



16780
November 01, 2008

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2555096
[REDACTED]
[REDACTED]
\$1,200.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2555096, which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,200.00 penalty for the following violations:

| <u>LAW/REGULATION</u> | <u>NATURE OF VIOLATION</u> | <u>ASSESSED PENALTY</u> |
|-----------------------|--|-------------------------|
| 33 CFR 88.05 | Failure of operator of self propelled vessel 12 meters or more in length to carry on board and maintain for ready reference copy of Rules. | \$200.00 |
| 46 USC 2302(c) | Operating a vessel under the influence of alcohol or a dangerous drug. | \$1,000.00 |

The violations are alleged to have been observed on October 29, 2005, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on the Trent River, near New Bern, North Carolina.

On appeal, you deny the violations and insist that the Hearing Officer erred in finding that you failed to respond to the alleged violations while the matter was pending at the Hearing Officer level. With regard to the violations, you contend that "the recorded alcohol blood level is higher in the written report than what they told" you on the evening that the alleged violation occurred. At the same time, you take "issue with the manner in which the sobriety test was administered and believe that...[the Coast Guard's]...test equipment had operational flaws as the officer had

to warm the apparatus under his ‘underarm’ before giving...[you]...the test.” In addition, you contend that “the walk and coordination testes were given to...[you]...on either...a vessel on water...or...on the ‘floating’ dock at the Sheraton.” As a result, you assert that you “do not believe that anyone could have passed those tests under those conditions.” Finally, you assert that the boarding officers responsible for conducting the boarding behaved in an inappropriate manner during the boarding and insist that “[s]everal facts of the case have changed on their formal write up with what they informed...[you]...that night.” You conclude by noting that you “have several witnesses who are willing to testify as to the rude manner in which the boarding occurred and words that were exchanged that night do NOT appear on that report.” (emphasis in original) Your appeal is denied for the reasons discussed below.

Before I address either the violations or your appeal arguments, I will address both the intent of the Coast Guard’s civil penalty process and the procedural progression of this case. 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 due process during informal administrative proceedings. The procedures in 33 CFR 1.07 have been 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).

I will now address the procedural progression of the case. The record shows that the Hearing Officer issued her Preliminary Assessment Letter in this case on August 2, 2006. 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 violations, the maximum penalties available for the violations, 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 notification via a letter dated August 28, 2006. In that letter you requested additional time to address the issue and specifically asked where a hearing would be held “if...[you]...requested one.” In response, via a letter dated September 11, 2006, the Hearing Officer informed you that you would be granted an extension of time in the matter and expressly made clear that if she “did not hear from you by 16 October 2006...[she would]...make a final decision based on the information already in the case file.” The record shows that you did not either request a hearing in the matter or submit evidence in response to the violation by the deadline established by the Hearing Officer and, as a result, she issued her Final Letter of Decision in the matter on October 24, 2006. In that decision, the Hearing Officer found the violations proved based on the evidence contained in the case file and assessed the penalty at issue in this proceeding. In addition, in accordance with the applicable procedural rules, the Hearing Officer informed you that you would have 30 days from the date of receipt of the Hearing Officer’s letter to appeal the matter to the Commandant, United States Coast Guard.

The record shows that you commenced the instant appeal via a letter to the Hearing Officer dated November 20, 2006.

Under 33 C.F.R. 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. The record shows that you have not raised any issues before the Hearing Officer and that, indeed, your first substantive correspondence with regard to the violations occurred after the Hearing Officer issued her Final Letter of Decision in the case. As a result, because the issues you present on appeal were not raised before the Hearing Officer, your right to have those issues considered has been waived. Regardless of that fact, I note that even if I were to consider the issues that you raise on appeal, the record contains sufficient evidence to support the Hearing Officer's conclusion that the violations occurred and that you are an appropriate party to be charged with the violations.

