



[REDACTED]
[REDACTED]
[REDACTED]

16780
MAR 16 2007

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal as owner/operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing three warnings and a \$750.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	Warning
33 CFR 175.15(b)	Failure to have one Type IV PFD on board in addition to at least one Type I, II, or III PFD for each person.	Warning
33 USC 2020(b)	Failure to comply with rules concerning lights and shapes (sunset to sunrise)	Warning
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$750.00

The violations were first observed on June 25, 2005, when Coast Guard personnel boarded the [REDACTED] while it was underway on the Inter Coastal Waterway near Juno Beach, Florida. On appeal, although you do not address the violations for which the Hearing Officer assessed warnings, you do specifically deny operating your vessel while under the influence of alcohol. To support this claim, you assert that even though you were arrested by the Palm Beach County Sheriff's Office for boating under the influence, you were found not guilty at a subsequent trial for the same offense. In addition, you contend that the "young sailors" who conducted the boarding of your vessel "created this whole mess." Your appeal is denied for the reasons discussed below.

As is noted above, you do not contest the alleged violations of 33 CFR 173.21(a)(1), 33 CFR 175.15(b), and 33 USC 2020(b). The record shows that when your vessel was boarded, you were unable to produce the vessel's Certificate of Registration, did not have a Type IV throwable PFD on board, and that your red/green bow lights were "burned out." The record further shows that, although you did not deny the violations while your case was pending before the Hearing Officer, you presented evidence to show that the deficiencies were corrected. Based on your assertions, in this regard, the Hearing Officer mitigated the initially assessed penalties for the violations to warnings in his Final Letter of Decision. Given the evidence contained in the record and the fact that you do not further contest the violations on appeal, I find that the Hearing Officer did not err assessing warnings for the violations.

I will now turn my attention to the central issue of your appeal, whether the Hearing Officer was correct to conclude that you operated your vessel while under the influence of alcohol on the evening of June 25, 2005. On appeal, you contend that the Hearing Officer erred in finding the violation proved because a Florida State Court found you not guilty of the charge in the related state action. Although you have not identified it as such, you are raising what amounts to a double jeopardy defense. The Fifth Amendment to the U.S. Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The concept of double jeopardy is one of the most fundamental rights afforded persons being tried for a crime in the United States. However, there are certain prerequisites that must be satisfied before an individual may assert double jeopardy as a defense. First, it is a concept that only applies in criminal proceedings. The double jeopardy clause does not apply in civil proceedings, i.e., to trials in which "life or limb" are not in jeopardy. A Coast Guard civil penalty action is administrative in nature and does not place anyone's "life or limb" in jeopardy. Rather, it is remedial in nature and can only result in the assessment of an administrative civil penalty when violations are found proved. Another limitation on the ability to rely upon the double jeopardy clause as a defense stems from our "dual sovereignty" doctrine. Conduct may simultaneously constitute a violation of both federal and state law. For example, boating while intoxicated is prosecutable under both federal and state law. The dual sovereignty doctrine was enunciated in United States v. Lanza, 260 U.S. 377 (1922), where the Supreme Court stated that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be [prosecuted and] punished by each." In effect, prosecutions under laws of separate sovereigns are prosecutions of different offenses, not re-prosecutions of the same offense. Therefore, it is permissible for the federal government to prosecute a defendant after a state prosecution of the same conduct, or vice versa.

In addition, you should be aware that acquittal of the state charges does not automatically result in dismissal of the charges brought in the instant civil penalty case. That is because 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. Therefore, even in a case where a state criminal court finds insufficient evidence to support a finding of guilt, under the lesser standard of proof required in an administrative proceeding, sufficient evidence may exist to support a conclusion that a violation occurred.

Pursuant to Coast Guard regulation, “[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.” See 33 CFR 95.030. 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 review of the record shows that at the time of the boarding, the Coast Guard boarding officers observed that you had a strong odor of alcohol on your breath and that when they asked whether you had consumed any alcoholic beverages prior to operating your vessel, you indicated that you had “3 or 4” drinks that evening. The record shows that, as a result of these observations, the boarding officers called personnel from the Florida Department of Fish and Wildlife to conduct sobriety testing of you. The record contains a copy of the Testing Report completed by Florida Fish and Wildlife Personnel. That report shows that, at the time of the tests, your speech was slurred and your eyes were bloodshot. In addition, the Report shows that you performed poorly on all Field Sobriety Tests (FSTs) administered: you swayed, used your arms for balance, and put your foot down during the “One Leg Stand” Test; you lost your balance during the instructional portion of the “Walk and Turn” Test and, during the administration of the test, you did not touch heel-to-toe, stepped off the line, used your arms for balance, improperly turned, and used the wrong number of steps; during the “Horizontal Gaze Nystagmus” Test, you showed a lack of smooth pursuit and distinct nystagmus onset prior to 45 degrees in both eyes. Based upon this evidence, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that you were intoxicated under 33 CFR 95.030(a) based upon the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officers and personnel from the Florida Fish and Wildlife Department 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 were intoxicated based upon recorded observations of your manner, disposition, muscular movement, and behavior, I believe that a discussion of your chemical test is important to the administration of this case. As the Hearing Officer noted in his Final Letter of Decision, pursuant to 33 CFR 95.040, when an individual refuses to take a timely chemical test when directed to by a law enforcement officer upon reasonable cause, it is presumed that the individual is under the influence of alcohol or dangerous drugs. A review of the record shows that, during the administration of the breathalyzer test, you were unable to provide sufficient breath sample for testing. The record shows that, based on the evidence presented, the Hearing Officer concluded both that you refused the administration of a chemical test and that you failed to present substantial evidence to rebut the presumption of intoxication created by that refusal. Although you do not address that issue on appeal, the record shows that, in correspondence with the Hearing Officer, you asserted that you gave an honest attempt to complete the breathalyzer and even offered to give a urine or blood sample when you were unable to provide a sufficient breath for testing. A review of the record shows that the Hearing Officer found your unsupported assertions in this regard to be insufficient to rebut the presumption of intoxicated created by your refusal to submit to the chemical test. Since it is the Hearing Officer’s responsibility to determine the reliability and credibility of evidence presented in these proceedings, I do not find that the Hearing Officer erred in so finding.

Therefore, I do not believe that the Hearing Officer erred in concluding that you were intoxicated under 33 CFR 95.030(b).

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that you are 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 \$750.00 penalty assessed by the Hearing Officer, rather than the \$2,300.00 originally assessed or \$14,200.00 maximum permitted by statute for the violations to be appropriate in light of the circumstances of the case.

Payment of **\$750.00** 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 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. In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 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