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

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-0941
Phone: (202) 372-3796
Fax: (202) 372-3972

16780
January 30, 2009

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

RE: Case Nos. 2272709, 2307137 & 2345908
[REDACTED]
[REDACTED]
$7,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the files in Civil Penalty Case Nos. 2272709, 2307137 and 2345908, which includes your appeal on behalf of [REDACTED] ([REDACTED]), as owner/operator of a maritime facility known as the [REDACTED] in Baltimore, Maryland. Because the three cases arose at the same location (the [REDACTED]) and involve alleged failures to comply with [REDACTED] Facility Security Plan, they were consolidated while the matter was pending at the Hearing Officer level. The cases will remain consolidated for this appeal, which is from the action of the Hearing Officer in assessing a $7,000.00 penalty for the following violations:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
33 CFR 105.255(a)	Failure to implement facility security measures for access control.	$2,250.00 ***Case No. 2345908** Warning ***Case No. 2307137**
33 CFR 105.205(c)	Failure of Facility Security Officer (FSO) to carry out all specified duties and responsibilities for each facility for which he or she has been designated.	$2,250.00 ***Case No. 2345908** $1,500.00 ***Case No. 2272709**
33 CFR 105.200	Failure of facility owner or operator to ensure that facility operates in compliance with security requirements.	Warning ***Case No. 2307137**

33 CFR 105.255(e)	Failure of facility owner or operator to be in compliance with security requirements for MARSEC Level 1.	$1,000.00 ***Case No. 2272709**

The violations in Civil Penalty Case No. 2272709 are alleged to have occurred on November 15, 2004, when four crewmembers of the vessel [REDACTED] were able to abscond, without detection or observation, from the vessel while it was moored at the [REDACTED]. The violations in Civil Penalty Case No. 2307137 are alleged to have been observed on February 23-24, 2005, during a routine harbor patrol conducted by Coast Guard marine safety personnel. Finally, the violations in Civil Penalty Case No. 2345908 are alleged to have been observed during a MTSA spot check of [REDACTED] facility in Baltimore, Maryland, on April 27, 2005.

On appeal, after asserting that [REDACTED] "takes its role in homeland security very seriously" and adding that "[REDACTED] feels that it is being wrongly accused of a lack of commitment to security at the Coal Piers," you raise two issues: 1) whether a civil penalty may be imposed against [REDACTED] for failure to account for four absconders from a vessel docked at [REDACTED] facility "when there is absolutely no evidence that the absconders exited the ship while [it was] moored at the Piers and 2) whether [REDACTED] "may implement an amendment to its Facility Security Plan…thirty days after submission of the amendment to the Captain of the Port…when no disapproval has been received, or whether under federal regulations [REDACTED] must wait indefinitely for the COTP to approve or disapprove the amendment before implementing. After raising these issues, you conclude that due to "the lack of substantial evidence in the case file supporting the charges, [REDACTED] respectfully requests that the penalties assessed against it…be dismissed." Your appeal is denied for the reasons discussed below.

Before I address your appeal arguments, I believe that it would be beneficial to briefly address the intent of the Coast Guard's civil penalty program. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety, security and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both sanctioned by Congress and upheld in Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc*., 480 F. Supp. 474 (S.D.N.Y. 1979).

In addition, after a thorough review of the record, I believe that it would be beneficial to address the factual circumstances surrounding the violations. The record shows, as I have already noted, that Civil Penalty Case No. 2272709 was initiated after four crewmembers from the vessel [REDACTED] were found to have absconded from the vessel while it was moored at [REDACTED] facility in Baltimore, Maryland on November 15, 2004. After the Coast Guard (and several other responsible agencies) conducted a review of the incidents surrounding the

absconders, it was determined that [REDACTED] had committed a violation of 33 CFR 105.205(c) due to the fact that the company's Facility Security Officer ("FSO") failed to ensure that the facility was operating in full compliance with its Security Plan. In that regard, the Coast Guard alleges that the FSO did not ensure the security awareness and vigilance at the facility, that he did not ensure the proper maintenance of required records, and that he did not ensure that security equipment was properly operating at the relevant time (cameras were not focused on the vessel while it was moored at [REDACTED] facility). In addition, the Coast Guard alleged that a violation of 33 CFR 105.255(e) occurred because the facility was not being operated in accordance with the conditions of MARSEC level 1 at the time of the absconding incident.

