

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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16200
November 23, 2020

[PARTY]
[COMPANY]
[ADDRESS]

RE: Activity No. 5752999
[PARTY]
[VESSEL 1]
[VESSEL 2]
\$42,000.00

Dear [PARTY]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Case No. 5752999, which includes your appeal as owner of the vessels [VESSEL 1] and [VESSEL 2]. The appeal is from the action of the Hearing Officer in assessing a \$80,000.00 penalty for the following violations, as to the [VESSEL 1]:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR § 176.100(a)	Small passenger vessel failed to have valid certificate of inspection (COI) on board.	\$32,000.00
46 CFR § 170.120	Failure to have a stability letter issued before vessel is placed in service, or to have information placed on COI or load line certificate.	\$8,000.00
46 CFR § 16.201	Failure of a marine employer to comply with the requirements concerning chemical testing of personnel in accordance with 46 CFR Part 16 and 49 CFR Part 40.	\$16,000.00

And as to the vessel [VESSEL 2]:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR § 176.100(a)	Small passenger vessel failed to have valid COI on board.	\$12,000.00
46 CFR § 170.120	Failure to have a stability letter issued before vessel is placed in service, or to have information placed on COI or load line certificate.	\$6,000.00
46 CFR § 16.201	Failure of a marine employer to comply with the requirements concerning chemical testing of personnel in accordance with 46 CFR Part 16 and 49 CFR Part 40.	\$6,000.00

The violations are alleged to have occurred between May 27, 2017, and June 30, 2018, when both vessels were operated in commercial service as small passenger vessels, on the waters of Lake Michigan. The [VESSEL 1] was allegedly operated in violation of the cited regulations on eight occasions (May 27, June 3, 10, 11, 16, and 30, 2017; May 26 and June 16, 2018), and the [VESSEL 2] on three occasions (July 8 and 30, 2017, and June 9, 2018). You are charged as owner of both vessels, through your control of [COMPANY]. You do not dispute your ownership of the vessels.

On appeal, you dispute the accuracy of the Hearing Officer's factual findings, especially as related to the income you derived from the operation of the vessels. You argue that the Hearing Officer should have considered, in mitigation, that any violations were not willful. You state that you are unable to pay.

First, I will address the alleged violations of 46 CFR § 170.120, a regulation that requires inspected vessels to obtain a stability letter before entering commercial service. This regulation is part of 46 CFR Subchapter S—Subdivision and Stability. According to 46 CFR § 170.001, Subchapter S applies to inspected vessels, and to certain uninspected vessels required to comply with Subchapter S by regulation found in 46 CFR, Subchapters C and E. Neither the [VESSEL 1] nor the [VESSEL 2] was an inspected vessel, and there is no regulation in Subchapters C and E that applies to them. In short, lack of a stability letter is not a violation for these vessels independent of the lack of a COI. An uninspected vessel such as these two vessels, carrying passengers on the Great Lakes, is not required to obtain a stability letter before undergoing inspection. Accordingly, I will dismiss both charges of violation of § 170.120.

Turning to your arguments on appeal: you claim that the Hearing Officer's findings of fact are based on inaccurate evidence, but you do not identify the inaccuracies. In the absence of more specific information, I, like the Hearing Officer, can only consider the evidence on its own merits, giving due consideration to its apparent reliability and relevance. I have reviewed all of the evidence in the case file, and find that, as to the alleged commercial operation of the [VESSEL 1] on June 3, 10, 11, 16 and 30, 2017, and June 16, 2018, and as to the alleged commercial operation of the [VESSEL 2], there is substantial evidence supporting the Hearing Officer's essential findings of fact, and his conclusions that violations occurred with the exceptions noted below.

You were charged as owner, under 46 CFR § 176.100(a), for operation of the [VESSEL 1] as a small passenger vessel without a valid COI. In terms relevant to this matter, a small passenger vessel is a vessel less than 100 gross tons, carrying more than six passengers, where either at least one of those passengers is for hire, or the vessel is under charter with a crew provided or specified by the owner. 46 CFR § 175.110. In the case of a vessel under charter, an individual charterer is not included in the passenger count. 46 CFR § 175.400.

You were charged as a marine employer, under 46 CFR § 16.201, for failure to comply with the chemical testing requirements of 46 CFR Part 16 and 49 CFR Part 40. "Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than a recreational vessel." 46 CFR § 16.105.

As to the operation of the [VESSEL 1] on May 27, 2017, the only evidence in the record is a Coast Guard investigator's recorded observation of nine to eleven individuals disembarking the vessel. [CG-2 at 4.] As to the [VESSEL 1]'s operation on May 26, 2018, the only evidence in the record is a Coast Guard investigator's recorded observation of ten individuals aboard the moored vessel. [CG-20 at 3.] The record does not contain, and the Hearing Officer does not cite to, any evidence that consideration was contributed for the carriage of at least one passenger for hire or evidence of a charter of the vessel on those dates, a necessary element to prove each of the violations alleged. I will dismiss the charges for those dates.

