

Volume 8

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 CAPT R. Trabocchi, USCG
Commanding Officer, Coast Guard Hearing Office

Greetings,

After the harsh and unusual winter here in the East, we are now enjoying warm weather.

The Coast Guard Hearing Office Detachment will soon complete processing all 2009 cases. Please do not delay in forwarding to us any remaining 2009 cases that have been identified as warranting civil penalty action. We are processing primarily 2010 cases at this time.

In this issue, we continue to address issues that we periodically encounter either due to general misunderstanding or because of lack of familiarity with a particular law or regulation. We also readdress some items that have been previously discussed.

Finally a reminder that as summer approaches us, it is important to process violations warranting civil penalty action as soon as it is practicable to do so. Civil penalty action is intended as remedial in nature. We want mariners to be safe on the water and the timely enforcement of regulatory requirements through civil penalty action when warranted is a path to achieve compliance.

Our newsletters make available information regarding civil penalty case processing. They also provide readers with discussion about various regulatory requirements.

These newsletters are posted on our website www.uscg.mil/legal/cgho and on the Coast Guard’s website HOMEPORT.



HEARING OFFICE NEWS

In our last newsletter we announced a refined procedure for the electronic “return” of a case file due to deficiencies. The feedback has been very positive. In some cases, the responsible unit has corrected the deficiency within hours and the violation case file has been able to proceed with virtually no delay. We have achieved greater efficiency with this process, saved the time and expense of mailing files and guarded against loss of files due to mailing. We thank everyone who has welcomed, and quickly adapted to, this new process.

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THE PRELIMINARY AND FINAL ASSESSED PENALTY AMOUNTS

We continue to receive much “discussion” regarding the assessed penalty amounts especially when they are compared to the maximum penalties allowed by law or to the penalty amounts recommended by a unit for a particular violation.

There is an important principle to remember. Penalties imposed by the Hearing Office are intended to be remedial; that is, to cause the charged party to “remedy” the violation. They are also intended to discourage the occurrence of future violations. Penalties imposed by the Hearing Office are not intended to be “punishment” for violations found “proved.” The Hearing Office does not impose fines.

When a Coast Guard unit forwards a violation case file to the Hearing Office, the violations alleged in the case file are not “proved” at that time. The charged party receives a copy of the violation case file with the Hearing Officer’s letter assessing a preliminary penalty amount. What does this mean? This means that the Hearing Officer

found sufficient evidence in the case file to proceed with a preliminary finding and that a civil penalty is warranted. The preliminary assessed penalty amount is the amount that the Hearing Officer determines appropriate for the violation(s) after reviewing the Coast Guard's evidence in the case file. It may not be the maximum allowed by law and it may be different than the unit's recommended penalty amount. Why?

The Hearing Officer is not required to assess the unit's recommended penalty amount. The Hearing Officer considers the facts and circumstances presented in the case file surrounding the alleged violation. The Hearing Officer weighs the strength of the evidence, past violation history, and aggravating and mitigating factors, and considers every piece of information in the case file including the unit's penalty recommendation to formulate the preliminary penalty amount. The Hearing Officer also considers the maximum penalty allowed by law including any inflation adjustment that may have been authorized. It is after due consideration of the entire case file that the Hearing Officer formulates the preliminary penalty amount.

A determination as to whether the violation occurred as alleged and any appropriate final penalty is made after the party has had an opportunity to respond to the Hearing Officer's preliminary assessment letter and case file. This means that the charged party may provide evidence to show that the violation did not occur as alleged (evidence in defense), or the charged party may admit the violation but provide an explanation that excuses the violation (evidence in extenuation), or the charged party may admit the violation but provide a basis as to why the penalty should be less than it otherwise might be (evidence in mitigation). The Hearing Officer considers and weighs the strength of all of the evidence submitted by the charged party.

To find the violation "proved" the Hearing Officer applies a standard of proof. The standard of proof is the "preponderance of evidence" standard. This means that the Hearing Office must determine, after due consideration of the Coast Guard's evidence and the charged party's evidence, whether it is more likely than not the violation occurred as alleged. If so, the violation is "proved."

