



16780

March 09, 2009

[REDACTED]

[REDACTED]

[REDACTED]

RE: Case No. 2755675

[REDACTED]

[REDACTED]

\$100.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2755675, which includes your appeal as owner/operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$100.00 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.	\$100.00

The violation is alleged to have occurred on August 18, 2006, when Coast Guard boarding officers boarded the [REDACTED] while it was underway on Nippersink Lake, near Fox Lake, Illinois.

On appeal, although you do not deny being under the influence of alcohol at the time of the boarding, "in light of the circumstances surrounding the penalty applied by the Lake County Circuit Court...and...the fact that the Coast Guard found no other violations on...[your]...vessel...[you]...feel a second fine is excessive and unnecessary." In so stating, although you note that your attorney is "debating whether double jeopardy actually does apply" in your case, you contend, irrespective of such a finding that the Coast Guard's assessment of a civil penalty in the case is "piling-on." At the same time, you note that if you had been "stopped by the Lake County Sheriff," the matter "would have been adjudicated by the county and that would have been the end of it." At the same time, you imply that the Coast Guard only "turned you over" to the Lake County Police because they were better capable of impounding your vessel, which they did during the course of the incident. You conclude by noting that since the violation occurred, you have had no other violations and insist that, based on your record, you cannot be considered a "multiple offender." Finally, although you acknowledge that the penalty assessed by the Hearing Officer "isn't an incredible amount of money," you contend that you

have already “paid...[your]...debt” for the violation and “learned a valuable lesson in the process.” Your appeal is denied for the reasons discussed below.

I will begin by addressing your double jeopardy concerns. 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 an administrative civil penalty. 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. Thus for the reasons just set forth, your claim of double jeopardy is inapplicable to the facts of this case.

I will now address the violation. 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 there is sufficient evidence to support the Hearing Officer’s conclusion that you operated a vessel while under the influence of alcohol. In addition to the fact that you performed poorly on five of the six Field Sobriety tests conducted by the boarding officers during the boarding, the record shows that a chemical test administered during the boarding revealed that you had a Blood Alcohol Concentration of .118% at the time of the boarding. Accordingly, given both the evidence contained in the record and the fact that you do not deny that the violation occurred, I find that the record contains substantial evidence to support the Hearing Officer’s conclusion that a violation of 46 USC 2302(c) occurred.

Since I have found substantial evidence in the record to support the Hearing Officer’s conclusion that you operated a vessel while under the influence of alcohol at the time of the incident, the sole issue remaining is whether the \$100.00 penalty assessed by the Hearing Officer is appropriate under the circumstances of the case. The record shows that the Hearing Officer assessed an initial penalty of \$1,000.00 for the violation. In response to the Hearing Officer’s preliminary letter of assessment, you submitted evidence in mitigation, including evidence to

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show that you sustained substantial fines as a result of the related criminal prosecution. The record shows that the Hearing Officer fully considered that evidence when she mitigated the initially assessed penalty to \$100.00. Indeed, in her final letter of decision, the Hearing Officer stated, in relevant part, as follows with regard to the assessed penalty:

You submitted evidence showing that [the] Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois found you guilty of operating under the influence. You were ordered to pay a fine in the amount of \$500.00, pay a monitored court supervision fee through the Clerk of the Circuit Court in the amount of \$50.00, attend and complete D.U.I. Education and Counseling class, [and] contribute to Alliance Against Intoxicated Motorists.

Boating while under the influence of alcohol or a dangerous drug poses a threat of danger to self, others and property. This is a serious violation. In consideration of the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois judgments you have already received and given the fact you have no record of prior violations, I am reducing the penalty assessment for this case to \$100.00.

Because the record shows that the Hearing Officer carefully considered the evidence that you submitted in mitigation, I do not believe that further mitigation of the assessed penalty is appropriate.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation 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 \$100.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute, to be appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$100.00** 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.

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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