

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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16200

November 1, 2013

[REDACTED COMPANY NAME]

Attn: Mr. [REDACTED NAME]

[REDACTED ADDRESS]

[REDACTED CITY, STATE, ZIP]

RE: Case No. 3748061

[REDACTED COMPANY
NAME]

[REDACTED VESSEL]

\$8,500.00

Dear Mr. [REDACTED NAME]:

The Coast Guard Hearing Office has forwarded the files in Civil Penalty Case No. 3748061, which includes your appeal on behalf of [REDACTED COMPANY NAME], as operator of the [REDACTED VESSEL]. The appeal is from the action of the Hearing Officer in assessing a \$8,500.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 15.805(a)(4)	Failure to have a licensed Master on an inspected small passenger vessel.	\$8,500.00

The violation occurred on March 20, 2010.

On appeal, you claim a lack of federal jurisdiction and a lack of due process. Your appeal is denied for the reasons discussed below.

The primary issue raised throughout the course of these proceedings was whether the Potomac River, above Great Falls where the [REDACTED VESSEL] operates, is a navigable waterway of the United States. You now contest the Hearing Officer's finding to the effect that the waterway is navigable.

The record contains a memorandum dated November 8, 2010, from the Fifth Coast Guard District legal office stating that the Potomac River, at the location of [REDACTED COMPANY NAME], has been determined to be a navigable waterway of the United States. Enclosed with the memorandum are several documents reflecting findings of navigability of the Potomac River by federal agencies and courts. Particularly significant among these materials is a copy of the court decision in *U.S. v. [REDACTED COMPANY NAME]*, 382 F.Supp. 162 (D.Md. 1974). In

that [REDACTED COMPANY NAME] case, the Coast Guard sought to collect civil penalties from [REDACTED COMPANY NAME] for violations of safety regulations regarding fire extinguishers aboard the [REDACTED VESSEL]. [REDACTED COMPANY NAME] argued that the Coast Guard lacked jurisdiction because the Potomac River at the location of [REDACTED COMPANY NAME] was not a navigable waterway of the United States. The court stated: “The Potomac River at White’s Landing is navigable in fact and subject to the admiralty jurisdiction of the United States.” *Id.* at 166. Hence, the Hearing Officer in this case was correct to find that the Potomac River at the location of [REDACTED COMPANY NAME] is a navigable waterway of the United States.¹

The Fifth Coast Guard District’s navigability package also contains a copy of the court decision in *Mullenix v. U.S.*, 984 F.2d 101 (4th Cir. 1993). That decision also held the Potomac River to be navigable at a location upstream of the [REDACTED COMPANY NAME] operation, where the Potomac River is bordered by West Virginia and Maryland. Before the Hearing Officer, you urged him to disregard the *Mullenix* and 1974 [REDACTED COMPANY NAME] court cases on the question of navigability. I see no reason to disregard them.

You next contest the Hearing Officer’s determinations that the [REDACTED VESSEL] is a United States vessel and that it is a small passenger vessel subject to inspection. During the proceedings you did not make clear the basis for your assertion that the vessel is not a United States vessel. You first put forward this assertion in your letter of March 9, 2011, and you repeated it in your letter of April 29, 2011.

During the hearing on May 16, 2011, your witness Mr. [REDACTED EXPERT 1], when asked by you whether the [REDACTED VESSEL] is a United States vessel, responded, “It does not meet the qualifications required for determining to be a United State vessel.” The Hearing Officer interjected, “What are those qualifications?” Mr. [REDACTED EXPERT 1] answered, “Well, size, weight, space, operation. But it was built to the requirements. It’s 500 tons.” (Transcript at 32.)

You then went on, addressing the Hearing Officer, “Now, we would offer for the – the regulation for a United States vessel. Are you aware, sir, that a non-self-propelled vessel cannot be registered as a United States vessel?” (Transcript at 33.) You proceeded to elicit from Mr. [REDACTED EXPERT 1] testimony that the vessel is non-self-propelled, that it does not have a rudder or any propulsion and is always tethered to the bank by a guide cable. (Transcript at 33-34.) Mr. [REDACTED EXPERT 1] further testified that the vessel is engaged in commercial service, but not in interstate commercial business. (Transcript at 35.)

