Volume 15

Newsletter Date
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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

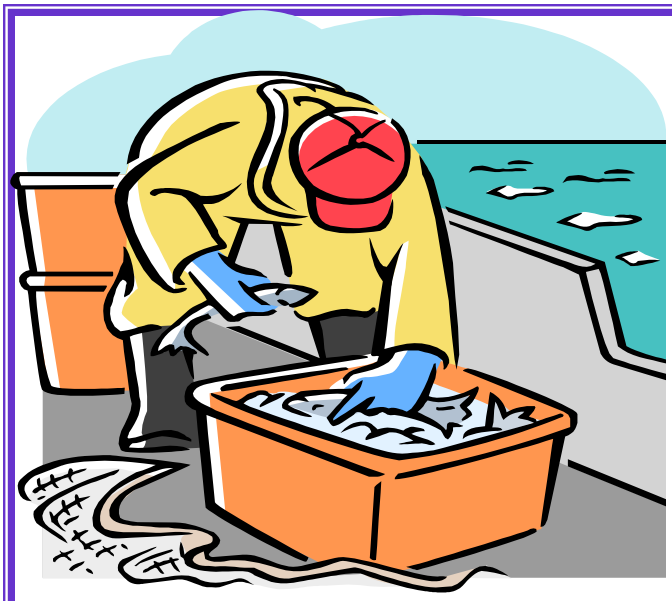
Newsletters like this one began being issued by the Hearing Office almost four years ago. I hope that they serve as a window into the process of adjudicating Coast Guard civil penalty cases, for both the general public and Coast Guard personnel. Currently, we have three Hearing Officers assigned to handle a significant number of cases (1770 cases received in 2011). It seems to me that the Hearing Officers generally find their work satisfying and often find it intellectually demanding. To be sure, they hear a lot of interesting explanations from people involved in the civil penalty process. Most often, the bottom line is that the charged party has been educated and they have done whatever was needed to come into compliance with the law. That is what the Hearing Officers like to see, although it won't necessarily outweigh the fact that there was a violation in the first place.

While it is true that Hearing Officers have a lot of discretion to weigh the evidence, make findings of fact, decide if a violation occurred, and assess a penalty if a violation is proved, they do have to work within certain bounds. Among other things, Hearing Officers do not make the laws and regulations, they do not decide who will be charged, and they do not decide what violations will be alleged. Also, Hearing Officers are essentially limited to deciding cases based on the evidence that is presented to them by the Coast Guard and the charged party in the case. I'm sure there are many times when a Hearing Officer feels that there is additional information about a case that they would like to know. If the information is critical to a fair decision of the case, the Hearing Officer can request additional information. If not, the Hearing Officer must work with what s/he has. Ultimately, the Hearing Officers are very conscientious and they always do their best to make the process fair and accurate.

HEARING OFFICE NEWS

Fortunately for the Hearing Office, we have had the same team in place since July 2011 when YN2 Steele arrived to relieve a departing member of our administrative staff. With an experienced and hard-working staff, the office is always humming with activity as new cases and responses to pending cases arrive in the mail, and cases that have been decided are mailed out. In the first quarter of 2012, the Hearing Office received 371 new cases. In the same period, 377 cases were paid and closed, and 172 cases were forwarded to our collections office.

Articles in this issue:



THE REQUIREMENT OF A CERTIFICATE OF DOCUMENTATION (COD)

CDR Evan Hudspeth

According to 46 CFR § 67.7, "Any vessel of at least five net tons which engages in the fisheries on the navigable waters or the United States or in the Exclusive Economic Zone, or coastwise trade… must have a Certificate of Documentation bearing a valid endorsement appropriate for the activity in which engaged." Commercial vessel owners and Coast Guard enforcement personnel alike should be aware of the two elements of this regulation so as to ensure that relevant evidence is before the Hearing Officer.

The first element is that the vessel must be at least five net tons. For vessel documentation purposes, gross and net tonnage of a vessel must be determined in accordance with 46 CFR Part 69 (the details of which are beyond the scope of this article). So, in order to meet this element of an alleged violation, some evidence showing the net tonnage should be included in the case file. A tonnage certificate or some other reliable record showing the vessel's net tonnage is the best evidence that a vessel is eligible for documentation. Please note that the results of calculations made using "MISLE" are not helpful unless the calculations are printed out and included in the case file, along with evidence describing who performed the calculations and how the information used to perform the calculations was obtained.

