



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, and the safety and security of vessels, facilities, ports, and waterways.

GREETINGS

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

*Greetings,
And a Happy New Year to all.*

The Coast Guard Hearing Office Detachment is wrapping up violation cases from 2009. If you have violations from 2009 to be processed for civil penalty action, please do not delay in getting them to us. We will soon begin to receive violations with a 2010 date and will turn our attention to processing and adjudicating them in a timely fashion.

In this issue, we 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, we want to stress that the process employed by the Coast Guard Hearing Office Detachment is an informal administrative process that is remedial in nature. That means the penalties imposed for violations are meant to gain compliance with laws and regulations and to deter future violations. Hearing Officers review facts and evidence and independently determine if a violation occurred and if so, whether a penalty is warranted, and if so the amount of the penalty. In this issue we discuss the responsibility of Hearing Officers to make these determinations and why Coast Guard field personnel should not suggest to mariners or facility personnel whether a penalty will or will not be imposed for any particular violation discovered during a boarding, examination, inspection or investigation.

These newsletters will be posted on our website www.uscg.mil/legal/cgho and on the Coast Guard’s website [HOMEPORT](http://www.uscg.mil/homeport).



HEARING OFFICE NEWS

To further refine our process for returning case files due to deficiencies, the following has been implemented.

Until now, if a case file contained an error that prevented the commencement of penalty action, the entire case file was returned to the unit with a memorandum stating the reason(s) for its return. If the unit desired to pursue the violation(s) for civil penalty action, the unit would take corrective action and resubmit the case file to the Hearing Office Detachment. The back and forth mailing of the case file incurred unnecessary expense and time in those instances where the processing official did not need the case file to effect corrective action. Such an instance is when the corrective action only affects the Enforcement Summary (the document prepared by the processing official that summarizes the violations and identifies the charged party).

In the future, when the error that prevents our commencement of civil penalty action affects *only* the Enforcement Summary or when the file is not needed by the processing official to effect corrective action, the memorandum stating the reason for its “return” will be scanned and emailed to the unit instead of mailing the memorandum with the case file. If the unit chooses to pursue the violation(s) for civil penalty action, the unit may effect corrective action and provide us email notification when their corrective action is complete. We will print the corrected Enforcement Summary or other corrective action taken from the Marine Information and Safety Law Enforcement ((MISLE) database, insert it in the case file and proceed with adjudication. If the corrective action necessitates that the processing official have the case file in hand, the case file will be mailed with the memorandum in accordance with our normal practice.

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BUI AND DOUBLE JEOPARDY

CDR Mark E. Hammond



Often during boardings involving boating under the influence (BUI), mariners are turned over to local law enforcement authorities and subsequently prosecuted under state law for intoxicated operation of a vessel. Hearing Officers routinely hear from these mariners because they have also received a notice of civil penalty action from a Coast Guard Hearing Officer for BUI under Title 46 United States Code (U.S.C.) Section 2302(c). In their responses, the mariners claim the civil penalty action constitutes “double jeopardy” because they are being prosecuted by the state for the same incident.

The Fifth Amendment of the U. S. Constitution prohibits that a person be put twice in “jeopardy of life and limb” for the same offense. Double jeopardy is a concept that applies to criminal proceedings. Where the conduct violates the laws of the nation and an individual state, a person may be “prosecuted” and punished at both the national and state level. This is because the laws are considered different because they arise from separate sovereigns.

The Coast Guard enforces federal regulations by imposing civil penalties (described in Title 33, Code of Federal Regulations, Part 1.07). This process is an informal, administrative process governed by basic due process standards found in administrative law. This process is separate and distinct from state judicial proceedings. Where there is an overlap of jurisdiction between federal, state and local law enforcement agencies, each agency may proceed with enforcement actions within the bounds of their jurisdiction and authority. Mariners who receive a civil penalty notice for BUI from a Hearing Officer are not being “tried” for a “crime” and as such there is no jeopardy of life or limb. Additionally the civil penalty action arises from violation of federal law separate and apart from any state prosecution for the same conduct under state law. As such, the Coast Guard civil penalty action does not create double jeopardy for the mariner.

Additionally, Hearing Officers often receive responses from mariners demanding that the Hearing Officer dismiss the violation and civil penalty action because their case was dismissed in state civil court or they were found guilty in state civil court and have already paid a significant fine. Hearing Officers are not bound by the findings of state proceedings in determining whether a violation of federal regulations did or did not occur. Hearing Officers may however, consider penalties and punishment imposed by a state as factors in mitigation.