Later, you argued, “This is a non-self-propelled vessel that isn’t engaged in interstate commerce . . . and that’s the reason that it doesn’t come under the definition of a United States vessel. And you, as the Coast Guard, do not have jurisdiction on a vessel – a non-United States vessel.” (Transcript at 42.) The following colloquy ensued:

¹ The Hearing Officer purported to make this finding of navigability based on the Fifth Coast Guard District’s determination of navigability. It does not appear from the memorandum or its enclosures that the Fifth Coast Guard District itself made a determination, but the package supports such a determination and there is nothing in the package to support a contrary determination.

HEARING OFFICER: What definition are you using for a United States vessel?

MR. [REDACTED NAME]: I'm using the definition in your records. I have it here, and I can give you that.

HEARING OFFICER: Okay.

MR. [REDACTED NAME]: It's your definition.

(Transcript at 42.) The definition was never specified on the record.

In the absence of a more specific argument by you, the Hearing Officer, in his final assessment letter, recited the statutory definitions of vessel, ferry, and small passenger vessel, and the statutory provision making small passenger vessels subject to inspection. He concluded that the [REDACTED VESSEL] is a ferry that "transport[s] passengers and vehicles across the Potomac River between the states of Maryland and Virginia," and that it "is a small passenger vessel subject to the inspection laws of the United States and therefore subject to inspection by the Coast Guard." He did not err in these conclusions.

In none of the provisions the Hearing Officer cited does the term "United States vessel" arise, and he did not discuss the term beyond stating your argument that the vessel is not a U.S. vessel. However, the premise appears to be unfounded in any event. 46 USC 116 defines the term "vessel of the United States" as "a vessel documented under chapter 121 of this title (or exempt from documentation under section 12102(c) of this title), numbered under chapter 123 of this title, or titled under the law of a State." 46 USC 12102(c) provides that a barge² qualified to engage in the coastwise trade may engage in the coastwise trade, without being documented, on rivers, harbors, lakes (except the Great Lakes), canals, and inland waters. This incidentally shows that a non-self-propelled vessel can indeed be registered as a United States vessel, contrary to your statement at the hearing. There is nothing in 46 USC chapter 121, which governs "registration" (documentation) of United States vessels, that would disqualify the [REDACTED VESSEL] from being a United States vessel; the only vessel characteristic required is that the vessel be at least 5 net tons, according to 46 USC 12103(a)(2). The vessel's Certificate of Inspection, included in the file, indicates that the vessel is 46 net tons. It also indicates that the vessel is documented, in that it includes the Official Number, 1038299. Clearly the [REDACTED VESSEL] is a vessel of the United States.

The conclusion of the Hearing Officer that the vessel transports passengers and vehicles between the States of Maryland and Virginia is contrary to the testimony of your witness, Mr. [REDACTED EXPERT 1], that the vessel is engaged in commercial service but not in interstate commercial service, and contrary to your argument that the vessel is not engaged in interstate commerce (and therefore cannot be a United States vessel). No doubt this conclusion is part of what you are contesting. Notwithstanding the fact that the vessel never leaves the State of Maryland, the vehicles and passengers that use it to cross the river undoubtedly come from

² According to 46 USC 102, a barge is a non-self-propelled vessel.

Virginia or continue into Virginia. This is interstate commerce. As I already stated, the Hearing Officer did not err in this conclusion.

You complain that the Hearing Officer failed to consider the testimony of your three witnesses. I will address each witness individually.

Mr. [REDACTED EXPERT 2] testified that the Potomac River is non-navigable. (Transcript at 22-24.) Inherent in his testimony was the river's susceptibility to commercial navigation along its length.³ However, commercial interstate navigation across the river suffices to establish the river as a navigable waterway of the United States. This is so regardless of the technical details of such cross-river navigation, i.e. that it is by cable ferry.

