Volume 5

Newsletter Date
JULY 2009

Coast Guard Hearing Office Detachment

**"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, vessel safety, and security at facilities, ports and waterways.

GREETINGS

From CAPT R. Trabocchi, USCG
Director, Coast Guard Hearing Office Detachment

Greetings,

This issue highlights some of the persistent issues we are seeing as of late.

This summer 's violations continue to highlight the large number of persons boating under the influence (BUI) and failing to carry the required number and size of personal flotation devices (PFDs). In this issue we discuss some issues related to BUI and PFD violations.

Finally we discuss the "recommended penalty" and the intended goals of the civil penalty process.

Note that we have had a change in name and address:
Coast Guard Hearing Office Detachment
CGHO MS 7160
U. S. Coast Guard
4200 Wilson Blvd, Suite 600
Arlington, Virginia 20598-7160

These newsletters are posted on our website ***www.uscg.mil/legal/cgho*** *(click on News/Newsletters) and on the Coast Guard's website HOMEPORT.*

HEARING OFFICE NEWS

All cases referred for civil penalty action with violation dates in 2009 should be forwarded to the Hearing Office without delay.

We conduct civil penalty hearings by video-teleconference between our location in Arlington, Virginia and the Coast Guard District or Sector with video-teleconference (VTC) capability. So in the future, you may be hearing from our Administrative Support Staff who handles all the coordination and logistics for these hearings.

Two new Hearing Officers have reported-in and are carrying on the work of adjudicating violation cases. Both have earned and wear the Marine Safety insignia. Therefore they bring a wealth of field experience and demonstrated expertise to the execution of their duties.

Long-time employee, Paralegal Specialist Vernon Slape has retired. We wish him well as he begins a new journey.

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THE MOST IMPORTANT ADDRESS

Obtaining a current and valid mailing address for a party whether it be a sole mariner or a maritime entity such as a facility, a port, a bridge operator, or a vessel's managing company, is essential to the civil penalty process.

Boarding teams, inspectors, and investigators are encouraged to use all possible means to obtain and verify a party's mailing address before departing a boarding, inspection or investigation.

While most parties provide a current and valid mailing address, some parties do not. We have too often experienced the parties that give as their own current address, a former residence or business address or an address of a person not related to the boarding, inspection or investigation. And of course there is the party that provides a current and valid mailing address but shortly thereafter moves to another address. In both of these cases, the civil penalty process is slowed due to the failure to deliver correspondence to the party.

The Coast Guard Hearing Office Detachment has instituted a process to search for current, valid mailing addresses when it receives correspondence back as undeliverable to a party. This process has been highly successful in obtaining current and valid mailing addresses. However, boarding officers, inspectors, and investigators can assist and improve the process by ensuring that best efforts are made to secure and verify a party's address before leaving the scene. All other party details reflected in MISLE such as birth date, telephone number, etc should also be obtained. Any identifying information may be helpful in locating a party. Boarding officers, inspectors, and investigators are reminded not to rely solely on party details already in MISLE as they may have changed since the party was last encountered.

The Coast Guard Hearing Office Detachment is exploring additional databases and other options to ensure that civil penalty documents are successfully delivered to the party and to emphasize the need for parties to provide accurate and valid addresses. Parties should be mindful to avoid providing false information to federal officers.

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CHILD WEAR OF PERSONAL FLOTATION DEVICES (PFDs) FEDERAL VERSUS STATE REQUIREMENTS

Danielle Davis

There seems to be confusion when using cites 33 CFR 175.25 and 33 CFR 175.15(c). Both cites discuss the requirement for child wear of personal floatation devices (PFDs). When determining the proper cite, keep in mind that only when a State has failed to establish a State requirement for children to wear a PFD, does the federal requirement found at 33 CFR 175.15(c) apply. When a State has established a State requirement for child wear of a PFD, the federal cite 33 CFR 173.15(c) is not applicable. The state law takes precedence over the federal regulation.

