



16780
OCT 30, 2009

REDACTED
REDACTED
REDACTED

RE: Case No. 2756189
REDACTED
REDACTED
\$500.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2756189, which includes your appeal as owner/operator of the unnamed recreational vessel REDACTED. The appeal is from the action of the Hearing Officer in assessing a \$500.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$500.00

The violation is alleged to have occurred on February 17, 2006, when Coast Guard boarding officers boarded the unnamed recreational vessel REDACTED while it was underway on the Alamitos Channel, approximately 100 yards south of Marine Stadium in Long Beach, California.

On appeal, you assert that you are “disappointed with the findings” of the Hearing Officer and “respectfully request that the findings be reconsidered.” To that end, while you acknowledge that the Coast Guard’s report of the incident is correct in noting that you stated that you had three glasses of wine on the evening of the violation, you note that the wine was “consumed over a 5-hour time period.” As a result, you contend that you “do not believe that this admission, while honest, qualifies or places...[you]...within the legal range of intoxication.” You further contend that the odor of alcohol observed by the boarding officers did not result from your consumption of alcohol on the relevant evening but, rather, caused by the wine that you had on board “spilling on the bench seat where...[you]...were sitting on when the Coast Guard turned on their spot light and...[you]...throttled back...for a stop.” In that vein, you contend that the Coast Guard’s report of the incident confirms your assertion, in this regard, because it notes that the boarding officers observed a half glass of wine aboard the vessel prior to the stop, but “when they boarded they noted that the glass was empty.” At the same time, you note that you “smelled heavily of

fuel” at the time of the boarding because you “had been working on the dinghy outboard motor that day, soaking, cleaning, and rebuilding the carburetors on that engine, getting it ready for the coming season.” To that end, you note that those activities “took...the better part of the afternoon and continued into the evening.” As a consequence, you contend that you “believe that working with, over and breathing chemicals for long periods of time will change ones [sic] appearance...which...[you]...feel contributed to a negative overall appearance” when the boarding of your vessel commenced.

In addition, with regard to your refusal to submit to chemical testing, you reassert, as you did while the matter was pending before the Hearing Officer, your belief that “methyl compounds, also found in fuel, solvents and stabilizers, can give false readings” on breathalyzer tests. In so stating, however, you imply that you would have availed yourself to some other form of chemical testing, such as a blood test, but “unfortunately...there wasn’t another choice available or offered.” At the same time, you address your performance on the Field Sobriety Tests (hereinafter “FSTs”) administered during the boarding. To that end, you note that you performed poorly on the “on-land tests” because you have “difficulties with your right knee” and assert that “the pain influences how... [you]... walk, turn and how long... [you]... can stand or walk.” Moreover, you assert that the “limitations may not be apparent, unless one knows you.”

However, your assertions in this regard, as you note, must have been observable to the boarding officers because “the amount of swelling typically seen in...[your]...right knee was obvious to the crew at the time” and should have been “convincing to the crew that a disability of some sort did exist.” In addition, you state that “two guardsmen requested to the administrator of the test to skip the one leg test because of the apparent injury.”

Finally, you note that although the boarding officers informed you that you would be notified of any further action resulting from the boarding in approximately 90 days, you contend that the “charge showed up almost 2 years after the original event.” In addition, you note that “while the penalty assessed seems to be a civil fine in nature, it does carry a criminal element to it as a misdemeanor.” You contend that, as a result, the “case should be considered for dismissal as...[you]...believe the delay in notifying...[you]...of this charge has or will impede...[your]...ability to present the events of that night in a manner that could help...[your]...defense, due to the length of time that has passed, the possible unavailability of the crew that were present that evening, and the questionable clarity of their memories as this event is now over two years old.” You further assert that “[d]ue to the potential criminal element that could arise from this charge either from a conviction today or this charge being considered a prior conviction...[you]...respectfully request that...[I]...consider the possibility to dismiss this case due to...[your]...rights under the Speedy Trial Act.” You conclude by noting that if, after considering your appeal, I believe that the assessment of a penalty is still appropriate, you would agree “to pay a fine as operating [a] vessel negligently,” but insist that you would not do so for operating a vessel while under the influence of alcohol, which you insist did not occur. Your appeal is denied for the reasons discussed below.

I will begin by addressing both your contentions regarding the timeliness of the case and the perceived criminal nature of the alleged violation. On appeal you contend that receiving notification of the civil penalty two years after the incident hinders your defense because it “has

or will impede... [your]... ability to present the events of that night in a manner that can help...[your]... defense.” You also contend that the delay brings “the possible unavailability of the crew present that night, and the questionable clarity of their memories.” Moreover, you assert that the penalty “carries a criminal element to it as a misdemeanor,” and therefore, because of the “potential criminal element that could arise from this charge...[you]... would like the administrative proceeding dismissed under the Speedy Trial Act, and or under 18 USC §3161(h)(8)(A).”

The Speedy Trial Act set forth in 18 USC §§ 3161-3174 establishes “specific time limits ...within which criminal trials must be commenced.” See *United States v. Rivera Constr. Co.*, 863 F.2d 293, 295 (3d Cir. 1988). 18 USC § 3172(2), defines “offense” as “any Federal criminal offense which is in violation of any Act of Congress...” A Coast Guard administrative civil penalty action is remedial in nature and can only result in the assessment of an administrative civil penalty. The Coast Guard’s civil penalty process 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 proved. Thus, the Speedy Trial Act does not apply to this proceeding.