Mr. [REDACTED EXPERT 3] testified that the boundary between Maryland and Virginia is on the Virginia side of the Potomac River, and that the [REDACTED VESSEL] never leaves the State of Maryland. (Transcript at 25-27.) As previously stated, notwithstanding the fact that the vessel never leaves the State of Maryland, the vehicles and passengers that use it to cross the river undoubtedly come from Virginia or continue into Virginia.

Mr. [REDACTED EXPERT 1]'s testimony, which concerned the characteristics and service of the vessel, has already been discussed.

In short, the witnesses' testimony was far from dispositive on any issue in these proceedings. Hence the fact that the Hearing Officer did not find in your favor certainly does not mean the witnesses' testimony was not given due consideration by the Hearing Officer. I see no basis to believe that the Hearing Officer did not consider all the testimony.

You complain that the Hearing Officer failed to continue this case pending the outcome of a 2009 case then on appeal. I see no reason why this case should have been delayed pending the appeal of the 2009 case. The Hearing Officer did not abuse his discretion by going forward with this case.

You complain that there was no live testimony from the government concerning the operator license application or any other part of the government's case. Under 33 CFR Subpart 1.07, which governs the proceedings, the contents of the initial case file submitted to the Hearing Officer by a designated Coast Guard official is evidence that the Hearing Officer is entitled to consider, without any requirement of oaths or live witnesses. 33 CFR 1.07-50 provides that the party may request the assistance of the Hearing Officer in obtaining witnesses, but you did not request any witnesses. The Hearing Officer did not abuse his discretion in proceeding without any government witnesses.

You complain that the Hearing Officer predetermined the "issues of navigation and jurisdiction." The issue of navigability of the Potomac River can properly be considered an issue of law. The Hearing Officer was entitled to follow the law as established by *U.S. v. [REDACTED]*

³ Mr. [REDACTED EXPERT 4] likewise testified concerning the absence of commercial traffic "up and down" the Potomac River. (Transcript at 45-47.)

COMPANY NAME], 382 F.Supp. 162 (D.Md. 1974). In the absence of any other legal citation from you, his action was wholly appropriate.

Finally, you complain about various features of these proceedings. The Hearing Officer acted entirely in accordance with 33 CFR Subpart 1.07, but there is one point that warrants discussion. You complain that the Hearing Officer “failed to compel the complainant to honor the demand for background documents to be included in the case file.”

Your letter of March 9, 2011 requested

a complete copy of the U.S. Coast Guard’s (the Complainant’s) full administrative file on this above-captioned enforcement activity together with any and all pertinent and relevant background material in any way touching upon or involved with the issue of Federal jurisdiction. Also, provide copies of all correspondence to and from the Respondent relating to or in any way touching upon the issue of Federal jurisdiction over the inland waters of the Potomac River from the Great Falls to Cumberland, MD.

The file contains no response from the Hearing Officer to this request.

At the beginning of the hearing, the following colloquy took place:

HEARING OFFICER: Okay, you have received a complete copy of the case file. Have you had a chance to review it?

MR. [REDACTED NAME]: I haven’t had a complete copy.

HEARING OFFICER: You have a copy of the case file that’s in this case file right here that I’ve presented to you?

MR. [REDACTED NAME]: I asked you to provide the different background material in this file, and I don’t have it.

HEARING OFFICER: This is the only evidence that I’m adjudicating this case on, sir. This is the only thing that I’m relying upon, and this is all that there is in this case file, and I’ve presented you a copy of it.

MR. [REDACTED NAME]: Is that what you’re relying on, sir?

HEARING OFFICER: Yes. This is the enforcement summary, and then there’s several enclosures that go along with it. And that’s the only evidence I have with which to adjudicate this case, and other than what you present in defense mitigation or extenuation. So you have everything that I have.

