



[REDACTED]
c/o [REDACTED]
[REDACTED]
Chicago, IL 60601

16780
July 16, 2007

RE: Case No. 2337864
[REDACTED]
[REDACTED]
Warning

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2337864, 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 \$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 June 12, 2004, when Coast Guard boarding officers boarded the [REDACTED] while it was underway on Lake Michigan near Hammond, Indiana.

On appeal, although you do not deny the violation, you imply that the assessment of a penalty in this case is inappropriate given the facts surrounding the incidents giving rise to the violation. To that end, you contend that "when...[the Hearing Officer]...assessed...[a]...penalty on the original case, Activity No. 2242818" he did so "mindful of the fact that your client "was stopped on two occasions" and assert that both you and your client were "under the assumption that he was being prosecuted under the one activity number only." In that vein, you assert that because the Hearing Officer "considered both separate stops in assessing...[a]...penalty and...[your]...client paid that penalty with the understanding that he was satisfying fines levied as a result of both stops, it seems fundamentally unfair to come after him...six months later for yet an additional fine based on the same circumstances." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the violation at issue, itself, I feel it necessary to address the factual circumstances surrounding the violation. The record shows that your client's vessel was boarded by the Coast Guard two times on the evening of June 13, 2004. During both boardings, which

July 16, 2007

occurred within one hour of each other, Coast Guard boarding officers found substantial evidence to support a conclusion that your client was operating a vessel while under the influence of alcohol. As a result, two civil penalty cases for operating under the influence were initiated against your client.

The procedural progression of the cases from that point forward may have added to the confusion surrounding the instant case. As the Hearing Officer informed you, it is customary for co-related cases to be processed simultaneously. However, the record shows that two “operating under the influence” cases were initiated against your client, one under Activity Number 2242818 and one under Activity Number 2337864. Although such action was neither inappropriate under the applicable procedural rules, nor inconsistent with your clients right to due process given the fact that the violations resulted from separate occurrences—two separate boardings of your client’s vessel within one hour—a careful review of the record supports a conclusion that the cases were reviewed collectively. Indeed, the Coast Guard Enforcement Activity Report contained within the record refers to both boardings, presumably as an aggravating factor. Moreover, the record shows that when the Hearing Officer addressed your client with regard to the \$2,000.00 penalty assessed for the operating under the influence case taken under Activity Number 2242818, he stated as follows:

Please be advised that the file indicates that your client was stopped twice and on each occasion was noted to be operating the vessel while under the influence. Despite the two different stops, he is cited for only one violation under this activity number. I know of no other cases that have been forwarded to this office; this case is one violation of BUI even though he was stopped twice.

The record shows that, shortly after receipt of the Hearing Officer’s notification letter in this regard, you wrote a letter to the Hearing Officer to address the violation. In that letter you expressly stated that you understood “that...[the Hearing Officer]...recommended a \$2,000.00 penalty based on the two...violations.” Shortly thereafter, on further consideration of the situation, you wrote a letter to the Hearing Officer wherein you stated that your client had elected to pay the preliminary assessed penalty without further argument. The record shows that your client has, since then, satisfied his debt with the Coast Guard for the violation. On doing so, both you and he presumed the matter was resolved in its entirety.

Irrespective of his initial comments with regard to Activity Number 2242818, the record shows that in his Final Letter of Decision in the case at issue here (Activity Number 2337864), the Hearing Officer—without reference to his prior correspondence with regard to the previous case—stated as follows in assessing the \$500.00 penalty at issue here:

You are correct in your assumption that both LCDR Bartz and I increased our respective penalties to \$2,000.00 because there were two incidents in a relatively short period of time. I have reviewed the information that you offer about his sister taking the helm and your client resuming control of the vessel when faced with an emergency situation. Although I can understand the predicament that he found himself in, I can offer little sympathy because he alone was responsible for

July 16, 2007

being under the influence. I will not dismiss the charge but I will reduce the penalty from \$2,000.00 to \$500.00.

The record shows that the Hearing Officer issued a subsequent letter to you wherein he addressed the issues that you raise on appeal. In that letter, the Hearing Officer clarified the issues surrounding the progression of the two cases as follows:

My March 30, 2005 letter was a response to your March 18, 2005 letter referencing Activity No. 2242818. In my response, I mistakenly indicated that there were no other cases pending against [REDACTED]. Your letter did not provide the activity number for this case and I simply was not aware of it at that time. I was aware of the fact that [REDACTED] had been stopped twice as I noted in my letter but I was not aware of the fact that the two different stops had resulted in two different cases. Later when it came to my attention that there were in fact two separate cases, consistent with office policy, I arranged to have this case (Activity No. 2337864) also assigned to me. Now that I am thoroughly familiar with both cases, I find that my mistaken belief that there was only one case did not prejudice your client. In fact, when I rendered my final decision in this case, Activity No. 2337864, I referred to both cases so I was aware of the fact that both cases existed when I made my final decision in this case dated December 8, 2005. In fact, I significantly reduced the penalty in this case because of the penalty in Activity No. 2242818. Frankly, I feel that I was quite lenient because the argument could easily be made that the two cases was reason to enhance the penalty. The facts demonstrate that [REDACTED] was stopped and cited for BUI and after he agreed that he was too intoxicated to operate the vessel, he was stopped an hour later still at the helm. I was aware of this fact when I issued my preliminary letter in Activity No. 2242818 and that is the reason that I increased the penalty to \$2,000.00 because of the two stops and [REDACTED]'s flagrant disregard for the directive given by the boarding officer not to operate the vessel. One could argue that under the circumstances, an enhanced penalty would have been justified in both cases. When I reviewed the second case, with full knowledge of the first, I decided leniency was in order and hence the reduced penalty of \$500.00 in this case.

While I do not believe that the Hearing Officer was arbitrary or capricious in determining, based on the evidence contained in the record and your client's admission as to the violations, that a violation of 46 USC 2303(c) occurred, I do not agree with the Hearing Officer that your client was not prejudiced by the Hearing Officer's initial statements with regard to Activity No. 2242818. Instead, after a thorough review of the record, I believe that one could easily presume that your client elected to pay the \$2,000.00 penalty at issue in Activity No. 2242818 based on a belief that such payment would resolve the matter in its entirety. In fact, in stating that only one case had been initiated with regard to the boardings, the Hearing Officer likely led your client to such an assumption. In view of this fact, I do not believe that the assessment of a monetary penalty is appropriate in this case. However, because I do agree with the Hearing Officer that the record supports a conclusion that a violation of 46 USC 2303(c) did occur and because this

case is the result of a separate boarding of your client's vessel, I will assess a warning in this case.

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

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