The final assessed penalty amount is an amount equal to the preliminary assessed penalty amount or an amount that is less than the preliminary assessed penalty amount. All evidence presented in the Coast Guard's case file and by the charged party is carefully considered and weighed to formulate the final penalty amount.

In order that determinations made by the Hearing Officer are fair to both the Coast Guard unit submitting the violation case and to the mariner responding to the violation(s), both the Coast Guard unit and the mariner would be well served by submitting complete, relevant, reliable, and credible evidence.

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CITIZENSHIP DOCUMENTATION

CDR Evan Hudspeth



Much has already been said in previous articles about the "75/25 rule" or more specifically 46 U.S.C. 8103 regarding citizenship requirements for personnel on documented vessels and certain types of fishing vessels. This article adds information concerning evidence of citizenship status to the discussion.

A state driver's license and/or social security card are often acceptable forms of identification for establishing identity and employment eligibility, but are generally not accepted as good indicators of citizenship status. These forms of identification provide little assistance in determining whether an unlicensed seaman is either a citizen of the United States, an alien lawfully admitted to the United States for permanent residence, or an alien allowed to be employed in the United States.

There are several different documents that are commonly relied on as indicators of a valid claim of U.S. citizenship. These documents include but are not limited to a certificate of U. S. birth, citizenship certificate, certificate of naturalization as a U.S. citizen, passport, voter registration card, or licenses and permits issued by governmental agencies *only* to U.S. citizens.

The document typically relied upon to indicate that one is lawfully admitted to the United States for permanent residence is a United States Permanent Resident Card, Form I-551, informally known as a "green card."

For non-immigrants, the Arrival-Departure Record, Form I-94, is evidence of lawful admission to the United States in a specific immigration class or status. Except for those non-immigrants granted admission to work in the United States, (class H), non-immigrants may not accept employment in the United States. Class H will be denoted on the I-94 for individuals that may accept employment in the United States.

Coast Guard boarding teams will often seek to determine whether unlicensed seamen on a vessel are citizens of the United States or, alternatively, lawfully admitted to the United States. Mariners and unlicensed seamen could assist Coast Guard boarding teams in making fair

determinations of citizenship status by ensuring the appropriate documentation is made available.

When possible, copies of, or information from, citizenship status documentation should be included in any civil penalty case file forwarded to the Coast Guard Hearing Office.

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WHERE'S THE EVIDENCE?

CDR Mark Hammond



Those of you that have been around for a while might remember the popular TV commercials that aired a while back for one of the big fast food chains. The ads featured an elderly woman who was so shocked by the small size of a competitor's hamburgers that she would exclaim "where's the beef?" I'm sometimes reminded of those ads when I review violation cases that are forwarded to the Coast Guard Hearing Office for adjudication. The "small size" of the evidence forces one to wonder "where's the evidence?"; the "beef" if you will.

A common reason for certain violations or even entire cases being dismissed by a Hearing Officer is the lack of evidence in the case file to support a violation. Without sufficient evidence to support each element of a violation as alleged, Hearing Officers cannot proceed with the adjudication of the violation. To proceed, the Hearing Officer must find a "prima facie case."

A prima facie case is found when the Hearing Officer determines that there is good and sufficient evidence in the case file to support each element of a violation. Absent evidence to the contrary, the violation can be found "proved" based on the evidence in the case file. Evidence to the contrary is typically provided to the Hearing Officer by the charged party.

Remember the Enforcement Summary is simply a summary of the violation case. The "evidence" is in the details found in the Activity Summary Report (ASR) and / or case exhibits and enclosures. These are documents, photographs, and statements of boarding team members, investigators, witnesses, etc. It is this evidence that a Hearing Officer relies on when determining if there is a prima facie case to proceed with adjudication. It is also this evidence that the charged party relies on in order to have a meaningful opportunity to comment and provide evidence in defense, extenuation, and mitigation.