The record shows that Civil Penalty Case No. 2307137 was initiated due to observations of Coast Guard personnel during a patrol of the facility on February 23, 2005. In that regard, the record shows that when Coast Guard personnel arrived at the facility, its main gates were found to be open, with no security present. As a result, Coast Guard personnel were able to enter the facility without challenge. Although the facility's FSO was made aware of the defect, the same violation was observed during subsequent inspections of the facility later in the day on February 23, 2005, and on the following day. The violation of 33 CFR 105.255(a) was initiated because the facility's security plan required that both of the facility's vehicle gates be secured when the facility was being operated under MARSEC level 1. The violation of 33 CFR 105.200 resulted from the fact that [REDACTED] failed to ensure that its facility was being operated in accordance with its Coast Guard approved Security Plan.

Finally, the record shows that Civil Penalty Case No. 2345908 was initiated after a MTSA "spot check" of the facility on April 27, 2005. The record shows that, during that check, a team of Coast Guard personnel arrived at the facility and observed that its main gates were open and that no guard was present in the guard house. At the same time, Coast Guard personnel observed that although transfer operations were underway at the facility, a guard was not present in the guard house near the pier where the transfer operations were occurring. During the check, Coast Guard personnel entered the facility and took pictures documenting the alleged violations; their presence was not, at any time, questioned by [REDACTED] personnel or in any way limited. The violations were observed to be continuing to occur during a subsequent check of the facility later in the day on April 27, 2005. I will now address the issues that you raise on appeal.

I.

Whether a civil penalty may be imposed against [REDACTED] for failure to account for four absconders from the M/V [REDACTED], a vessel docked at the [REDACTED] on November 15, 2004, when there is absolutely no evidence that the absconders exited the ship while [it was] moored at the Piers?

Your first appeal argument centers on the allegations raised in Civil Penalty Case No. 2272709. With regard to the violations alleged in that case, you properly note that the operative civil penalty procedural regulations mandate that civil penalties be assessed based on substantial evidence. You contend that in the relevant case "there is absolutely no evidence that the absconders exited the vessel when it was moored at the Piers or as a result of [REDACTED] failure to properly secure the area." In so stating, you assert that at the time the absconders allegedly left the vessel, "[REDACTED] placed security guards at points required under its FSP [Facility Security Plan]," "kept the area where the ship was moored well lit…and strategically

placed cameras on the Piers." You further note that the "contract security guard on duty provided a written statement to the Coast Guard stating that he did not see anyone get on or off the ship." In that vein, you assert that "[t]here is no evidence, let alone substantial evidence, that the absconders exited the ship at the Piers" and add that the record does not contain any evidence to even suggest "that they were still on the ship when it docked at the Piers on November 15, 2004." After noting, as you did while the matter was pending at the Hearing Officer level that "there are many ways the crew members could have absconded before reaching the Piers," you assert that "[i]n the absence of substantial evidence proving that the crew members exited the vessel at the Piers or that [REDACTED] failed to properly secure the Piers while the vessel was moored, there is no basis under federal regulations to find [REDACTED] in violation." As a result, you "request" that the $2,500.00 penalty assessed by the Hearing Officer for the violations that resulted from the absconder incident be dismissed.

Because your argument centers on whether there is substantial evidence in the record to support the Hearing Officer's conclusion that the violations occurred, I will begin by addressing the standard of proof applicable to the instant proceeding. As you correctly note, the Coast Guard's civil penalty procedural rules mandate that civil penalty cases be proved by "substantial evidence." *See* 33 CFR 1.07-65(a). The Supreme Court defined substantial evidence, both affirmatively and negatively, in *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938). The affirmative definition states that "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 229. In the negative, the Court stated that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." Id. at 230. Later decisions have clarified the definition, stating that "substantial evidence" is the quantum and quality of relevant evidence that is more than a scintilla but less than a preponderance and that "a reasoning mind would accept as sufficient to support a particular conclusion." *See LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984) (overruled on other grounds); *see also United Seniors Ass'n v. Social Sec. Admin.*, 423 F.3d 397, 404 (4th Cir. 2005).