(Transcript at 8-9.)

Later, after the witnesses had testified, the following took place:

MR. [REDACTED NAME]: I wrote to ask that a petition be put in this file, and they shut us down once, and in two days, we had a thousand signatures, I guess, those petitions. All right, those petitions are – they’re in your files. They are part of this record. Just so you’ll be sure we’ve got them, here’s some of them. Take a look at them.

HEARING OFFICER: This is not part of this file right now.

MR. [REDACTED NAME]: Yes, it is. I asked it all be included. I asked all the background be included.

HEARING OFFICER: So you want to submit this?

MR. [REDACTED NAME]: You got it. It’s in your files.

HEARING OFFICER: It’s not part of this file.

MR. [REDACTED NAME]: Well, I can’t give it up. I may need those names.

HEARING OFFICER: You can submit it later on, if you’d like.

(Transcript at 50-51.) At the end of the hearing, which was May 16, 2011, the Hearing Officer gave you “till the 26th then to present any other documents you’d like to present.” (Transcript at 65.) In his final assessment letter dated June 8, 2011, he adverted to the opportunity to submit additional materials, and remarked, “Having received no post-hearing submission to date, I now proceed to final determination.”

33 CFR 1.07-30 provides that the party may receive a copy of all the written evidence in the case file. This ensures the fundamental due process right of the party to notice of everything in the file. As reflected in the transcript extracts above, you were given a copy of everything that the Hearing Officer had.

33 CFR 1.07-55(b) provides, “The party may offer any facts, statements, explanations, documents, sworn or unsworn testimony, or other exculpatory items which bear on appropriate issues, or which may be relevant to the size of an appropriate penalty.” 33 CFR 1.07-55(f) allows for the party to present argument, and also a written statement within a reasonable period specified by the Hearing Officer. These rights were duly accorded to you.

33 CFR Subpart 1.07 does not include any terms providing for what you requested in your letter of March 9, 2011, namely, that “pertinent and relevant background material” be added to the file, as well as “copies of all correspondence to and from the Respondent” relating to the issue of Federal jurisdiction over the Potomac River. However, by analogy to 33 CFR 1.07-50 on the subject of witnesses, one might posit that a party could request the assistance of the Hearing Officer in obtaining documentary evidence in the possession of the government. If so, the terms of that regulation, 33 CFR 1.07-50, would be appropriate to apply: “If the Hearing Officer determines that [the requested documents] may materially aid in the decision on the case, the

Hearing Officer seeks to obtain” the documents. But in this case, your request for “pertinent and relevant background materials” is surely too vague for a Hearing Officer to attempt assistance. As for “correspondence to and from the Respondent” on the jurisdictional issue at the heart of this case, it is difficult to imagine how such correspondence could be significant on that issue of law.

In short, even if the Hearing Officer had an obligation to act in response to your request (which the regulations do not support), he did not abuse his discretion in failing to do so, and no error occurred on this account.

Finally, I will address the substance of the alleged violation of 46 CFR 15.805(a)(4). The regulation provides, “There must be an individual holding an appropriate license as . . . master in command of...[e]very inspected small passenger vessel.” The Certificate of Inspection establishes that the [REDACTED VESSEL] is an inspected small passenger vessel. Therefore, it is required to be under the operation of a licensed Master. The record shows, and you do not deny, that the vessel was operated by an unlicensed individual. Thus a violation of 46 CFR 15.805(a)(4) clearly occurred.

I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that [REDACTED COMPANY NAME] is the responsible party. The Hearing Officer’s determination that the violation occurred was neither arbitrary nor capricious and is hereby affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

Payment of **\$8,500.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 531112
Atlanta, GA 30353-1112

Interest at the annual rate of 1% accrues from the date of this letter but will be waived if payment is received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

L. I. McCLELLAND
Civil Penalty Appellate Authority
By direction of the Commandant

Copy: Coast Guard Hearing Office
Coast Guard Finance Center