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FIRE EXTINGUISHER VIOLATIONS

CDR Evan D. Hudspeth



Not having the proper number of fire extinguishers, or having unserviceable fire extinguishers are common violations for both recreational vessels and commercial fishing vessels. Processing officials require detailed information to determine the proper cite to be used when charging a party for a fire extinguisher violation. Hearing Officers consider and weigh facts presented to determine if a violation occurred. Therefore, presenting detailed information is necessary to that determination.

46 CFR 25.30-20(a) reflects the hand portable fire extinguisher requirements for motorboats less than 65 feet. There is not a separate regulatory cite to reference for unserviceable fire extinguishers (unless the fire extinguisher doesn’t have a pressure gauge and was manufactured prior to January 1, 1965..see 46 CFR 25.30-10(g)). In some cases, a violation of 46 USC 4102(a) has been cited for lack of serviceable fire extinguishers on recreational motorboats, but this cite is only applicable to uninspected vessels, which by definition under 46 USC 2101 (43) does not include recreational vessels.

Certain details are needed to determine if a hand portable fire extinguisher is required on a motorboat and if so, how many. Fire extinguishers need not be carried on motorboats that are less than 26 feet in length, propelled by outboard motors, and not carrying passengers *if* the construction of the motorboat “will not permit the entrapment of explosive or flammable gases or vapors.” Details concerning the location of the motor and fuel tank, as well as whether the fuel tank is fixed or portable are necessary to a violation determination. 46 CFR 25.30-20 provides a table for determining how many fire extinguishers are required. In order to use Table 25.30-20(a)(1) the length of the vessel and whether the vessel has a fixed fire extinguishing system in the vessel machinery space must be known and documented.

For commercial fishing vessels, the proper cite to use for fire extinguisher violations is 46 CFR 28.160. Fishing vessels less than 65 feet in length must meet the requirements of 46 CFR 25.30. If the fishing vessel is 65 feet or greater in length, then Table 28.160 is applied instead of 46 CFR 25.30. Table 28.160 provides for space requirements, quantity, location, and classification of the fire extinguishers. The details gathered as to whether a vessel has complied with each of the requirements in this table should be clearly documented.

There is not a separate regulatory cite to reference if the fire extinguisher on a commercial fishing vessel is deemed unserviceable, although a violation of 46 USC

4502(a)(1) may be appropriate if the fishing vessel is un-inspected.

Note that in addition to setting forth the requirements for motorboats as identified above, 46 CFR 25.30 also sets forth fire extinguisher requirements for uninspected passenger vessels, motor vessels, and barges.

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CITATION CHANGES

CDR Evan D. Hudspeth



This article highlights one of the changes to the United States Code that has not yet been made in MISLE. This particular change affects 46 USC §12110 which stated that “a documented vessel, other than a vessel with only a recreational endorsement, or an unmanned barge operating outside of the territorial waters of the United States, may be placed under the command only of a citizen of the United States.” This requirement now appears at 46 USC §12131, although in a slightly different format. The cite for the penalty for failure to satisfy this requirement has also changed. It was 46 USC §12122 and is now 46 USC §12151. The civil penalty for violation of this law remains the same. A person who violates this law is liable for a civil penalty of not more than \$10,000 which has been adjusted for inflation to \$15,000. Each day of a continuing violation is a separate violation.

The Hearing Office Detachment will pen the new cites as necessary until MISLE is updated.

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MARINE CASUALTY REPORTING

CDR Mark E. Hammond



This article briefly describes the reporting requirements for marine casualties involving commercial vessels and discusses the important elements of violations of the reporting requirements.

What is a marine casualty? A marine casualty is defined in Title 46 Code of Federal Regulations (CFR), Part 4.03-1. Essentially it is casualty or accident involving a vessel (other than a public vessel), that occurs upon the navigable waters of the United States, its territories or possessions. 46 CFR 4.03-1(b) indicates the term “marine casualty” applies to events caused by or involving a vessel, and it goes on to list specific occurrences or incidents that constitute a marine casualty. Some examples include loss of life, collisions, groundings, loss of propulsion, and incidents involving significant harm to the environment.

Reportable Marine Casualties

46 CFR 4.05-1 contains the requirement for immediate notice to the Coast Guard of certain marine casualties involving vessels. Paragraph (a) of this subpart states:

“Immediately after addressing the resultant safety concerns, the owner, agent, master, operator, or persons in charge, shall notify the nearest Sector Office, Marine Inspection Office, or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in...” and then it goes on to list the specific casualties for which an immediate notice is required.