After a thorough review of the record, I do not find your assertions with regard to the evidence contained in the case file to be persuasive. First and foremost, the record contains a report made to the National Response Center which indicates that Mr. [REDACTED], an employee of [REDACTED], reported that while the [REDACTED] was docked at [REDACTED] facility in Baltimore, "four crew members jumped the vessel." In addition, the record contains a copy of an incident report from Wackenhut, the company that provides security for [REDACTED] facility in Baltimore, Maryland, which indicates that [REDACTED] complained to the security provider that "four ship workers…[were]…unaccounted for at approximately 0200 from the [REDACTED]." Moreover, the record contains an "Exercise Report" filed by [REDACTED] FSO, Mr. [REDACTED], that states that "[a]t 1015 hours on Monday 15 Nov 2004…[REDACTED] received a telephone call from vessel agent John Pucher advising him that during the night, four…men left the vessel (jumped ship) without a valid shore pass." The report further noted that on November 16, 2004, "the Captain of the M/V [REDACTED]…reported the four crewmembers missing to his crew at 0230 hours 15 Nov" and that "[t]he vessel Owners informed [REDACTED] at approximately 0830…[on November 15, 2004]…and the Master telephoned only a couple of minutes later to make the same report." The report further states that, as a result of the incident, the vessel agents "were placing guards on the vessel to monitor

anyone attempting to exit via the gangway." Finally, the report noted that it was unknown whether the security officer on duty at the relevant time "saw the crewmembers leave the vessel." The record shows that in his Final Letter of Decision in the matter, the Hearing Officer addressed the violation as follows:

> In Activity # 2272709, the allegation was that four crew members from the foreign flagged M/V [REDACTED] were allowed to slip off the vessel while she was moored at the [REDACTED] facility in Curtis Bay, Maryland and that this happened as a result of the party's failure to have the area properly secured.
>
> The testimony offered was that there was a guard on duty at the facility guarding the vessel. The guard was a contract guard with specific instructions from the party. The guard was employed by Wackenhut and did not follow all instructions provided but the party contends that there is no proof that the crew members were on board the vessel when she entered the facility.
>
> Apparently, the crew members could not be found at 0200 on Tuesday, November 16, 2004, but the ship's captain did not notify [REDACTED] until 1000 when they called [REDACTED]. In [REDACTED]' testimony, he opined that it was possible the crew members disembarked when at the facility and simply were not challenged by the guard…
>
> Exhibit #2 was submitted to show that there had been four absconders before from this same vessel in July 2003 at the same dock.
>
> * * *
>
> Testimony indicated that even when it is dark that the ship itself would have been moored in a well lit area and people leaving the vessel could have easily been detected. A DVD recording of the vessel was provided to the Coast Guard. The guard on duty at the time indicated that he did not make any log entries of people going and coming from the vessel. The party terminated their contract with Wackenhut after this incident.
>
> Given the company's admission that Wackenhut was in effect derelict in their responsibilities and their concession that the crew members could have absconded while the vessel was at their facility, I find sufficient evidence to support the allegations contained in violations 1 and 2; accordingly, I find these violations proved.

After a thorough review of the record, I do not find that the Hearing Officer erred in concluding that there was substantial evidence to support a conclusion that the absconders left the vessel while it was moored at [REDACTED] facility.