The second element addresses whether the commercial vessel is engaged in either the fisheries or coastwise trade. If engaged "in the fisheries on the navigable waters or the United States or in the Exclusive Economic Zone," then a COD is required, which must contain a fishery endorsement. Regulation 46 CFR § 67.21 explains that, "A fishery endorsement entitles a vessel to employment in the fisheries as defined in § 67.3 subject to Federal and State laws regulating the fisheries, and in any other employment for which a registry or coastwise endorsement is not required. A fishery endorsement entitles a vessel to land its catch, wherever caught, in the United States."

Regulation 46 CFR § 67.3, "Definitions," explains that "*Fisheries* includes processing, storing, transporting (except in foreign commerce), planting, cultivating, catching, taking, or harvesting fish, shellfish, marine animals, pearls, shells, or marine vegetation in the navigable waters of the United States or in the Exclusive Economic Zone." It is important to keep in mind that, although a vessel may be designed for the purpose of commercial fishing, that fact alone does not show that the vessel is being used for that purpose ("engages in the fisheries"). Quite often a simple statement by the boarding officer concerning relevant observations (fish in hold, nets deployed, etc.) will suffice, but in order to meet this element of the alleged violation, some

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form of evidence should be in the case file for the Hearing Officer's consideration.

Alternatively, if engaged in "coastwise trade," then a COD with a coastwise endorsement is required. Regulation 46 CFR § 67.19 explains that, "A coastwise endorsement entitles a vessel to employment in unrestricted coastwise trade, dredging, towing, and any other employment for which a registry or fishery endorsement is not required."

Additionally, 46 CFR § 67.3 explains that, "*Coastwise trade* includes the transportation of passengers or merchandise between points embraced within the coastwise laws of the United States." Again, it is important to remember that the design of a vessel does not necessarily indicate a vessel's engagement in a particular activity. Information concerning the vessel's origination, destination, cargo, passengers, and activity (towing, dredging, transporting, etc.) is necessary to meet this element of the alleged violation, and should be in the case file. If a vessel is engaged in commercial activity that does not clearly require a coastwise endorsement, evidence that the activity constitutes coastwise trade, such as an opinion from Customs and Border Protection, may be necessary to prove a violation.

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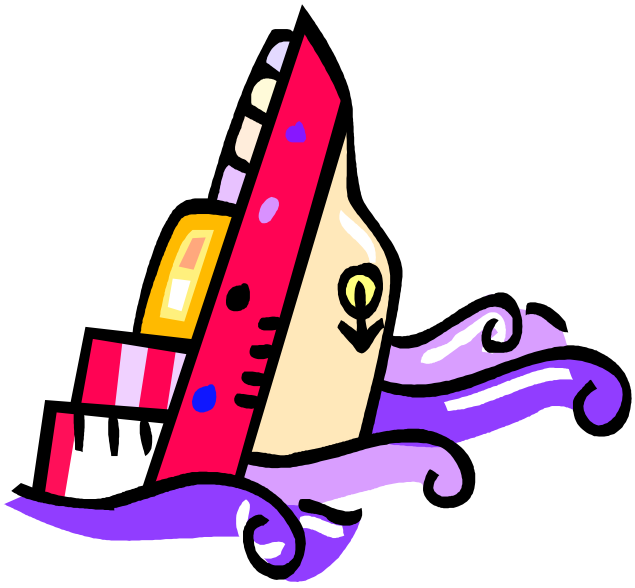

NEGLIGENT OPERATIONS - ESTABLISHING THE STANDARD OF CARE

CDR Mark Hammond

The Hearing Office Newsletter previously featured information pertaining to cases involving negligent operations. (See Newsletter Volume 9 – October 2010, "K N O T" #1.) The article very briefly touched on the key factual elements needed to be shown in order for Hearing Officers to find prima facie evidence of a violation under Title 46 United States Code (U.S.C.), Section 2302(a). A recent appeal decision in which a civil penalty case involving negligent operations was dismissed for lack of evidence of the "standard of care" prompts further discussion of these types of cases.