Often mariners violate the immediate notice requirement but just as often there are legitimate reasons for a delay in reporting a marine casualty. It is necessary to know and document the facts and circumstances surrounding what at first might appear as a failure to provide immediate notification. Details that should be known and analyzed might include the type of casualty and why pursuant to regulation it qualifies as a marine casualty requiring reporting, the date and time of occurrence, and how it was discovered. If there is a substantial delay in notification, it would be important to know and document when the party was aware of the casualty, and how the party had the opportunity to make timely notification but failed to do so. Was there a reason given for the delay or failure to provide notification altogether? For cases of untimely notifications, careful consideration should be given to any actions that were required of the party to address any safety concerns as a result of the casualty. And in cases of lack of any reporting, perhaps what first appeared as a marine casualty requiring reporting was instead some event that did not require reporting. Only after analyzing the details can a fair assessment be made as to whether there was failure to immediately report a marine casualty.

Written Notification Requirements

In addition to the immediate notice requirement above, a written report is required. According the 46 CFR 4.05-10(a) the owner, agent, master, operator, or person in charge, shall within five days, file a written report of any marine casualty required to be reported under 4.05-1. The written report must be submitted on Form CG-2692 (Report of Marine Accident Injury, or Death). It is important to note that in accordance with 4.05-10(b), if the 2692 is filed without delay after a marine casualty, then it serves to satisfy the immediate notice required by subpart 4.05-1 discussed above.

New language was added to the regulations in 2005 to include “any occurrence involving a vessel that involves significant harm to the environment” as a reportable marine casualty which requires the submission of a 2692. 46 CFR 4.03-65 defines “Significant harm to the environment”, and includes the following: a of discharge of oil into the navigable waters of the United States as

set forth in 40 CFR 110.3 – which causes a film, sheen, or discoloration of the surface of the water and a discharge of a hazardous substance in quantities equal to or exceeding in any 24 hour period, the reportable quantity determined in 40 CFR 117.

It should also be noted that if a marine casualty exclusively involves an occurrence involving significant harm to the environment, a report made pursuant to 33 CFR 153.203, 40 CFR 117.21, or 40 CFR 302.6 satisfies the immediate notification requirement of 46 CFR 4.05-1. For example, if a commercial tug operator experiences a discharge of oil from his vessel and he/she makes an immediate notification to the National Response Center in accordance with 33 CFR 153.203, the immediate notice requirement of 46 CFR 4.05-1 is satisfied. A written report is still necessary.

Reporting exclusion

Recreational vessels are excluded from the requirements of 46 CFR 4.05, and fall under the reporting requirements of 33 CFR 173.51.

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PROMISE OF A WARNING FROM THE BOARDING OFFICER

YN3 Victor A. Anderson, YN3 Christopher J. Brown



The Coast Guard Hearing Office Detachment receives calls from mariners after they have received our letter that we have made a preliminary civil penalty (monetary) assessment against them for a violation. In these calls, mariners often claim that the boarding officer issued a warning for the violation and advised that no civil penalty would be assessed. Other calls concern the boarding officer’s promise that a warning only will be issued concerning the violation if the mariner fixes the discrepancies and brings proof of compliance to the local Coast Guard unit.

While well-intentioned, the boarding officer cannot foresee what action will ultimately take place concerning a noted violation. Generally, once a violation is noted the potential for civil penalty action exists. There is one exception to this and that is when a written warning is issued in accordance with 33 CFR 1.08.

Boarding officers do not issue “verbal” warnings. Nor should they make any “promise” of a warning being issued at a later time or in lieu of civil penalty action. Hearing Officers do not automatically dismiss violations or issue a warning in every case where there is proof of compliance. If a written warning is issued in accordance with 33 CFR 1.08, then it should be documented as part of the boarding. This is the only type of warning that

can be issued by the boarding officer. Please refer to our articles concerning written warnings and mariners who show proof of compliance. See our newsletters, VOL: 2 issued in SEP 2008, “Written Warning VS. Civil Penalty”, and VOL: 4 issued in APR 2009, “Compliance”.

Processing officials may recommend to the Hearing Officer that a warning be issued for a violation included in a civil penalty case. This should be clearly reflected on the Enforcement Summary and include the rationale and / or support for the recommendation under the Aggravating/Mitigating Factors.

