U.S. Department of Homeland Security
United States Coast Guard

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United States Coast Guard

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16611
March 10, 2003

[REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00001418
[REDACTED].
[REDACTED]
$2,000.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00001418, which includes your appeal on behalf of the owners of the mobile facility [REDACTED] ([REDACTED]). The appeal is from the action of the Hearing Officer in assessing a $3,000.00 penalty for the following violations:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
46 CFR 35.35	Failure to comply with cargo handling requirements.	$1,000.00
33 CFR 156.150	Declaration of inspection not properly completed.	WARNING
33 CFR 156.120	Failure to comply with the requirements for oil transfer.	$2,000.00

The violations were observed on April 20, 2000, when Coast Guard Marine Safety Office San Juan conducted a transfer monitor between the U.S. Coast Guard Cutter [REDACTED] and the [REDACTED], a mobile facility owned by [REDACTED] ([REDACTED]), at Coast Guard base San Juan, Puerto Rico.

On appeal, you deny the violations and contend that they are the result of "unfair and abusive actions taken by the San Juan Marine Safety Office." To that end, you contend that "this civil penalty action is a direct result of a harassment campaign started by the San Juan MSO as retaliation for…[[REDACTED] [REDACTED]'s]…reporting of [a] spill made by a Coast Guard vessel." With respect to the alleged violation of 46 CFR 35.35, you contend that "[t]he Hearing Officer erroneously concluded that the tank truck doing the fuel transfer did not have adequate signs" and note that "[o]ver many years the Company has been inspected many times and has

always showed the inspectors the same tank trucks with the same signs and they have always approved them." You further contend that the alleged violation of 33 CFR 156.150 should be dismissed because "the Hearing Officer based…[his]…decision in (sic) the erroneous assumption that initials are required so that the individual who checks off a particular item can be readily identified." You also note that "the form which has been inspected and approved in many annual inspections, specifically calls for check marks." You deny the alleged violation of 33 CFR 156.120 and contend that the Coast Guard's allegation that [REDACTED] used a five-gallon bucket cut in half as a method of containment is a "perfidious lie." You further contend that [REDACTED] could not adequately refute this violation because the Company did not receive "the opportunity to present its case in an actual hearing" and add that the Hearing Officer improperly afforded the evidence submitted by the Coast Guard more weight than the signed statement submitted by [REDACTED]. You conclude that "the Hearing Officer erred in using a flawed burden of proof standard and in giving unwarranted weight to an unsigned statement of unknown authorship over a duly sworn statement supplied by Mr. [REDACTED]." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the violations in issue, I will address the procedural concerns that you raise on appeal. You contend, "[h]ad the company received the opportunity to present its case in an actual hearing the witnesses would have declared and the actual buckets in question would have been produced establishing beyond any doubt that no cut off buckets were used." You further assert that "the Hearing Officer assurances in the first paragraph of his decision, that he has assigned to [REDACTED]'s written defense no less weight tha[n] he would if presented at a formal hearing strike the undersigned as somewhat hollow." The Hearing Officer's letter of August 23, 2000, clearly indicated that [REDACTED] had the right to request a hearing or submit written evidence in lieu of a hearing. That letter also stated "[t]he Coast Guard's penalty procedures are contained in Subpart 1.07 of Title 33 of the Code of Federal Regulations." While 33 CFR 1.07-45(a) makes clear that "[t]he hearing is normally held at the office of the Hearing Officer," 33 CFR 1.07-45(c) states that "[a] request for a change of location of a hearing or transfer to another Hearing Officer must be in writing and state why the requested action is necessary or desirable." Your letter dated September 22, 2000, clearly indicates that you chose to submit written evidence in lieu of a hearing because you did not believe [REDACTED] could afford to attend an in-person hearing. The record clearly evidences that you did not, at any time, request a change of venue for the hearing. Therefore, it is clear that the Coast Guard did not prevent [REDACTED] from having an in-person hearing and I am confident that the company's rights, with respect to the Coast Guard's hearing process, have not been violated.

I will now address your allegation that [REDACTED] is the victim of harassment at the hands of the Coast Guard. There is simply no evidence in the record, other than [REDACTED]'s self-serving statements, that would allow me to conclude that the Coast Guard is harassing [REDACTED]. Indeed, to rebut your assertions, MSO San Juan has provided evidence of their enforcement of Coast Guard regulations with respect to other mobile facilities in Puerto Rico. In any event, as a representative of the Commanding Officer of the Coast Guard's Seventh District noted in his rebuttal comments, the civil penalty process is "the improper venue to present such a concern."

