



[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
95 West Elm Street  
Brockton, MA 02301

16780  
Nov 17, 2006

RE: Case No. [REDACTED]  
[REDACTED]  
[REDACTED]  
\$1,000.00

Dear Mr. Asack:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal on behalf of [REDACTED], as operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,000.00 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. | \$1,000.00              |

The violation is alleged to have occurred on July 7, 2003, after Coast Guard boarding officers commenced a boarding (which was later continued at the Sandwich, Massachusetts, Coast Guard Station) of the [REDACTED] after finding it idle in the Cape Cod Canal near the Sagamore Bridge in the vicinity of Sandwich, Massachusetts.

On appeal, you do not raise any specific issues. Therefore, I have reviewed the file for substantial evidence to support the Hearing Officer's conclusions. Because, as is discussed below, I find that there is substantial evidence in the case file to support the Hearing Officer's conclusion that the violation occurred, your appeal is denied.

Before I begin, I believe a brief recitation of the circumstances of the boarding is necessary. The record shows that at 6:05 p.m. on July 17, 2003, Coast Guard Station Cape Cod Canal received a call concerning a disabled vessel in the Cape Cod Canal located about one-half mile east of the Sagamore Bridge. Shortly thereafter, a small boat was launched from the Coast Guard station and, upon arriving at the scene observed the vessel [REDACTED] positioned very near to the rocky edge of the canal, not making headway. When Coast Guard boarding officers inquired about the situation, the vessel's operator, [REDACTED], stated that he was "alright" and was simply waiting for his brother to return to the vessel. [REDACTED] further indicated that he had dropped his brother off on the rocks so that he could go to a nearby store and purchase a

pack of cigarettes from a nearby store. At that time, the boarding officers told [REDACTED] that it would be unsafe for him to pick up his brother at that location and instructed him to meet his brother at a local marina, instead. The statements of the boarding officers indicate that [REDACTED] subsequently agreed to do so. Shortly thereafter, the boarding officers continued moving westbound in the Cape Cod Canal in search of the reported disabled vessel. Upon their return through the area, the boarding officers observed [REDACTED] still operating his vessel in approximately the same position and, thereafter, witnessed [REDACTED] "pick up" his brother from the rocks on the side of the canal, contrary to the earlier advice given by the boarding officers. Following their observation, the boarding officers instructed [REDACTED] to follow the Coast Guard vessel to the Sandwich Basin where the [REDACTED] could safely be moored for a Coast Guard boarding. After the vessel tied up to a transient pier in the Sandwich Basin, the Coast Guard boarding officers conducted the boarding from which the instant violation case resulted.

The record shows that throughout the course of these proceedings, [REDACTED] denied that he operated his vessel while under the influence of alcohol. To support this assertion, [REDACTED] provided the Hearing Officer with information from the Sandwich Police Department that indicated that [REDACTED] passed a breathalyzer test administered by the police department after the Coast Guard boarding of his vessel was completed. [REDACTED] further asserted that, as a result of the breathalyzer test administered by the Sandwich Police Department, the State of Massachusetts dismissed a related Intoxicated Operation charge stemming from the same incident.

Although you have provided evidence to show that you passed a breathalyzer test administered by the Sandwich Police Department, I do not find that the Hearing Officer erred in finding the violation proved. As the Hearing Officer indicated in her final letter of decision, the Coast Guard's actions in this case are in no way barred by any of the proceedings in the related state action. The waters of the Cape Cod Canal are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against [REDACTED] without regard to any action taken by the State of Massachusetts. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from assessing a civil penalty in this case. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. See, *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489 (1972).

Furthermore, I note that the standard of proof necessary to impose a civil penalty at an administrative proceeding like this one is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. Because of the more serious consequences associated with a criminal trial, due process requires that an individual can only be convicted by proof beyond a reasonable doubt of every element which constitutes the offense. This has generally been described as proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. This is the highest standard of proof in the American judicial system. However, at administrative proceedings, the burden of proof is not as strict. At Coast Guard administrative proceedings, the Coast Guard must prove its case only by a preponderance of the evidence. Preponderance of the evidence means the trier of

fact, here the Hearing Officer, is persuaded that the points to be proved are more probably so than not. Stated another way, the trier of fact must believe that what is sought to be proved is more likely true than not true. For the reasons set forth below, I am convinced that the Coast Guard proved its case against [REDACTED] by a preponderance of the evidence.

Pursuant to 33 CFR 95.030 “[a]cceptable evidence of intoxication 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.” 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 the Hearing Officer carefully considered the evidence contained in the case file in determining that [REDACTED] operated the [REDACTED] under the influence of alcohol on the evening of July 17, 2003.

The Field Sobriety Test Report contained in the record showed not only that [REDACTED] had a “faint” odor of alcohol on his breath and that his eyes were “bloodshot,” but also that he performed poorly on all eight Field Sobriety Tests (FSTs) administered by the Coast Guard: 1) he sang during the “Alphabet Test,” 2) he hesitated during the “Backwards Count” Test, 3) he did not speed up during the “Finger Count” Test, 4) he did not speed up on the “Palm Pat” Test, 5) he opened his eyes and hesitated on the “Finger to Nose” test, 6) on the “Horizontal Gaze Nystagmus” test, he lacked smooth pursuit and showed distinct nystagmus at maximum deviation onset prior to 45 degrees in both eyes, 7) on the “Walk & Turn” Test, he stopped walking, stepped off line, improperly turned and used his arms for balance, and 8) on the “One Leg Stand” Test, he swayed, used his arms to balance and put his foot down during the test. In addition, the record shows that [REDACTED] did not deny consuming alcoholic beverages on the day of the boarding. Based upon the totality of the circumstances of the boarding, including [REDACTED]’s FST results and the personal observations of the Coast Guard boarding officer regarding his manner, disposition, speech, muscular movement, and behavior, I find that the Hearing Officer was not arbitrary or capricious in determining that there was sufficient evidence in the record to support a conclusion that [REDACTED] operated his vessel under the influence of alcohol under 33 CFR 95.030(a).

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation 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 the \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,000.00 maximum permitted by statute to be appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,000.00** 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 70945  
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4.00% 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//

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