



16780  
18 June 08

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

RE: Case No. 2317907  
[Redacted]  
[REDACTED]  
\$1,000.00

Dear [Redacted]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2317907, which includes your appeal on behalf of [Redacted], owner/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 June 20, 2004, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on the York River, near Gloucester, Virginia.

On appeal, although you do not deny that your client had a Blood Alcohol Concentration of .12% at the time of the boarding, you assert that he was not operating the vessel at the relevant time. In that regard, although you acknowledge that although "the vessel had been operated by [Redacted]," you insist that after the vessel was "beached at Ferry's Point on Sarah's Creek," Mr. [Redacted] consumed the alcohol and, insist that when the vessel left that location, "it was operated by a third party." As a result, you conclude that "while [Redacted] BAC may have been .12 at the time of boarding, that measurement is of no relevance whatsoever" and assert that "[t]he question is what his BAC was, if anything, at the time of his operating the vessel." You note that "[t]here is no competent information as to that issue and the presumption must be that he had a BAC at that time of .000 and that he was not operating the vessel under the influence."

I will begin by addressing the factual circumstances surrounding the violation. The record shows that Coast Guard personnel first observed the [REDACTED] being operated approximately 1 nautical mile west of the Coleman Bridge on the York River at 6:10 p.m. At that time, the vessel was being operated in close proximity to another vessel at a high rate of speed. There were three persons aboard the vessel, including [Redacted] who was determined to be the vessel's operator by the Coast Guard boarding officer. Shortly thereafter, Coast Guard boarding officers energized their boarding lights and attempted to commence a boarding of the [REDACTED]. As the Coast Guard vessel approached the [REDACTED], it increased speed, presumably to avoid any subsequent boarding. The record shows that shortly thereafter, beached the vessel on a shoal in Sarah's Creek and all passengers left the vessel and went onto the beach. During this time, Coast Guard boarding officer's watched the three occupants and elected to wait to conduct a boarding of the vessel until it exited Sarah's Creek. The boarding officer's statement further shows that after approximately 10 minutes, the vessel got back underway under the operation of a different person. Irrespective of that fact, because [Redacted] exhibited signs of being under the influence of alcohol and admitted to consuming alcoholic beverages prior to the boarding, he was asked to submit to Field Sobriety Testing. The Field Sobriety Test (FST) Performance Report contained within the record shows that such testing began at 6:20 p.m. and that, the vessel was taken under Coast Guard tow at 6:45 p.m., after Coast Guard boarding officers found sufficient evidence to support a conclusion that [Redacted] operated the vessel while under the influence of alcohol. The record further shows that after the vessel was safely moored, by approximately 7:15 p.m., [Redacted] was turned over to the custody of the Gloucester County Sheriff's Department. The Certificate of Blood Alcohol Analysis contained within the record shows that a sample of [Redacted]'s blood taken at 8:31 p.m. that night revealed that he had a BAC of .09.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both sanctioned by Congress and upheld in Federal courts. See H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

A careful review of the record shows that, throughout the course of these proceedings, you have implied that because [Redacted] was not prosecuted for boating while intoxicated in a related state court action (the case ended when the Commonwealth Attorney moved the court to *Nolle Prossse* the case), the assessment of a civil penalty here is inappropriate. I note that in so stating you may be raising a double jeopardy concern. After a thorough review of the record, I do not find such an assertion to be persuasive. As I am sure you are aware, 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.

Moreover, I note that the standard of proof necessary to impose a civil penalty at an administrative proceeding 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. 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. Accordingly, even if insufficient evidence is found to support the prosecution of a matter in a state court, the assessment of a civil penalty in a related administrative matter may still be appropriate.

I will now address the issue that you raise on appeal. As I have already stated, although you do not deny that [Redacted] was under the influence of alcohol at the time of the boarding, you insist that the evidence contained in the case file—which shows that he was not operating the vessel at the time of the boarding—is insufficient to support a conclusion that [Redacted] committed the alleged violation. After a thorough review of the record, I do not agree.

First and foremost, a careful review of the Hearing Officer’s Final Letter of Decision in the matter shows that she expressly found “that [Redacted] did operate the vessel under the influence of alcohol.” In rebuttal comments forwarded with your appeal in the matter, the Hearing Officer explained her decision, in that regard, as follows:

The party contends that he was not operating the boat at the time of the boarding, when his BAC was measured at .120. When I made my decision, I noted that the elapsed time between when the party was seen operating the vessel and when he was tested was at least 25 minutes and probably over a half hour but most likely less than an hour. I also noted that about two hours after the boarding, the State measured his BAC at .09. The body processes alcohol at a rate of at least .015 per hour, sometimes more depending on the individual. Although it is possible for the BAC to increase after no more alcohol is consumed, especially if absorption is slowed down by food, the two readings led me to a conclusion that most likely the party’s BAC was at least as high if not higher while he was operating, than at the

time of the boarding. This conclusion was also supported by the party's statement that he had had 6-7 beers during the day, and there is no mention of any food or drink being consumed at any time between the time he was seen operating and the boarding officer's final act.

In Coast Guard civil penalty cases, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented in the evidence. In this case, the record shows that Coast Guard boarding officers observed your client operating the [REDACTED] in an erratic manner. The record further shows that a period of approximately 10 minutes elapsed between the time that your client beached the vessel and the time that Coast Guard personnel observed the vessel being operated under the command of one of the other passengers. The statements of the Coast Guard boarding officers—which indicate that your client was under observation while the vessel was beached—do not indicate that your client was observed consuming alcoholic beverages during that time and, indeed, the record does not contain any evidence in that regard, other than [Redacted]'s own self-serving assertions. Moreover, I agree with the Hearing Officer that even if your client had consumed alcohol during that period, the elapsed time was not sufficient to allow that alcohol to be metabolized by his system. As such, I find that the record contains substantial evidence to support the Hearing Officer's conclusion that your client operated the [REDACTED] while under the influence of alcohol.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate under the circumstances of the case.

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. 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 1.0% 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

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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