For example, 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. For violations of this statutory

provision, a brief narrative that simply states: "Subject operated too fast in a No-Wake Zone" with no other details might be insufficient to support a violation for negligent operations. Details are important to understanding a violation. In this example, details might include how the operator was negligent and how the operator's, actions, or inactions endangered life, limb, or property. Details also might include how the boarding officer identified the operator, a description of weather conditions, visibility, traffic density, hazards in the water (ie, swimmers, paddlers), speed of vessel, etc.

For PFD serviceability violations, simply stating "Vessel's PFDs were found unserviceable" might be insufficient to support all elements of the violation. 33 CFR 175.23 sets forth the serviceability requirements for PFDs and describes some conditions in which PFDs are found to be unserviceable. For these types of violations, a description as to the specific discrepancies that caused the boarding team to determine that the PFDs were unserviceable would be helpful to understanding the violation. For example, where and how big was the rip or tear; where and how long were the open seams in the fabric or coating of the PFD, and the location, size, and degree of any finding of the PFD being water logged, oil-soaked, etc.

Similarly, a case file that included a narrative statement on the ASR that says "vessel's navigation lights were inoperable" could be better explained by including the time the vessel was boarded and the time of sunset/sunrise on the day of the boarding.

A clear understanding of the regulation that was violated is helpful when determining the details necessary to be documented to constitute "good and sufficient" evidence in support of each element of the violation. "Good and sufficient" evidence provides the charged party with a clear understanding of the alleged violation and a basis upon which to make informed decisions regarding their response to the Hearing Officer.

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KNOT

(Knowledge Note Or Tip)

You wonder about it and we see it...the confusion over COLREGS and INLAND waters. In what waters do COLREGS rules apply and in what waters do INLAND rules apply?



Title 33, Code of Federal Regulations, Part 80 provides the "lines of demarcation" between the two waters. Inside the lines, the INLAND navigation rules apply, outside the lines, the International Regulations for Preventing Collisions at Sea (COLREGS) rules apply.

Knowing the difference is very important for determining whether a vessel is in violation of a navigation rule. If violation of an INLAND rule is alleged and the location of the vessel at the time of the violation is in COLREGS waters, the violation typically cannot be processed for civil penalty and may be returned for further review to the processing official. The same applies if a COLREGS rule is allegedly violated and the location of the vessel at the time of the violation is in INLAND waters.

Of course the boarding may occur in INLAND waters but the vessel at the time of violation was operating in COLREGS waters causing the violation of COLREGS rules. If the evidence in the case file fails to describe how the boarding team determined the vessel was previously operating in COLREGS waters, then the violation may appear to be in error. The same applies if the violation is of INLAND rules and the vessel was boarded in COLREGS waters.

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VIOLATION...WASTE MANAGEMENT PLAN

CDR Mark Hammond



A boarding of a 42 foot recreational vessel was completed. The boarding officer remembered she was taught the general rule that recreational vessels 40 - 65 feet are required to have a waste management plan on board. The boarding team found no waste management plan on board. Seems simple enough. It's a violation, right? Not so fast.

There are important elements to the regulation pertaining to waste management plans. Alleged violations of this regulation often fail because either the regulation did not apply to the vessel or there is insufficient evidence to support that the violation occurred.

Using job aids or general rules learned is often insufficient to properly apply a regulation and determine if a violation occurred. To ensure a regulation applies and a violation is properly identified, it is important to refer to, and carefully read, the relevant regulation and its applicability section to know whether it applies to the vessel and any other conditions that may be present. A brief examination of the regulation pertaining to waste management plans follows.

33 CFR 151.57(a) states in part: This section applies to the following: (1) Each manned oceangoing ship (other than a fixed or floating platform) of 40 feet or more in length that is documented under the laws of the United States or numbered by a state and that either is engaged in commerce or is equipped with a galley and berthing.

Paragraph (b) goes on to say in part, the Master or person in charge shall ensure that the ship is not operated unless a waste management plan is on the ship and that each person handling garbage follows the plan.

Simply stating a vessel was 42 feet long and did not have a waste management plan on board does not provide sufficient evidence of a violation. Evidence should be sufficient for a reader to know that the vessel is "oceangoing" and either documented or state numbered, and engaged in commerce or equipped with a galley and berthing.