33 CFR 175.15(c) provides that no person may operate a recreational vessel underway with any child under 13 years old aboard unless each such child is *either* wearing an appropriate PFD approved by the Coast Guard *or* below decks or in an enclosed cabin. If the child is observed above deck without a PFD, then a violation has occurred. If the child was below decks with no PFD, then no violation has occurred.

33 CFR 175.25 provides that where a State has established by statute that children aboard a recreational vessel of a certain age wear an appropriate PFD approved by the Coast Guard, that requirement *applies* on the waters subject to the State's jurisdiction. For example, the State of Ohio has established by statute that children under the age of 10 years old wear a PFD. A violation would not exist if a child of 11 years was not wearing a PFD aboard a recreational vessel on waters subject to Ohio jurisdiction. So knowing if a State requirement exists is the first factor in determining what cite is applicable. Secondarily, knowing the child's age and location on the vessel when observed without a PFD is critical.

A narrative for an alleged violation for a child not wearing a PFD should indicate if the State has established a requirement for child wear of a PFD. If so, then 33 CFR 175.25 is applicable and the evidence should then support violation of the State requirement. Remember it is 33 CFR 175.25 that gives the authority for Coast Guard enforcement of the requirements of the State's statute. If the wrong cite is used, the case will most likely be dismissed.

When submitting a case don't just indicate there were children on board and not wearing a PFD. This is insufficient evidence. Boarding teams should always ask questions, seek evidence or document how they determine the age of the child and provide that information in the violation case. Evidence to support a conclusion that the child was of an age that required wear of a PFD, is almost always necessary to find a violation occurred. Similarly important is a good description as to where the child was located on the vessel when observed without a PFD and whether the vessel was underway at the time.

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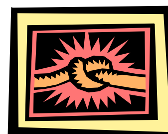

K N O T

(Knowledge Note Or Tip)

The rule known to many as the "75/25" rule is really a federal law that addresses unlicensed seaman that may be employed on board certain vessels. The law is 46 USC 8103 and there are two provisions in this law that we routinely see. The first is (b)(1) which requires that not more than 25 percent of the total unlicensed seaman on board a documented vessel be aliens lawfully admitted to the United States for permanent residence. All other 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 seaman on board are aliens lawfully admitted OR there are unlicensed seaman that are not U. S. citizens or aliens lawfully admitted, or are not enrolled in the Merchant Marine Academy there is a violation of 46 USC 8103 (b)(1).

The second provision is (i)(1) and (2) and is applicable to

fishing vessels engaged in fisheries. The first part (i)(1) requires all 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. The second part (i)(2) requires that not more than 25 percent of the total unlicensed seaman that fall within the four categories identified in (i)(1) may be employed under the Immigration and Nationality Act. Therefore, on fishing vessels engaged in fisheries, if there are unlicensed seaman that do not fall within the four categories in (i)(1), there is a violation of 46 USC 8103 (i)(1). If more than 25 percent of the unlicensed seaman that fall with the four categories (*not* the total unlicensed seaman on board) are aliens allowed to be employed under the Immigration and Nationality Act, then there is a violation of 46 USC 8103 (i)(2).

It is important to document the names of all persons on board, the position each held on the vessel, and to document any statements made or make copies of any documents produced regarding 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.

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, Vol III posted at the link at the beginning of this newsletter.

The KNOT is to know that a violation of 46 USC 8103 requires the collection and documentation of information about the persons on board a documented vessel or a fishing vessel engaged in fisheries. Take the time to ask the questions and document the answers, and collect documentation when available. This will assist in determining whether a violation occurred.

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REASONABLE CAUSE IN THE BUI ARENA

Often we see angst over whether a boarding officer had reasonable cause to direct a chemical test in a potential boating under the influence (BUI) violation. So we thought we would generally reiterate the laws, regulations, and definitions.

Where's the law? See 46 USC 2302(c) Where's the regulations? See 33 CFR 95.

What's required for a BUI? A person *operating* a vessel while impaired or intoxicated by a drug or alcohol.

What's *operating*? Having an essential role in the operation or control of a recreational vessel *underway*, or in the matter of a commercial vessel be a crewmember, pilot, or watchstander.

What is *underway*? Not at anchor, not made fast to the shore, and not aground.

