391

Number of final assessments issued in 2010: 956

Number of violation case files returned to the program manager for deficiencies in 2010: 145

Number of hearings held in 2010: 12

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