According to 33 CFR 151.05, a "Ship" means a vessel of any type whatsoever, operating in the marine environment. This includes hydrofoils, air cushion vehicles, submersibles, floating craft whether self-propelled or not, and fixed floating drilling rigs and other platforms.

According to 33 CFR 151.05, an "Oceangoing" ship means a ship that is operated under the authority of the U.S. and (1) engages in international voyages; (2) is certificated for ocean service; (3) is certificated for coastwise service beyond three miles from land; (4) and operates at any time seaward of the territorial sea of the US as defined in 33 CFR 2.22; or (5) is operated under the authority of a country other than the US.

This definition makes it necessary to know the vessel's location or route of service to determine whether the vessel is in fact an "oceangoing ship" and required to have a waste management plan on board. Careful consideration should always be given to documenting the facts that establish the regulation applied to the vessel and how the vessel did not comply with the regulation.

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CON vs. COD

CDR Evan Hudspeth



Generally with some exceptions, all non-government vessels under five net tons that are operated on waters subject to the jurisdiction of the United States or owned in the United States, and equipped with propulsion machinery, are required to be registered in the State of principal use and receive a Certificate of Number (CON) by that State. Vessel owners and operators are required to have the valid CON documentation on board (registration), and must display the assigned number on each side of the forward half of the vessel. Specific requirements pertaining to CONs are found in Title 33, Code of Federal Regulations, Part 173 (33 CFR 173).

Generally, any vessel of at least 5 net tons wholly owned by a citizen of the United States is eligible to be documented under the laws of the United States and receive

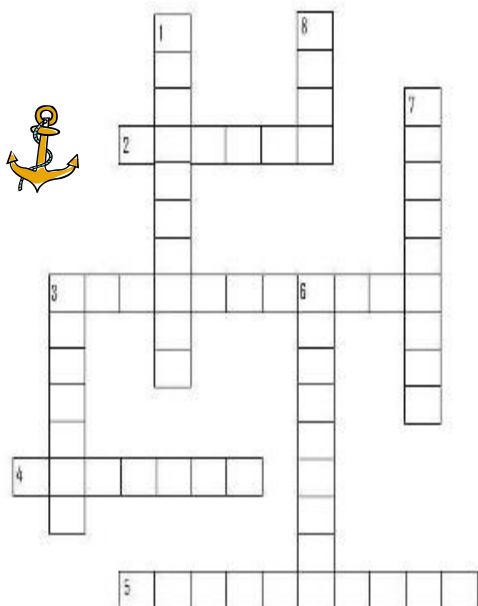
a Certificate of Documentation (COD). Subject to certain exceptions, generally any vessel of at least 5 net tons that engages in fisheries on the navigable waters of the U. S. or in the EEZ, or engages in coastwise trade is required to have a COD. CODs are issued by the U.S. Coast Guard National Vessel Documentation Center. Information on how to document your vessel can be found on their website at www.uscg.mil/hq/cg5/nvdc/. The original COD currently in effect must be on board the vessel, and there are specific requirements for displaying the COD number. Specific requirements pertaining to CODs are found in Title 46, Code of Federal Regulations, Part 67 (46 CFR 67).

If a vessel does not have a COD either because it is

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JUST FOR FUN

Alicia Scott, YN3 Victor Anderson



SEE LAST PAGE FOR ANSWERS

ACROSS:

- 2. A sailor; an old or experienced one.
- 3. A cask that had an opening in the side fitted with a spigot that sailors used to congregate at. Maybe known today as a water cooler in the modern day office.
- 4. Slang; place to purchase snacks, sweets, ice cream on a naval ship.
- 5. Large bracket that attaches the foot of mast to the deck.

excluded or exempt from that requirement, then it is likely required to have a CON. Typically vessels should not have both a COD and a CON. However, some States require vessels that are required to have a COD to also be registered in the State of principal use for tax purposes. In such a case, these vessels may also have a CON.