What is the limit for intoxication by alcohol? For recreational vessel operators the limit is .08 unless on waters within a State's geographical boundaries if that State has established a blood alcohol level for purposes of finding "under the influence." In that case, the State level applies. For instance, Michigan has a limit of .10 and so recreational vessel operators are not considered to be under the influence at .09 as they might in most other States.

For commercial vessel personnel, the limit is .04.

How can a BUI be determined? In the case of a recreational vessel operator, evidence that is sufficient to show that the person was in fact operating the vessel. In other words, documentation of the actual observation of the person operating the vessel to include some description of the person and his / her clothing, position held on the vessel (ie, master, passenger, crew, etc) and location of the person when observed "operating."

Additionally, acceptable evidence of intoxication is necessary. Acceptable evidence includes documented personal observations and / or a chemical test. Observations of the peron's manner, disposition, speech, movement, appearance, and behavior might be sufficient to conclude a person was under the influence. A chemical test (ie, breathalyzer) to determine alcohol content (discussed above) may be sufficient to conclude a person was under the influence. Often both observations and a chemical test are documented in a case file. Where no chemical test is directed, detailed documentation of the observations that led to a conclusion that the person was intoxicated is critical to support a violation.

The administration of a chemical test first requires reasonable cause to believe that the operator is in violation

of the stated limit (discussed above). Reasonable cause might be established by an articulation of those reasons that would motivate a person of ordinary intelligence under the circumstances to believe that the operator is suspected to be in violation of the standards. The Field Sobriety Tests (FSTs) are typically conducted as a reliable means to establish reasonable cause. Documentation, whether FSTs or statements, should "articulate" the basis for finding reasonable cause. The ultimate question is whether the tests, observations, etc provide a basis to suspect that the person is in violation of the standards articulated in 33 CFR 95.020 or 95.025. Only after finding reasonable cause can a chemical test be directed.

How is the chemical test administered? The operator is first informed that he or she is suspected of being in violation of the legal limit for boating under the influence and that he or she is being directed to undergo a chemical test. Documentation (ie, boarding officer statement) that reflects that the operator has been so advised and directed is always helpful. A chemical test is administered and the results are documented.

What is a refusal of a chemical test? A refusal by the party is an express or demonstrated determination not to submit to or cooperate in the administration of a chemical test. Such refusal is generally documented on the FSTs form. If not, it should be documented in a statement.

What does a refusal do? A refusal creates a presumption that the operator is under the influence of alcohol or a dangerous drug. The burden shifts to the person to overcome this presumption with evidence.

A word about reasonable suspicion, reasonable cause and probable cause. From time to time we see boarding teams and parties alike get wrapped around the axle with these terms. Legal experts and pundits alike have tried to define these terms in varying degrees over the years. There are several "dictionaries" that define reasonable cause as probable cause and add that reasonable cause is more than reasonable suspicion which is more than mere suspicion. While a lively dissertation might be written here, it is not necessary to the topic. The only term used in the federal regulations, 33 CFR 95, is reasonable cause. It is this that must be established to administer a chemical test.

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THE RECOMMENDED PENALTY

Periodically, parties will question the "recommended penalty" amount on an Enforcement Summary and the preliminary penalty amount assessed by a Hearing Officer. Simply, the penalty amount reflected on an Enforcement Summary is an amount that the processing official recommends as appropriate for the cited violations. It is but one factor among many factors that the Hearing Officer considers. All too often a processing official fails to articulate the factors that led to the determination of the recommended penalty amount thereby diminishing its usefulness as a factor for consideration by the Hearing Officer. Hearing Officers consider all evidence from the unit including any aggravating factors that are articulated and sufficiently explained.

It is important to understand that Hearing Officers are impartial and independent in the execution of their duties and are not bound by the recommended penalty amount. They make a determination as to the penalty amount based on the facts and circumstances of the violation. Remember, the goal of the civil penalty amount is compliance and deterrence. Penalty amounts are formulated to gain mariner compliance with laws and regulations that the Coast Guard enforces and to deter mariners from future violations. For these reasons, the Hearing Officer's preliminary penalty may be higher than the recommended penalty. The civil penalty process is not a process that seeks to punish mariners for violations as a criminal process might do. Therefore penalty amounts are not determined in the context of being "punishment" for violations. In a case of a declined Notice of Violation (NOV), the party is not "punished" in the civil penalty process for declining the NOV. Penalty amounts are determined in such cases in the same manner as nonNOV civil penalty cases.