As to the operation of the [VESSEL 1] on June 10, 16, and 30, 2017, for each date there is evidence in the record that the vessel was chartered with crew provided, and there are photographs showing the presence of seven individuals other than the captain and the deckhand. Since the charterer is not a passenger, there is not evidence that the vessel operated as a small passenger vessel (that is, with more than six passengers) on those dates.¹ I will reduce the assessed penalty for failure to have a COI, on a proportional basis, on account of those dates. However, since the vessel was under charter with crew provided, it was not a recreational vessel and was subject to the chemical testing requirements. Accordingly, I will not reduce the assessed penalty for failure to comply with chemical testing requirements on those dates.

As to the operation of the [VESSEL 1] on June 3 and 11, 2017, and on June 16, 2018, for each date there is evidence in the record that the vessel was chartered with crew provided, and there

¹ There is evidence of a separate trip on June 10, 2017, with photographs showing the presence of eight individuals other than the captain and the deckhand. However, there is no evidence of a charter or consideration being contributed for carriage of a passenger, as to that separate trip.

were nine or more passengers aboard. The same is true for the [VESSEL 2] on July 8 and 30, 2017, and June 9, 2018.

For violation of § 176.100(a) by the [VESSEL 1], I will reduce the assessed penalty by \$20,000, to \$12,000. For violation of § 16.201 by the [VESSEL 1], I will reduce the assessed penalty by \$4,000, to \$12,000.

Returning to the issues raised by your appeal, you assert that the Coast Guard's estimates of [COMPANY]'s income from charter operations were "completely" inaccurate. The Coast Guard's narrative in the Enforcement Summary estimated that you and [COMPANY] "likely collected in excess of \$572,000 during 2017 and 2018," based on the average charter fees documented by the Coast Guard investigation, and projections as to total days of operation. [Enforcement Summary at 4.]

You do not present any evidence to rebut the Coast Guard's estimate of your revenue. During this process you have been provided with ample opportunity to submit your own evidence to support your claims that the Coast Guard's evidence is "inaccurate." The only evidence you have submitted is a bank statement for an unidentified business checking account, showing a balance of \$2,767.64 on January 13, 2019.

Even if the \$572,000 revenue estimate is, as you assert, completely inaccurate, there is no indication that the Hearing Officer relied on that figure in assessing an appropriate penalty for the violations found proved. In the narrative in which the revenue estimate appears, the total recommended penalty for all the violations alleged is \$139,639 ("approximately 25% of the estimated illegal revenue"), yet the total proposed and finally assessed by the Hearing Officer is \$80,000. There is no reason to modify the assessed penalties, based on the asserted inaccuracy.

Next, you assert that the Hearing Officer should have considered, in mitigation, that any violations on your part were not willful, as your actions were taken in a good-faith effort to comply with the law. The Hearing Officer did consider your assertion that any violations were inadvertent, not willful, and discounted it. Specifically, he cited to the undisputed facts establishing that you continued to operate the [VESSEL 1] in violation of regulations after information from the Coast Guard warning you of legal requirements, boardings by State officials or the Coast Guard during which violations were identified, and even after the Captain of the Port (COTP) had ordered you to cease operation of the [VESSEL 2], on June 9, 2018. The evidence in the record establishes that both vessels were operated in the same manner, and the COTP order as to the [VESSEL 2] put you on actual notice that the [VESSEL 1]'s operation was also unlawful. Your continued operation of the [VESSEL 1] in those circumstances gave the Hearing Officer good reason to discredit your assertions that all of your actions were taken in a good-faith effort to comply with the law. I agree with the Hearing Officer's assessment, and do not find that any mitigation is warranted on this account.

Finally, you assert that you are unable to pay the assessed penalty, and you are no longer in business. The Hearing Officer considered your ability to pay in his March 26, 2019, response to your request to reopen. He found that the evidence provided as to your financial distress was insufficient to warrant reduction in the penalty assessed.

In your prior submission to the Hearing Officer, you represented that [COMPANY] “will 100% cease operations for any type of bareboat charter and will be getting rid of all of our vessels in lieu of a fine.” The Hearing Officer directly responded to that proposal in his March 26, 2019 letter: “Please note, it is not the Coast Guard’s goal to put you out of business . . . and I am not in a position, nor willing, to dismiss the penalty based on your claim that you would cease operations and sell your vessels in lieu of paying the penalty.” Cessation of [COMPANY]’s charter operations, assuming it has occurred, does not warrant modifying the penalty assessed at this point.

I find substantial evidence to support the Hearing Officer’s conclusion that your vessels were operated in violation of 46 CFR § 176.100(a) on June 3 and 11, 2017, on July 8 and 30, 2017, and on June 9 and 16, 2018. Further, I find substantial evidence to support the Hearing Officer’s conclusion that your vessels were operated in violation of 46 CFR § 16.201 on June 3, 10, 11, 16, and 30, 2017, on July 8 and 30, 2017, and on June 9 and 16, 2018. The penalty is within the amount authorized. The decision of the Hearing Officer, with regard to those dates, was neither arbitrary nor capricious and is affirmed, as modified.

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

Payment of \$42,000.00 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 979123
St. Louis, MO 63197-9000

Interest at the annual rate of 2% 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.

If you are financially unable to pay the penalty amount, you may request establishment of a payment plan or other accommodation by contacting the collection office at (510) 437-3644.

Sincerely,

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

Copy: Coast Guard Hearing Office
Coast Guard Finance Center