According to 33 CFR 173.33, "The person whose name appears on a certificate of number as the owner of a vessel shall remove the number and validation sticker from the vessel when... The vessel is documented by the Coast Guard..." Additionally, according to 33 CFR 173.77(b), "A certificate of number issued by an issuing authority is invalid after the date upon which... The vessel is documented or required to be documented under Part 67 of Title 46, Code of Federal Regulations..."

In short if your vessel has a COD but is also required to be registered in the State of principal use, the State numbers should not be displayed on the hull of the vessel. Additionally the CON would be invalid as "registration" for federal purposes...the COD must be on board.

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COAST GUARD FUNDAMENTALS

YN3 Christopher Brown (from CG Publication 1)



- Roles:**
- Maritime Safety
 - Maritime Security
 - Maritime Stewardship

Statutory missions:

- Marine Safety
- Search and Rescue
- Defense Readiness
- Migrant Interdiction
- Other Law Enforcement
- Ports, Waterways & Coastal Security
- Ice Operations
- Drug Interdiction
- Aids to Navigation
- Living Marine Resources
- Marine Environmental Protection

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DOWN:

- 1. Upper deck forward part of a ship.
- 3. Another name for the Captain of a boat.
- 6. Responsible for the sails, ropes and boats on a ship; pipes commands to seamen.
- 7. Chunk of sandstone size of a Bible to scour and whiten wooden decks; used in a kneeling position.
- 8. Watered down rum consisting of half a gill with equal part water issued to seamen over the age of twenty.

DECKPLATE RIVETS

☉ Don't forget the all important e-signature!! See our Newsletter, Volume II, September 2008, page 3.

☉ Identify the capacity (role) of the charged party and ensure that the cited regulation is applicable to the role; ie, if the regulation requires the owner to do the required act, don't charge the operator with the violation.



☉ EPRIB batteries that are expired but not installed in an EPRIB do not constitute a violation; expired batteries installed in an EPRIB constitute a violation of 46 CFR 25.26-50 (c)(2).

☉ A violation charged against the operator of the vessel often requires the boarding officer to explain how the subject person was identified as the operator. This is best done in statements included in the case file, a copy of which is sent to the charged party.

☉ Include a copy of the boarding report CG-4100 or PDA printout in the case file.

☉ Include sunrise and sunset times, and time of boarding when addressing violations for visual distress signals (VDS) or navigation lights.

☉ The INLAND navigation rules are now codified at Title 33, Code of Federal Regulations, Part 83.

☉ There are several different regulatory provisions for the size and marking of life ring buoys as well as for reflective material and length of line. Check all and ensure to cite the right provision if a violation is suspected.

MAILING CDs and DVDs

Note that digital media sent via United States Postal Service is sometimes damaged in handling before it is delivered to the Coast Guard Hearing Office. CDs and DVDs and similar digital media may be rendered unreadable. Units submitting CDs and DVDs are encouraged to use overnight delivery service when mailing such media. And don't forget if the format is such that the Hearing Officer *OR* charged party cannot read the digital media, then the violation case file will be returned so printed images from the digital media can be made and inserted in the violation case file. Also remember to

CROSSWORD ANSWERS

- Across:
- SEADOG
 - SCUTTLEBUTT
 - GEEDUNK
 - TABERNACLE

send two (2) copies of each CD or DVD. One copy is for the Hearing Officer and one copy is sent to the charged party along with the copy of the violation case file and the Hearing Officer's preliminary assessment letter. Finally, label the CD or DVD with the case file name and enforcement activity number.



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: 1448

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 942

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1308

Number of case files received by the Coast Guard Hearing Office with violation dates in 2010: 68

Number of case files received by the Coast Guard Hearing Office Jan 2010 - Mar 2010 regardless of violation date: 348

Number of preliminary assessments issued Jan 2010 - Mar 2010: 351

Number of final assessments issued Jan 2010 - Mar 2010: 293

Number of violation case files returned to the program manager for deficiencies Jan 2010 - Mar 2010: 27

Number of hearings held Jan 2010 - Mar 2010: 1



- Down:
- FORECASTLE
 - SKIPPER
 - BOATSWAIN
 - HOLYSTONE
 - GROG