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THE LETTER OF WARNING FROM THE HEARING OFFICER

Alicia Scott



The Coast Guard Hearing Office Detachment also receives many calls from field units advising us that a mariner has contacted them because the mariner received notice of civil penalty action from a Hearing Officer.

Field units and personnel are reminded that if a mariner has received a letter from a Hearing Officer the party should respond in writing to the Hearing Officer. If the party has questions about the process, they can be advised to contact the Hearing Office Detachment at 202-493-6870 and the Administrative Support Staff will assist them with questions they have regarding the civil penalty letter and how to respond. Personnel can also refer the mariner to our website www.uscg.mil/legal/cgho. The website offers information as to options available to the party and how to respond to the Preliminary Assessment Letter (PAL) . There is also guidance regarding the conduct of hearings and where to send evidence in defense, extenuation and mitigation. Our website also offers important information on how to make a payment should they choose to pay their penalty in full or set up a payment plan. The website offers some background information about our mission.

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KNOT
(Knowledge Note Or Tip)

When conducting a vessel safety inspection, facility inspection, response to a spill, or any other type of examination or investigation and a violation of a law or regulation is discovered, remember that noting the violation is not enough. If the violation is processed for civil penalty, then the information and evidence gathered must be sufficient to convince a Hearing Officer that there is a prima facie case of a violation in order for the Hearing Officer to proceed with a civil penalty action.



A prima facie case presents to the Hearing Officer some evidence in support of each of the elements of a violation. It should be good and sufficient evidence to find the violation occurred as alleged if it is not rebutted or contradicted by other evidence.

Remember a simple statement that a violation of a certain regulation occurred is not evidence. Conclusory statements are not evidence. A statement that a person acted negligently in the operation of a vessel is not evidence. In such a case it is important that witness statements explain how the person acted negligently. In the case of the lack of safety equipment, a statement that the vessel is required to have a certain number of the item and only had a certain number on board helps to understand why a violation was found. Or in the case of an item being expired such as visual distress signals, a statement that the item was expired because the expiration date on the item is a certain date is helpful.

These details are important not only to a Hearing Officer reviewing a case file for civil penalty action but also to the mariner who should understand why a violation has been alleged. Reflecting the details helps the mariner exercise their meaningful opportunity to comment on the evidence and that is a due process right afforded to every mariner who is subject to the civil penalty process.

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DECKPLATE RIVETS

For visual distress signal (VDS) violations involving recreational vessels, the applicable regulation is dependent on the nature of the violation. For missing VDS, the applicable cite is 33 CFR 175.110. If the vessel has VDS on board but they are expired, the proper cite is 33 CFR 175.125, under "serviceability". To determine if an expired VDS violation exists, the expiration date of the vessel's VDS should be known and documented.



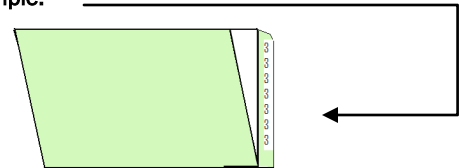
When processing violations under 46 U.S.C. 8103(b) and (i), careful attention should be given to the specific fishing activity involved. 8103(b)(1) and (i) do not apply to fishing vessels fishing exclusively for highly migratory species as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802). Highly migratory species include: tuna species, marlin, oceanic sharks, sailfishes, and swordfishes. Also included are "dorado", a.k.a. dolphinfish and mahi-mahi.

After all the hard work in putting together a violation case file for the Hearing Officer and the Party, make sure to STAPLE the Party's copy so the individual

pages are not lost or misplaced in the process.

When sending a violation case file to the Hearing Officer, please make sure to label the case file on the **RIGHT** side of the file with the Enforcement Activity Number. This is the number for the administrative civil penalty action and NOT the boarding activity number.

Example:



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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 metrics that provide a glimpse into "how it goes" at the Coast Guard Hearing Office Detachment:

Number of case files received by the Coast Guard Hearing Office with violation dates in 2007: 1,448

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 938

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1,044

Number of case files received by the Coast Guard Hearing Office Oct 2009—Dec 2009 regardless of violation date: 435

Number of preliminary assessments issued Oct 2009—Dec 2009: 399

Number of final assessments issued Oct 2009—Dec 2009: 254

Number of violation case files returned to the program manager for deficiencies Oct 2009—Dec 2009: 11



Number of hearings held Oct 2009—Dec 2009: 4

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