I will now address the alleged violation of 46 CFR 35.35. The narrative statement on the Marine Violation Charge Sheet indicates that this violation occurred because the "[m]obile facility did not have adequate safety signs" in that the signs present "[d]id not warn against open flames and visitors." It appears that both the Hearing Officer and the Marine Safety Office incorrectly cited 46 CFR 35.35 as the regulation violated. While Subpart 35.35 does, in fact, deal with cargo handling, it is only applicable to tank vessels, not mobile facilities. In fact, all of Subpart D deals only with tank vessels. Warning sign requirements for mobile transfer facilities are found at 33 CFR 154.735(g). 33 CFR 154.735(g) makes clear that "[s]igns indicating that smoking is prohibited are posted in areas where smoking is not permitted." There are no requirements for signs prohibiting visitors or open flames. Photo number 3 in the case file clearly shows a "No Smoking" sign on the dock near [REDACTED]'s gasoline truck. Therefore, it is evident that [REDACTED] posted the signs required by 33 CFR 154.735(g). Therefore, I will dismiss the violation and associated monetary penalty.

Although I have dismissed the incorrectly charged violation of 46 CFR 35.35, I will discuss your contention that "[o]ver many years the Company has been inspected many times and has always showed the inspectors the same tank trucks with the same signs and they have always approved them." To that end, you further assert that "out of the blue personnel of the same MSO that did the facility inspection and approved the signs decide that the signs are not adequate and slap the Company with a $1,000.00 fine." It is evident, from this comment, that you are confused about the violation at issue. As a representative of the Commanding Officer of Marine Safety Office San Juan noted in his rebuttal comments dated December 26, 2000, there is "a great deal of difference between an annual equipment inspection and a transfer monitor" and successful completion of one does not necessarily equate to successful completion of the other.

I will now address the "warning" issued by the Hearing Officer with respect to [REDACTED]'s alleged violation of 33 CFR 156.150. With specific regard to the violation at issue, 33 CFR 156.150(c)(4) makes clear that the Declaration of Inspection must contain "[a] list of the requirements in §156.120 with spaces on the form following each requirement for the person in charge of the vessel or facility to indicate **by initialing** that the requirement is met for the transfer operation." (*Emphasis added)* You contend that "even assuming, for the sake of argument, that the Declaration has to be filled using initials instead of check marks the MSO personnel could have halted the transfer operation and instructed [REDACTED]'s employee to use initials instead of check marks." You add that "[t]he whole thing would have taken less than a minute and that would have been the end of the matter." You conclude that "the alleged requirement of initials to identify who did the Declaration of Inspection is not logical nor needed to fulfill its putative purpose." Regardless of whether the Coast Guard could have prevented [REDACTED]'s failure to comply with the requirements of 33 CFR 156.150, the plain language of the regulation makes clear that initials, not check marks, are required to certify compliance. Because the Declaration of Inspection at issue was not initialed, I find the violation proved.

Before I address the alleged violation of 33 CFR 156.120, I would like to address the concerns that you raise regarding the admission of additional evidence after the Hearing Officer issued his final decision. You contend that it is "unprofessional for the MSO to include in their appeal comments a photo not submitted in the original case." You further contend that the Coast Guard's additional submission "places the company in a defenseless position since there is no

way of knowing the origin and/or date of the photo" and add that the late submission of the photo prevents [REDACTED] from "adequately address[ing] such new evidence presented after the case has been initially decided by the Hearing Officer." I do not agree with your assertions. First, I note that, while you contend that there is no way to tell when the photo was taken, you have not denied that the photo is of [REDACTED]'s mobile facility. Indeed, you contend that the photo clearly shows that [REDACTED] was not in violation of the Coast Guard's regulations. The Coast Guard's civil penalty procedures are contained in Part 1.07 of Title 33 of the Code of Federal Regulations (33 CFR 1.07). Section 1.07-55(b) provides that evidence may include "sworn or unsworn testimony." Section 1.07-55(d) provides that the Hearing Officer is not bound by strict rules of evidence. However, he must give due consideration to the reliability and relevance of each item of evidence and resolve any conflicts. Additionally, the Coast Guard's civil penalty procedures specifically allow for the submission of comments following the decision of the Hearing Officer. *See* 33 CFR 1.07-75. Those comments may include any additional evidence that the parties deem relevant to the issues of the particular case. The record clearly evidences that [REDACTED] was afforded the opportunity to address the additional evidence submitted by MSO San Juan. On February 12, 2001, you submitted a letter that you called your "response to the San Juan MSO comments in this matter." At that time, you were afforded the opportunity to address the additional evidence submitted by MSO San Juan. Therefore, I find that the evidence contained in the record, including the additional evidence submitted by MSO San Juan, is properly before me.