As I have already stated, the alleged violation of 33 CFR 105.205(c) is predicated upon the Coast Guard's conclusion that the [REDACTED] FSO "did not ensure the security awareness and vigilance of the facility," "the proper maintenance of records required" by the applicable

regulations, and "that security equipment was properly operated during the time in question." While the Coast Guard's allegations, in this regard, are predicated on a belief that if the FSO had properly performed his responsibilities, the absconding might not have occurred, I find that the record contains substantial evidence to support a conclusion that the violation of 33 CFR 105.205(c) occurred absent consideration of that fact. 33 CFR 105.205 establishes the qualification requirements and responsibilities of a FSO. More importantly for the purposes of this case, 33 CFR 105.205(c) states the responsibilities of the FSO. Specifically, 33 CFR 105.205(c)(6) makes clear that the FSO must "[e]nsure the security awareness and vigilance of facility personnel." 33 CFR 105.205(c)(9) states that the FSO must "[e]nsure the maintenance of records required by [the applicable regulations[1]]." Finally 33 CFR 105.205(c)(13) mandates that the FSO "[e]nsure that security equipment is properly operated, tested, calibrated, and maintained." The key elements supporting these allegations are that the security guard responsible for the vessel did not notice the absconders, that "the security guard's log for the time in question is missing" and that relevant security cameras were "not focused on the restricted area during the time of the incident." The record shows that no evidence was presented at the hearing to rebut these allegations. Accordingly, I find that the record contains substantial evidence to support the Hearing Officer's conclusion that the violations occurred.

II.

Whether [REDACTED] may implement an amendment to its Facility Security Plan thirty days after submission of the amendment to the Captain of the Port when no disapproval has been received, or whether under federal regulations [REDACTED] must wait indefinitely for the COTP to approve or disapprove the amendment before implementing.

Your second argument on appeal focuses on violations alleged in civil penalty case nos. 2307137 and 2345908. In that regard, you note that [REDACTED] amended its FSP in November of 2004 to provide for different security requirements for its main gates and restricted gates at MARSEC Level I. While the approved FSP required that all gates be closed and secured at MARSEC Level I, the amendment did not require that the main gates be either closed or secured at MARSEC Level I. On appeal, you note that "the citations turn on an incorrect interpretation of the federal regulations governing amendments to an [sic] FSP" and contend that the Hearing Officer erred in concluding "that [REDACTED] should not have implemented its amended FSP until it received an approval letter from the COTP." To support your assertion in this regard, you contend, citing 33 CFR 105.415(2), that "federal regulations require that any amendment to a FSP by the facility owner or operator must be submitted 'at least 30 days before the amendment is to take effect'." At the same time, you note that [t]he federal regulations are silent on whether the FSO must wait indefinitely to receive an approval letter from the COTP before implementing the new security measures." You further note that "Section 105.415 explicitly requires submission of an amendment 'initiated' by [REDACTED] at least thirty days before the amendment is to take effect." As a result, you conclude that "the interpretation of the regulations by…[the Hearing Officer]…is contrary to our national interest in promoting homeland security"

[1] 33 CFR 105.255 establishes the record keeping requirements for facilities and mandates, among many other things, that the FSO maintain records of all incidents and breaches of security. Indeed, under 33 CFR 105.255(b)(3), "[f]or each incident or breach of security" the FSO is required to maintain a record of "the date and time of the occurrence, location within the facility, description of incident or breaches, to who it was reported, and description of the response."

and add that "[r]equiring [REDACTED] to wait to receive an approval letter from the COTP before implementing its amendment would require an interpretation of the regulations as an impediment to improving security measures, should the COTP fail to timely respond to an amendment." You further note that "[a]s each FSO gains experience, as the threat assessments against our country change, FSOs should—and will—refine their FSP" and add that "[w]hen refinements are identified, all citizens should want those changes implemented as soon as possible—with a short thirty-day waiting period to ensure that the COTP does not disagree." You conclude by stating that "[r]equiring FSOs to wait indefinitely to implement properly-submitted amendments is not only contrary to a plain reading of the regulations—it results in the triumph of bureaucracy over security." Finally, you note that "when the COTP ultimately acted on the November 2004 FSP, he approved the amendments" and insist that "[REDACTED] has been penalized for following a plan that was approved by the COTP" and add that "[t]he plain wording of the regulations supports [REDACTED] good faith belief" that it was proper to follow the amended FSP after the requisite thirty-day time period.

The evidence in the case file shows—and [REDACTED] does not deny—that its facility's main security gates were open and unattended on February 23, 2005 (Case No. 2307137), and on April 27, 2005 (Case No. 2345908). Accordingly, this case turns, as [REDACTED] properly notes, on a decision as to whether the Hearing Officer was correct to conclude that [REDACTED] was required to follow its original FSP until it received express approval of the amendment from the COTP.