This article will briefly revisit the elements of 46 U.S.C. § 2302(a) and review what constitutes negligence, focusing on the importance of establishing the standard of care applicable to the circumstances of each case.

46 U.S.C. § 2302(a) provides that 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. In order to show a violation occurred under this cite, there must be evidence to show that the charged party in fact: 1) operated a vessel; 2) in a negligent manner; and, in doing so, 3) endangered the life, limb or property of a person.

In most cases, presenting evidence identifying the vessel operator and showing how persons or property were endangered is fairly straightforward. Occasionally, however, showing how a person's actions were negligent can be more challenging.

So, what *is* negligence? Regulation 33 CFR § 5.29 defines negligence as, "...the comission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not

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commit, or the failure to perform an act which a reasonable and prudent person, of the same station, under the same circumstances, would not fail to perform." To sum it up: It is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Before showing that a person failed to use such care as a reasonably prudent and careful person would use under similar circumstances, the "standard of care" applicable to the circumstances of the case must first be firmly established. In other words, the case file must show evidence of what was expected of the vessel operator under the then-existing circumstances. The standard of care can be established in a number of ways, such as reference to existing laws or regulations such as the Navigation Rules, or navigation safety regulations which require specific actions under specific conditions. For example, the standard of care may require adherence to: posted "No Wake/Speed" zones; a state law prohibiting "bow riding"; or a state law restricting vessel operations in close proximity to "diver-down" flags.

Applicable or persuasive court decisions may recognize a presumption of negligence when certain things occur that generally do not happen in the absence of negligence, such as vessel groundings, or when a moving vessel allides with a fixed object, such as a bridge or a charted stationary navigational aid. In such cases, the presumption of negligence will make it unnecessary to further address the standard of care.

In situations where the applicable standard is not so obvious, a standard of care may be established by submission of expert witness testimony concerning generally accepted marine practices. Coast Guard witnesses may provide evidence of a standard of care, if the witness is shown to have sufficient expertise in the particular subject matter. Such evidence must have a sound basis, however, and be supported by something more than conclusory statements of disapproval for certain conduct.

To sufficiently address the negligence element, the case file should contain: 1) evidence of the applicable standard of care as described above; and 2) evidence showing how the charged party failed to follow the applicable standard. As always, each element is essential to the Hearing Officer's determination as to whether the alleged violation did, or did not, occur as alleged. Evidence clearly addressing the negligence element also provides the charged party with a good understanding of the basis for the alleged violation(s) against him/her, and allows for a more meaningful opportunity to respond with evidence in his/her defense, or to present extenuating or mitigating factors for consideration.

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CITIZENSHIP VIOLATIONS UNDER 8103 (b) AND (i) REVISITED

CDR Mark Hammond

The Hearing Office continues to see a fairly steady flow of cases alleging violations of crew citizenship requirements under section 8103 of title 46, United Sates Code. Many cases continue to be returned to the charging unit for various deficiencies. Some are dismissed altogether because there is insufficient evidence in the case file to prove that the violation occurred. The following article, which first appeared in Volume 5 of the Hearing Office Newsletter, is reprinted here with a few updates to re-emphasize key elements of 46 U.S.C. § 8103(b) and (i), and highlight important considerations when documenting and constructing cases.

The requirements known to many as the "75/25" rule are really two different provisions of federal law that address the percentage of unlicensed seamen that may be employed on board certain vessels. The two provisions are found in 46 U.S.C. § 8103.

The first is subsection (b) of section 8103, which applies to DOCUMENTED VESSELS. Paragraph (1) of subsection (b) requires that not more than 25 percent of the total unlicensed seamen on board a documented vessel may be aliens lawfully admitted to the United States for permanent residence. Otherwise, the unlicensed seamen must be citizens of the United States or foreign nationals enrolled in the United States Merchant Marine Academy. If more than 25 percent of the total unlicensed seamen on board are permanent resident aliens, OR there is an unlicensed seaman on board that is not a U. S. citizen, a permanent resident alien, or enrolled in the Merchant Marine Academy, there is a violation of 46 U.S.C. § 8103 (b)(1).