Additionally, it is important to remember that the recommended penalty is based on the unit's view of the alleged violation. Often the final penalty is substantially lower than what the unit might have recommended. The unit at the time of determining the recommended penalty amount does not have the benefit of having seen or heard the party's evidence. The Hearing Officer in formulating the final penalty considers all of the party's evidence in defense, mitigation, and extenuation. It is this evidence that often causes the final penalty to be lower than the recommended penalty amount.

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DECKPLATE RIVETS

Remember to transfer control but **not** ownership of the MISLE enforcement activity when sending a case to the Coast Guard Hearing Office Detachment for civil penalty action.

All enforcement activities must have an Enforcement Summary prepared by the processing official. This includes cases forwarded for civil penalty action that resulted from a declined Notice of Violation (NOV) "ticket."

When sending a case to the Coast Guard Hearing Office Detachment, use a file folder that has a folder tab along the complete length of the right side of the folder, and that has two prongs inside the folder on the right side. This allows you to fasten the Hearing Officer copy of the case inside the folder. Place a second copy of the entire case inside the folder but do not fasten it to the folder. **Staple** the pages of the second copy together or fasten with a clip if too thick for a staple gun. Write the enforcement activity number **not** the boarding or case activity number on the file folder tab. See our newsletter, Vol I, May 2008 for additional information and an image of the file folder described above.

When sending CDs and DVDs, remember that the party must also receive the same CD or DVD that you send to the Hearing Officer. Always send 2 copies of any CD or DVD included in the case file. And since VHS is of the past, please don't send VHS tapes.

Many parties are opting to "fix" violations / deficiencies where possible rather than face having to pay a civil penalty. When mariners mail "proof" or show up at your unit to "prove" that they have "fixed" the violations / deficiencies, return to the boarding or case details in MISLE and enter information on when and how the mariner "proved" that the violation / deficiency was "fixed."

Always check the party details in MISLE when entering the results of a boarding, inspection, or investigation. Often the party will provide a new address to the boarding team but unless it is entered into the MISLE party details, the address is not available for the processing of civil penalty actions.

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JUST FOR FUN

YN3 Victor Anderson, Alicia Scott

Ever wonder how it was in the beginning? Recently we came across a post on the internet. The post was entitled "Our Coast Guard .. A Brief History of the United States Revenue Marine Service", by Lieutenant Worth G. Ross, U.S.R.M. It appears to be a reprint from the Harper's new monthly magazine Volume 73, Issue 438, November 1886. Although the entire 21 pages make fascinating reading, the following excerpts caught our eye:

"The fines and penalties incurred by vessels violating the law average per year, in round numbers, about $645,000, or more than three-fourths of the entire cost of conducting the service."

And speaking of the Revenue Marine fleet:

"The officers and crews, besides receiving regular pay, were entitled to a proportion of the amounts derived from the fines, penalties and forfeitures that were collected in case of seizures, and for violations of the navigation and customs laws. This prize-money, as it was termed, was in later years abolished, and an increased compensation voted the officers."

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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.

The Coast Guard Hearing Office Detachment has some business metrics for you to consider. We hope to periodically provide a glimpse into our business through these metrics:

Number of case files received as of 30 June with violation dates in 2007: 1,447

Number of case files received as of 30 June with violation dates in 2008: 911

Number of case files received as of 30 June with violation dates in 2009: 252

Number of case files received Jan 2009—June 2009 regardless of violation date: 529

Number of preliminary assessments issued Jan 2009—Jun 2009: 663

Number of final assessments issued Jan 2009—Jun 2009: 636

Number of violation case files returned to the program manager for deficiencies Jan 2009—Jun 2009: 80

Number of hearings held Jan 2009—Jun 2009: 19