I will now address [REDACTED]'s alleged violation of 33 CFR 156.120. You contend that the Hearing Officer based his decision that the violation was proved "on his non acceptance of the company's 'explanation' of the charge." To that end, you contend "the Hearing Officer erred in using a flawed burden of proof standard and in giving unwarranted weight to an unsigned statement of unknown authorship over a duly sworn statement supplied by Mr. [REDACTED]." I do not agree. It is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts that arise in that evidence. To that end, I will disturb the decision of the Hearing Officer only if I determine that that decision is arbitrary and capricious as a matter of law. In the instant case, I find there is substantial evidence to conclude that [REDACTED] committed a violation of 33 CFR 156.120.

33 CFR 156.120(n) makes clear, in relevant part, that "[t]he discharge containment required by §154.530…[must be]…in place and periodically drained to provide the required capacity." 33 CFR 154.530(a) requires the following:

> (a) Except as provided in paragraphs (c), (d), and (e) of this section, each facility to which this part applies must have fixed catchments, curbing, or other fixed means to contain oil or hazardous material discharged in at least—
>
> (1) Each hose handling and loading arm area (that area on the facility that is within the area traversed by the free end of the hose or loading arm when moved from its normal position into a position for connection):

(2) Each hose connection manifold; and

(3) Under each hose connection that will be coupled or uncoupled as part of the transfer operation during coupling, uncoupling, and transfer.

33 CFR 154.530(d) states, however, that "[a] mobile facility may have portable means of not less than five gallons capacity to meet the requirements of paragraph (a) of this section. The record indicates that [REDACTED] used portable means of containment. Thus, to remain in compliance with the Coast Guard's regulations, [REDACTED] was required to have portable means of containment under each hose handing and loading arm area, each hose connection manifold, and under each connection that would be coupled and uncoupled as part of the transfer operation. Pursuant to 33 CFR 156.120, "[a] transfer is considered to begin when the person in charge on the transferring vessel or facility and the person in charge on the receiving facility or vessel first meet to begin completing the declaration of inspection." Thus, when the person in charge of [REDACTED]'s mobile facility and the person in charge of the Coast Guard Cutter [REDACTED] first met to begin completing the declaration of inspection, the portable means of containment, noted above, were required to be in place. In his sworn statement, Mr. [REDACTED], the person in charge of [REDACTED]'s mobile facility on the day of the incident, stated that "photo #4 of the hose without the 5 gallon bucket under it was taken before I placed the bucket there, before the declaration was filled by me and the USCG person in charge at the ship, and before the transfer began." Although this statement does not address whether Mr. [REDACTED] and the Coast Guard had, at the time the photo was taken, met to discuss the completion of the Declaration, the record indicates that the violation is the result of the fact that [REDACTED] used what the Coast Guard calls a "five gallon bucket that had been cut in half" as a means of containment. Since Coast Guard regulations require that a mobile facility use a portable means of containment of not less than five gallons, use of a partial five gallon bucket would be a clear violation of the regulation. *See* 33 CFR 154.530(d).

You contend that the Coast Guard's allegation that [REDACTED] used partial five gallon buckets as their means of containment is a "perfidious lie" and cite the sworn statement of Mr. [REDACTED] as proof that the company has not use portions of five gallon buckets as its means of containment. On December 26, 2000, MSO San Juan submitted a photo that was not submitted with the case file. That photo shows one of the five gallon buckets at issue. In your rebuttal to the additional evidence submitted by the Coast Guard, you do not deny that the photo is of [REDACTED]'s mobile facility and assert that "the photos speak for themselves." You conclude that the photo proves that the buckets used by [REDACTED] were "not cut in half." I have thoroughly reviewed the photo at issue and, as a result, I am not persuaded by your assertions. While the photo may, indeed, show a bucket that is not cut in half, it clearly shows a bucket that has, at least in some portion, been cut. Five-gallon buckets typically have a "lip" at the top and some sort of handle attachment on the side. The photo of the bucket in question clearly shows that the bucket does not have these appendages and seems to be shorter than a full-size five-gallon pail. Therefore, I find the violation proved. Furthermore, I am confident that the Hearing Officer considered both [REDACTED]'s financial position and its small business stature when he mitigated the penalty from $6,000.00 to $2,000.00 and I will not mitigate the penalty further.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find a penalty of $2,000.00 rather than the $3,000.00 assessed by the Hearing Officer or $110,000.00 maximum permitted by statute appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **$2,000.00** 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 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4.25% accrues from the date of this letter if payment is not 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,

//S//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center