The second provision is subsection (i), paragraphs (1) and (2), which are applicable to FISHING VESSELS ENGAGED IN FISHERIES. Paragraph (1) requires any unlicensed seaman to be either a citizen of the United States, an alien lawfully admitted to the United States for permanent residence, an alien allowed to be employed under the Immigration and Nationality Act, or an alien allowed to be employed under certain rules and immigration laws of the Commonwealth of the Northern Mariana Islands (CNMI). Paragraph (2) requires that not more than 25 percent of the total of unlicensed seamen may be employed under the Immigration and Nationality Act, such as a person lawfully admitted for employment in the U.S. holding an HB-2 work visa. On fishing vessels engaged in fisheries, therefore, if there are unlicensed seamen that do not fall within the four categories in (i)(1), there is a violation of 46 U.S.C. § 8103 (i)(1). If more than 25 percent of the unlicensed seamen are aliens allowed to be employed under the Immigration and Nationality Act, then there is a violation of 46 U.S.C. § 8103 (i)(2).

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Subsection (i) of section 8103 applies to all U.S. fishing vessels, whether they are documented or state-numbered. If we set aside the special provision for vessels in the CNMI, this subsection differentiates between unlicensed seamen who are U.S. citizens or permanent resident aliens, and unlicensed seamen who are aliens legally in the U.S. but not permanent resident aliens. There is no limit on the number of U.S. citizens or resident permanent aliens who may serve as unlicensed seamen. No more than 25% of the unlicensed seamen on board, however, may be aliens in the U.S. legally but not permanent resident aliens.

Documentation of the important facts is key in these cases. Vague statements such as "two of the vessel's 4-man crew admitted to being foreign citizens," without more specific evidence of their status, is not sufficient to show a violation occurred. Since it is conceivable that there could be persons on board to whom this law does not apply, such as passengers or NOAA observers, it is important to document the names of all persons on board, whether they are members of the crew on the vessel, and whether they hold a Coast Guard license or are unlicensed. It's also important to document any statements made, and make copies of any documents produced regarding: identification; citizenship; lawful admittance as an alien; enrollment in the U.S. Merchant Marine Academy; and employment under the Immigration and Nationality Act or immigration laws of the Commonwealth of the Northern Mariana Islands.

A statement or evidence that the vessel is either a documented vessel, or a vessel engaged in fisheries in the navigable waters of the United States or the exclusive economic zone (EEZ), is necessary to the determination that a violation occurred. Also, in cases where Immigrations and Customs Enforcement (ICE) personnel have made a determination regarding citizenship status, a statement from the ICE official or other evidence of such determination would be helpful.

A detailed discussion of the law and manner in which citizenship, lawful admittance, or proper employment might be demonstrated can be found in our Newsletter, Volume 3. A violation of 46 U.S.C. § 8103 requires sufficient evidence to identify the number of unlicensed seamen on the vessel and the relevant status of the unlicensed seamen as legal residents of the U.S. or otherwise. Take the time to ask the questions and document the answers, and collect any status documentation available. This will assist in determining whether a violation occurred and help to avoid unnecessary delays in processing a case.

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DECKPLATE RIVETS

It appears that MISLE does not provide for specifying subsection (b) or (i) of 46 U.S.C. § 8103 in the "Law/Reg" part of the Enforcement Summary. Charging units should make it clear in the Narrative Overview or elsewhere on the Enforcement Summary whether the case is alleging a violation of subsection (b) or (i).

Different cites are applicable to cases alleging that Personal Flotation Devices are unserviceable, not readily available, or not on board at all. Use the regulation that fits the facts to charge a violation. If the Boarding Report does not contain enough information to determine how exactly the PFD requirement was violated, an effort should be made to further develop the facts in the case.

When an owner is on board his/her recreational vessel, but is not the operator of the vessel when a boarding occurs, it may be most effective to charge the owner with any marine safety equipment violations. This is because the owner is the person with the most motivation to achieve compliance for future use of the vessel. Although the operator is equally liable for a penalty if the violation is proved, if your primary objective is to achieve compliance, charging the operator may not be the most effective option.

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K.N.O.T.

(Knowledge Note or Tip)

TIME TO BE HEARD

Ms. Alicia Scott

What is the purpose of a hearing? What happens at a hearing? Who will attend? We members of the Hearing Office Administrative Staff hear these questions often. The questions come both from Coast Guard units who have submitted cases to the Hearing Office, and from parties who have been charged with marine safety violations and have received a Preliminary Assessment Letter (PAL) from one of the Hearing Officers.