A careful review of your appeal letter shows that you may be confused as to your rights while the matter is on appeal. Indeed, I note that in your letter of appeal, you state that you have "several witnesses who are willing to testify" regarding the circumstances surrounding the relevant boarding. The applicable procedural regulations, however, do not allow for a hearing on appeal. Moreover, after a thorough review of the record, I am persuaded that prior to the assessment of the civil penalty at issue in the instant 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. The record shows that you were given the appropriate notice of the initiation of the Coast Guard's civil penalty action, advised of your right to request a hearing, provide any written evidence and argument in lieu of a hearing, or pay the amount specified in the notice as being appropriate. As I have already stated, the record shows that although you inquired as to the location where a hearing would occur, *if you requested one*, you never actually requested a hearing in the matter. Moreover, although you were granted an extension of time within which to respond to the alleged violations, you neglected to do so. Under 33 CFR 1.07, there are no provisions for a hearing on appeal. Furthermore, since the penalty in issue is administrative in nature, and not criminal, you have no right to a formal court proceeding with respect to the violation.

I will now address the violations at issue, beginning with the alleged violation of 33 CFR 88.05. 33 CFR 88.05 makes clear that "[t]he operator of each self-propelled vessel 12 meters or more in length shall carry on board and maintain for ready reference a copy of the Inland Navigation Rules." The Coast Guard Form 4100 Boarding Report for the incident shows that the [REDACTED] is 39 feet, 4 inches in length. The report further shows that you were operating the vessel at the time of the relevant boarding. Therefore, as the operator of the vessel, you were required to ensure that a copy of the Inland Navigation Rules was on board. Because the record shows both that the Rules were not aboard the vessel at the relevant time and that you were the operator of the vessel, I do not find that the Hearing Officer erred in finding both that the violation occurred and that you were the appropriate party to be charged with the violation. Moreover, because the record does not contain any evidence to indicate that you have taken any remedial steps to ensure that the violation will not be re-committed in the future, I do not believe that mitigation of the penalty assessed by the Hearing Officer for the violation is appropriate under the circumstances of the case.

I will now address the alleged violation of 46 USC 2302(c). 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.” (emphasis added) 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 faint odor of alcohol on your breath, your face was pale and your eyes were bloodshot. In addition, the test report shows that you performed poorly on six of the eight Field Sobriety Tests administered by the boarding officers. Although you completed the “Alphabet Test” and the “Backwards Count” tests satisfactorily; on the “Finger Count” test, you miscounted, slid and improperly touched your fingers and improperly counted your fingers; on the “Palm Pat” test, you slid and improperly counted your hands, failed to speed up and hesitated; on the “Finger to Nose” Test, you missed your nose and used a searching pattern; on the “Horizontal Gaze Nystagmus” Test, you lacked smooth pursuit and showed distinct nystagmus at maximum deviation, onset prior to 45 degrees, in both eyes; on the “Walk & Turn” test, you missed heel-to-toe, stepped off the line and improperly turned; and on the “One Leg Stand” test, you swayed, used your arms to balance, and put your foot down. While each of these factors, alone, might not have been sufficient to support a conclusion that you were operating a vessel while 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 the standard articulated at 33 CFR 95.020(c), regardless of your performance on the chemical test administered by the boarding officers.

Although I have concluded that there was substantial evidence in the record to support the Hearing Officer’s determination that you operated a vessel while under the influence based upon recorded observations of your manner, disposition, muscular movement, and behavior, I believe that a discussion of your chemical test is also important to the administration of this case. The record shows that you were administered a breathalyzer test during the boarding and that the test showed that you had a BAC of .090%. Given this test result, I find that the record also contains substantial evidence to support a conclusion that you operated a vessel under the influence of alcohol under the standard articulated at 33 CFR 95.020(a).

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$1,200.00 penalty assessed by the Hearing Officer, rather than the \$12,000.00 maximum permitted by statute to be appropriate under the circumstances of the case.

November 01, 2008

Payment of **\$1,200.00** 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 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