



[REDACTED]
[REDACTED]
[REDACTED]

16780
OCT 30, 2006

RE: Case No. [REDACTED]
[REDACTED]
Unnamed [REDACTED]
\$1,100.00

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 operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,100.00 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.	\$1,100.00

The violation is alleged to have occurred on August 7, 2004, when Coast Guard boarding officers boarded the unnamed recreational vessel [REDACTED] while it was underway on the St. Lawrence River near Alexandria Bay, New York.

On appeal, although you do not deny operating the vessel while under the influence of alcohol, you contend that you were "actually convicted without being charged, found guilty without someone looking at all the evidence" and add that you are now being "denied the right to speak." Your appeal is denied for the reasons discussed below.

I will begin by addressing the procedural concerns that you raise, for the first time, on appeal. The record shows that the Hearing Officer issued her Preliminary Assessment Letter in this case on November 19, 2004. A review of that letter shows that, in accordance with the applicable procedural regulations, at 33 CFR Part 1.07, the Hearing Officer informed you of the alleged violation, the maximum penalty available for the violation, the amount of the preliminarily assessed penalty, and that you would have 30 days within which to either request a hearing, provide written evidence in lieu of a hearing or to pay the preliminarily assessed penalty. The record shows that you responded to the Hearing Officer's Preliminary Assessment letter via a letter dated December 5, 2004. A review of your response shows that you did not deny that the violation occurred, rather, you noted that you had "plead guilty to" a related action initiated by the State of New York. As a result, you indicated that you believed that once the Coast Guard boarding officers "handed...[you]...over to the State Police," the Coast Guard waived its right to bring civil penalty action against you because "[w]e live in a place where no man should...be

charged twice for the same crime.” After reviewing your response and considering the evidence presented in the case file, the Hearing Officer issued her Final Letter of Decision in the case on January 18, 2005. The record shows that, in accordance with the applicable procedural rules, that decision informed you that the Hearing Officer had found the violation proved and did not mitigate the initially assessed penalty. In addition, the Hearing Officer informed you that you would have 30 days within which to file an appeal of her decision with the Commandant, United States Coast Guard. The record shows that you filed an additional letter with the Hearing Officer on February 18, 2005. In that letter, although you continued to acknowledge that the violation occurred, you reiterated the double jeopardy concerns that you raised before the Hearing Officer and offered your version of the events that transpired on the evening of the boarding. On March 15, 2005, the Hearing Officer issued a General Notification letter to you informing you that although she received your subsequent letter, she was not persuaded to re-open your case. After receiving the General Notification Letter, you wrote a final letter to the Hearing Officer. That letter has been treated as your appeal. Irrespective of your assertions that you were “convicted without being charged, found guilty without someone looking at all the evidence” and were “denied the right to speak,” the record shows that prior to the assessment of a civil penalty in this case, the Hearing Officer followed all regulatory procedures and ensured that you were fully apprised of and had the opportunity to exercise your rights in this matter. As such, I find the procedural assertions that you raise on appeal to be wholly without merit.

I will next address 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 the assessment of 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, as the Hearing Officer informed you in her Final Letter of Assessment, it is permissible for the federal government to prosecute a defendant after a state prosecution of the same conduct, or vice versa. Therefore, 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 when a vessel operator is under the influence of alcohol or a dangerous drug 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 under the influence of alcohol or a dangerous drug 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.” The Field Sobriety Test Report of the incident shows that during the boarding you had a moderate odor of alcohol on your breath, your speech was mumbled, slurred and confused, your face was flushed and your eyes were both bloodshot and watery. In addition, the test report shows that although you completed the “Backwards Count” Test satisfactorily, you performed poorly on the seven other Field Sobriety Tests administered by the boarding officers: 1) on the “Alphabet Test”, you sang, hesitated and missed and repeated numerous letters; 2) on the “Finger Count” test, you improperly touched and counted your fingers; 3) on the “Palm Pat” Test, you failed to speed up as instructed; 4) on the “Finger to Nose” Test, you missed your nose, used a searching pattern and hesitated; 5) on the “Horizontal Gaze Nystagmus” Test, you lacked smooth pursuit and showed distinct nystagmus onset prior to 45 degrees in both eyes; 6) you were unable to safely complete the “Walk & Turn” Test because you could not keep your balance, used your arms for balance and stepped off the line; and, 7) you swayed during the “One Leg Stand” Test. While each of these factors, alone, might not have been sufficient to support a conclusion that you were operating a vessel under the influence of alcohol on the evening of the boarding, taken together, I am persuaded that the results of your Field Sobriety Tests and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were “under the influence” under 33 CFR 95.030(a).

In addition, I note that the record shows that a breathalyzer test administered during the boarding revealed that you had a blood alcohol concentration of .199%. Given this evidence, and the fact that you do not deny being under the influence of alcohol at the time of the boarding, I find that the record contains sufficient evidence to support the Hearing Officer’s conclusion that you were under the influence of alcohol under the standard articulated at 33 CFR 95.030(b), as well.

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 \$1,100.00 penalty assessed by the Hearing Officer, rather than the \$1,500.00 penalty initially assessed or \$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 **\$1,100.00** 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 100160
Atlanta, GA 30384

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