28 USC § 2462 addresses the time limitations for a civil penalty proceeding. The statute states that a “proceeding for the enforcement of any civil penalty, shall not be entertained unless commenced within five years from the date when the claim first accrued, if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” A review of the relevant case law shows that there is a split in the federal circuits as to the meaning and application of 28 USC § 2462. Among the circuits that have addressed the subject, the Fifth, Ninth, and D.C. Circuits have all held that an action to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty. See *U.S. v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985); *Federal Election Com’n v. Williams*, 104 F.3d 237 (9th Cir. 1996); and *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). As such, for an assessed penalty to be available for collection (as imposed by a federal court), the final assessment and collection action must be commenced within the five year period set forth in 28 USC § 2462. On the contrary, decisions of the First, Seventh and Eighth Circuits support the general proposition that the limitation period set forth in 28 USC § 2462 does not begin to run until after administrative proceedings have resulted in a final determination. See *U.S. v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *U.S. Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982); and *U.S. v. Godbout-Bandal*, 232 F.3d 637 (8th Cir. 2000). Given the split in the circuits, I believe that an equitable determination based on the particular facts and circumstances of a case, rather than a strict adherence to either rationale, is appropriate in Coast Guard civil penalty cases. In this case, the record shows that the violation at issue occurred on February 17, 2006. On February 12, 2008, the Hearing Officer issued his Preliminary Letter of Assessment. Thus, the civil penalty action was initiated two years after the violation at issue occurred. Therefore, this civil penalty proceeding, due to a violation of 46 USC § 2302(c), is within the five year time frame provided for by 28 USC § 2462.

I will now address the violation. Pursuant to 33 CFR 95.030 “[a]cceptable evidence of when a vessel operator is under the influence of alcohol...includes but is not limited to: (a) Personal observation of an individual’s manner, disposition, speech, muscular movement, general

appearance, or behavior; or (b) A chemical test.” (emphasis added). 33 CFR 95.020(c) further provides that an individual is considered intoxicated when “[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person’s manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.” A careful review of the record shows that there was ample evidence in the record to support the Hearing Officer’s conclusion that you operated a vessel while under the influence of alcohol for the purposes of this proceeding. Indeed, the record shows that prior to the boarding, the vessel was observed to “be swerving, traveling south approximately 6 feet away from a break wall.” Additionally, a wine glass half full was observed next to you. Upon boarding, it was observed that the wine glass initially spotted as half full was now empty and on the deck of the boat. Moreover, when asked by the Boarding Officer whether you had been drinking you replied that you had “previously had three glasses of wine.”

In addition, the Coast Guard Field Sobriety Test Performance Report for the incident marked that your speech was observed as slurred. Moreover, the report shows that you failed four out of six Field Sobriety Tests administered to you. On the “Recite A-B-C” test, you missed and repeated letters. During the “Count from 25 to 1” test, you hesitated before counting and miscounted. During the “Finger Count” test, you began before being instructed to; you failed to speed up, and miscounted. During the “Palm Pat” test, you again failed to speed up. During the “Walk and Turn” test, you made an improper turn and executed an “about face” rather than small steps. Due to your disability, which the record shows was observed by the boarding officers, you were unable to complete the “One-Leg Stand.” Based upon this evidence, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that you operated a vessel while under the influence of alcohol under 33 CFR 95.030(a) after consideration of the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior.

Although I have concluded that there was substantial evidence in the record to support the Hearing Officer’s determination that you operated a vessel while under the influence of alcohol based upon recorded observations of your manner, disposition, muscular movement, and behavior, I believe that a discussion of your refusal to submit to a chemical test is important to the administration of this case. The signed statement of the boarding officer, contained within the record, shows that you refused to submit to a Breathalyzer test requested during the boarding. As the Hearing Officer properly noted in his final letter of decision, under 33 CFR 95.040(a), “[i]f an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by a law enforcement officer based on reasonable cause, evidence of that refusal is admissible in any administrative proceeding and the individual will be presumed to be under the influence of alcohol.” The term “chemical test” is defined as “a test which analyzes an individual’s breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use.” See 33 CFR 95.010. In cases such as this one, the chemical test contemplated by the regulation would typically come in the form of a breathalyzer test. Given the recorded observations of your manner, disposition, muscular movement, and behavior, I believe that the boarding officers had reasonable cause to direct you to submit to a Breathalyzer test.

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As I have already stated, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented within the evidence. I find no abuse of discretion in the Hearing Officer's conclusion that the presumption of operating a vessel while under the influence of alcohol operated in this case. While the presumption created by your refusal to submit to the chemical test is a rebuttable one, the evidence you have provided has simply not overcome that presumption. Your concern that a false positive would have been read on the Breathalyzer because you had been exposed to "methyl compounds" is not without refute. The article states that "methyl tert-butyl ether (hereinafter "MTBE") presents a positive interference on the older type analyzers, and only when combined with alcohol." At the same time, however, the article states that "[t]he newer type analyzers use electrochemical and infrared absorption sensors to detect alcohol levels, and...[do]...not create...false positive reading[s]...[because]...the instrument [is able to] successfully identify...the interference [of MTBEs to] invalidat[e]...the test." The record shows that the breathalyzer test that was to be administered to you uses electrochemical sensors to quantify alcohol. Thus, the analyzer was of the "newer" analyzers tested in the study you provided, those which successfully identified the MTBE interference and invalidated the tests. Therefore, the evidence you provided refutes the idea that there would have been a false positive result had you taken the requested chemical test.

Furthermore, for the purposes of 33 CFR 95.020(c), as discussed above, there is enough evidence in the record to support a conclusion that you operated a vessel while under the influence of alcohol without regard to the operation of the presumption. Therefore, I find the violation proved.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$500.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances surrounding the violation. In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$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 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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//

F.J. KENNEY
Captain, U.S. Coast Guard
Chief, Office of Maritime and International Law
By direction

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