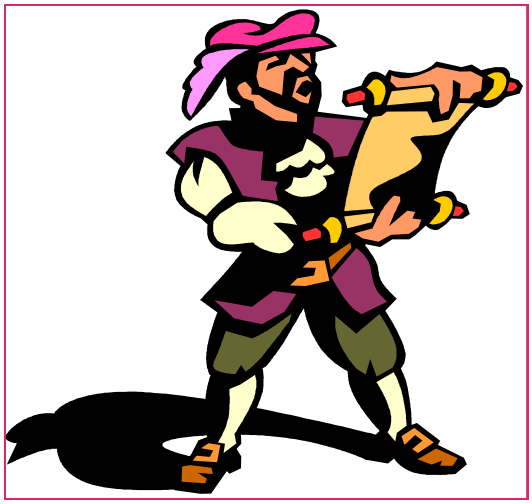
All parties charged with a marine safety violation and preliminarily assessed a civil penalty have a right to a hearing. A hearing is the party's opportunity to exercise of one of his/her due process rights: the right to be heard. A hearing is not the only way to exercise the right to be heard, however. A party can also be "heard" by submitting a response to the PAL in writing.

Hearings are held by Video Teleconference (VTC) at one of seven Coast Guard Districts, or in person at the Hearing Office at Arlington, VA.

When a party requests a hearing, s/he must provide the issues in dispute with the request. Once the Hearing Office has the party's issues in dispute, the Administrative Staff will contact one of the seven Coast Guard District Offices to schedule the VTC hearing. The staff chooses the District office closest to the party's home or office, unless the party requests otherwise.

Once scheduled, the Hearing Office contacts the District Chief of Prevention or the Chief of Response to request an escort for the party. What does the escort do? The escort greets the party, and any representative or witnesses. The escort will take them to the VTC hearing location at the District office. The escort will sit with the party and witnesses during the hearing and fax documents (evidence, for example) to the Hearing Officer. After the hearing the escort will escort the party and others out of the building or base. VTC hearings take an average of about 1 ½ hours.

Note: No one from the Coast Guard unit that generated the case participates at the hearing unless the party requests assistance from the Hearing Officer in securing a Coast Guard member's attendance (and the Hearing Officer determines that the testimony of the witness may materially aid the Hearing Officer in deciding the case), or unless the Hearing Officer requests the attendance of a Coast Guard witness at the hearing to address a particular issue.



Hearings are quite informal. The first order of business is for the Hearing Officer to explain and obtain acknowledgement from the party of his/her rights. After that, the party is free to present his/her case to the Hearing Officer. Hearing Officers afford the party a fair amount of leeway in presenting his/her case, but ensure that dignity and respect are maintained throughout the process.

Hearing Officers give the same consideration to evidence presented in writing (sent through the mail) as to evidence presented at a VTC or in-person hearing. See the Newsletter article, volume 14 January 2012, "RESPONDING TO CHARGES

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– (*HEARINGS vs. WRITTEN RESPONSES*)," posted at: www.uscg.mil/legal/cgho .

Writing a letter in response to the Hearing Officer's Preliminary Assessment Letter is the most popular choice. The party can send a letter stating everything s/he wants to point out to the Hearing Officer. The party can include photos of evidence (of flares or Personal Flotation Devices, for example), receipts of purchase, compliance letters, updated inspection reports, and witness statements.

To reiterate, whether a party presents evidence at a hearing, or presents written evidence in lieu of a hearing, the evidence is treated equally and weighed in the same manner by the Hearing Officer. What matters is the quality of the evidence—the thought and care that goes into presenting your side of the case, however it is presented.

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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 are some Coast Guard Hearing Office metrics (as of March 31, 2012) 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: 1443

Number of case files received by the Hearing Office with violation dates in 2010: 1496

Number of case files received by the Hearing Office with violation dates in 2011: 1570

Number of case files received by the Hearing Office with violation dates in 2012: 63

Number of case files received by the Hearing Office in 2011 regardless of violation date: 1770

Number of preliminary assessments issued in 2012: 421

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2012: 369

Number of violation case files returned to the program manager for deficiencies in 2012: 55

Number of hearings held in 2012: 4