While the applicable regulations, at 33 CFR Part 105, expressly allow for the submission and approval/disapproval of FSPs, they do not expressly address the approval/disapproval requirements for amendments. Indeed, the regulations covering FSP amendments state simply as follows:

> Proposed amendments must be submitted to the cognizant COTP. If initiated by the facility owner or operator, the proposed amendment must be submitted at least 30 days before the amendment is to take effect unless the cognizant COTP allows a shorter period. The cognizant COTP will approve or disapprove the proposed amendment in accordance with § 105.410.

Although 33 CFR 105.410 establishes the procedures for submission and approval of FSPs (and amendments) and makes clear that if a plan or amendment is approved by the cognizant COTP, he will provide the submitter a letter stating that the plan (or amendment) has been approved, the regulation does not establish a time-period within which the COTP is required to take action on a proposed amendment. I believe that a review of the regulatory history is illuminating as to the issue presented in this case. Indeed, when the Coast Guard published the Final Rule that established the regulations at issue in this proceeding, it offered the following comments regarding plan and amendment approval:

> We received 15 comments about the process of amending and updating the security plans. Five commenters requested that they be exempted from auditing whenever they make minimal changes to the security plans. Two commenters stated that it should not be necessary to conduct both an amendment review and a

> full audit of security plans upon a change in ownership or operational control. Three commenters requested a de minimis exemption to the requirement that security plans be audited whenever there are modifications to the vessel or facility. Seven commenters stated that the rule should be revised to allow the immediate implementation of security measures without having to propose an amendment to the security plans at least 30 days before the change is to become effective. The commenters stated that there is something "conceptually wrong" with an owner or operator having to submit proposed amendments to security plans for approval when the amendments are deemed necessary to protect vessels or facilities.
>
> …The regulations state that the security plan must be audited if there have been significant modifications to the vessel or facility, including, but not limited to, their physical structure, emergency response procedures, security measures, or operations. These all represent significant modifications. Therefore, we are not going to create an exception in the regulation. We recognize that the regulations requiring that proposed amendments to security plans be submitted for approval 30 days before implementation could be construed as an impediment to taking necessary security measures in a timely manner. **The intent of this requirement is to ensure that amendments to the security plans are reviewed to ensure they are consistent with and supportable by the security assessments. It is not intended to be, nor should it be, interpreted as precluding the owner or operator from the timely implementation of additional security measures above and beyond those enumerated in the approved security plan to address exigent security situations.** Accordingly we have amended §§ 104.415, 105.415, and 106.415 to add a clause that allows for the immediate implementation of additional security measures to address exigent security situations. (Emphasis added)

See Facility Security, 68 Fed. Reg. 60,515-01 (October 22, 2003). In light of this comment, it is reasonable to conclude that the promulgators of the FSP Amendment regulations sought—via the FSP amendment provisions in 33 CFR 105.415—to allow facility owners and operators the opportunity to amend their FSPs to allow for additional security measures immediately. However, in cases involving significant modifications to a plan, such as a reduction in security measures, the regulatory history makes clear that an audit would be required. In light of this stated intent, it is proper to conclude that an amendment to a FSP that proposes a significant modification to the plan, would require express approval by the COTP prior to enactment.

In this case, the record shows that [REDACTED] proposed amendment reduced security levels at its facility by removing the requirement that all of the facility's gates be locked and guarded at MARSEC Level I. Because the proposed amendment reduced the facility's security measures, express approval of the amendment by the COTP was required prior to implementation of the amended procedures. Because [REDACTED] implemented the amended procedures prior to approval by the COTP, I find that the Hearing Officer was correct to conclude that the violations occurred. Moreover, because [REDACTED] failed to amend its procedures after being informed of the violation by the Coast Guard (the facility's main gates were observed open and unattended

on several occasions), I find the penalty assessed by the Hearing Officer for the alleged violations to be appropriate under the circumstances of this case.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the $7,000.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances surrounding the violations.

Payment of **$7,000.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.0% 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